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The Council of Europe and the Protection of Minority Rights: The Case of Roma People and the European Court of Human Rights

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Introduction

The COVID19 crisis has once again brought at the forefront of the international debate the precarious living conditions of minority groups, which have been adversely hit by the pandemic[1]. Indeed, while the new virus has swept throughout the world and killed millions of people regardless of their characteristics, some groups have been affected more than others by the pandemic, given their living conditions and their difficulty in accessing essential services. Among these groups, we can find minorities: the reason lies in the fact that, generally, these communities live in overcrowded settlements and may experience more difficulty in accessing healthcare services. Moreover, minority groups are also paying the highest toll for what concerns education: they are more likely to not be able to afford online learning and have already lost more school hours than non-minority students[2], a fact that will have a strong negative impact on their future lives and careers. Seeing these worrying developments, the pandemic has highlighted the importance of ensuring equality and protecting minorities and minority's rights. Born out of this reflection, this dissertation has the aim of understanding to what extent minority rights are protected in Europe. Since, in an increasingly interconnected world, the model of nation-State is facing many challenges and its capacity of addressing them is questioned, we decided to concentrate this analysis on the measures developed by an international organisation, which, for its structure, may be more able to address today's challenges, which are international and not confined to the territory of a State. The choice fell on the Council of Europe, the international organisation born out of the Second War World with the aim of protecting human rights in the continent. Since minority rights are an essential part of human rights, it made sense to take into account the policies, the judgments, and the programs developed by the Council of Europe to protect minority rights. Moreover, this analysis will not take into account all minority groups, but the one often regarded as the most vulnerable community living in Europe: Roma people. With a wide spread racism against them, also called anti-Gypsyism, the failure of many national and international policies aimed at their integration and the constant scepticism and stereotypes concerning this minority, Roma people are a community that does not seem to have found its place in the European society, not even after many years since arriving in the continent. Their continuous exclusion and discrimination make them a correct choice for this analysis, since they, more than other groups, need a proper regime of protection.

Moreover, while all the main documents produced by the Council of Europe protecting minority's rights will be analysed, a final reflection will concern the European Court of Human Rights and its judgements revolving around housing, health, education and cultural rights of Roma people. The European Court of Human Rights is probably the most famous organ of the Council of Europe, and it can deliver binding judgements which member States must implement. The analysed rights have been chosen for their importance for this minority and for minorities in general: indeed, these communities face discrimination in the access to housing rights[3], and often, the settlements where they live do not meet security and hygienic standards, like in the case of Roma camps in Italy. Moreover, they face more issues in accessing health services, since they are often discriminated. Also, in some cases, doctors have

[1] DORN, HANCOCK, SARAKATSANNIS, VIRULEG (2020).
[2] *Ibidem.*
[3] PERIĆ (2012: 23).

performed surgeries without the consent of the patient[4]. For what concerns education rights, minorities are at risk of being excluded from normal schools, and, in the case of Roma people, they are often put in special classes for people with disabilities. Lastly, cultural rights and cultural identity are a fundamental topic for minorities, which risk to be assimilated into the mainstream society or not rightfully protected in their diversity. Having seen the importance and the risks concerning these rights, it is important to see how the European Court of Human Rights can protect them, to see how the obligations relating to one of the most vulnerable communities are fulfilled.

This analysis will be structured in three chapters: in the first, we will try to understand what the term "minority" means. Moreover, the different categories of minority will be presented and lastly, a reflection on the difficulty of including the Roma community into any of these categories will be made. Thus, it will be pointed out that none of the different national legal regimes concerning this minority has been successful in ensuring its protection. Therefore, we will look at the international level for a solution.

In particular, as a starting point, it will be pointed out that, while it may seem very intuitive, the international community has tried and failed various times throughout the years to find a definition of "minority" which met the general consensus. Since their efforts have not produced a universal binding definition, it is important to understand what is meant today by this term. Therefore, this Chapter will be dedicated to investigate the different definitions of "minority" which have been proposed throughout the years by the international community, in order to point out any similarities. The analysis will start from the proposals made at the international level and then will move at the European level, with the description of the definitions proposed by the Council of Europe. Then, the Chapter will propose an overview of the characteristics of four types of minorities: territorial, non-territorial, historical and new. These adjectives are often attached to the term in analysis and give to it a different meaning, as well as granting different types of legal protection. Therefore, it is important to underline when a minority can be considered as historical or new, and what rights and international standards apply to their protection. This specific analysis will start with an historical account of the legislative regimes applied to these categories, up until today. Then, the specificity of the Roma minority will be analysed. In particular, the Chapter will consider if this community manages to perfectly fit into the categories previously underlined or if its characteristics do not allow it. Then, the different legal status attributed to Roma people by the different member States of the Council of Europe will be taken into account, in order to show if a common legislative position is adopted or if this minority enjoys different status across Europe. Having shown that, notwithstanding the different legal frameworks, the situation of Roma minority is negative throughout Europe, the analysis will then take into account the protection offered by the Council of Europe. The second Chapter thus, will be dedicated to the analysis of the different instruments used by this organization in its quest to ensure the respect and protection of minority's rights. In particular, the various shortcomings of these instruments will be pointed out, in order to understand which are the improvements to implement in order to enhance minorities' protection. The documents taken into account will be the European Convention of Human Rights, the Framework Convention for the Protection of National Minorities, the European Charter for Regional or Minority Language, and, more specifically centred on Roma minority, the ROMED program.

[4] Report of the Centre for Reproductive Rights, 2003, *Body and Soul: Forced Sterilization and Other Assaults on Roma Reproductive Freedom in Slovakia.*

The Convention is often regarded as the most important document produced by the Council of Europe, and it is the document that all States must sign in order to become members of the organization itself. However, it is not specifically concerned with minority rights, even though it has been used to protect them. Moreover, the topic of the margin of appreciation reserved to States will be analysed, arguing that sometimes it may be too wide. Then, the fact that Protocol 12 to the Convention, including a general prohibition of discrimination, has received few notifications will be addressed. Lastly, it will be pointed out that, sometimes, States interpret the rights included in the Convention as the maximum level of protection that they should ensure to minorities, instead of the minimum standard that they actually are. Then, the shortcomings of the Court tasked with overseeing the implementation of the Convention will be analysed: it will be shown that the Court's legitimacy is often questioned, and that it does not seem to promptly address the heavy workload of cases brought before it. Moreover, the rule of exhaustion of domestic remedies will be presented as a limitation to the Court's power. Then, the shortcomings of the Framework Convention will be highlighted, namely, the weak wording of some articles, the non-justiciability of the rights included, the non-direct applicability of the progressive standards and the absence of a definition of minority. The same will be done for the European Charter for Regional or Minorities Languages, which does not create individual or collective rights, includes some ambiguities regarding the identification of minority and regional languages and does not allow to apply its third and most important part to the Romani language. Lastly, the ROMED intercultural mediation program, aimed at fostering Roma inclusion will be analysed. Being that this instrument is not legally binding and its utility may be more easily questioned, also its achievements will be pointed out.

After having analysed what is the extent of minority's protection in the Council of Europe, the specific case study of the European Court of Human Rights and housing, health, education and cultural rights of the Roma minority will be taken into account. This analysis has the aim of showing more in depth what protection is granted to a specific minority by a specific body. It will be shown that, throughout the years, the Court has increased the respect and protection of Roma, although some improvements still need to be made. The third Chapter will be structured as follows: starting from housing rights, a brief description of what these rights include will be given; then the discrimination faced by Roma people in the four different fields will be pointed out. In all cases, Roma people will be particularly discriminated and their rights not often uphold by States. Then, the protection offered by the Convention will be detailed. Aside from education, protected by an additional protocol, the other rights are not specifically included in this document. Therefore, the Court had to derive their protection through persist litigation and the use of a more comprehensive approach, enlarging the scope of some articles. Consequently, these articles will be analysed to show how the Court has interpreted them as granting protection to housing, health and cultural rights. Then, a specific judgment for each right will be analysed: after having recalled the main facts, the achievements of the Court and its shortcomings will be pointed out. The decisions chosen all include some new development adopted for the first time by the Court, developments that increase the protection granted to minority's rights. So, for example, in the case related to housing rights, the Court applied Rule 39 for the first time, thus suspending the eviction of the Roma family pending the judgement.

In conclusion, this dissertation will describe the level of protection granted to minorities by the Council of Europe, with a particular focus on the regime of protection developed by the European Court of Human Rights toward Roma people. The necessity of ensuring minority's protection is even more pressing

now that the recent pandemic has adversely hit those groups. An overview of the current level of protection is a useful starting point to reach this aim, since it will highlight which are the next steps to take in order to reach better results.

Chapter 1: What is a minority?

1.1 A problem of definition

The origin of minority protection can be traced back to the seventeenth century reforms concerning the protection of religious minorities[5]. After that, the topic was again brought forward in the international arena during the three great congresses that took place in the nineteenth century[6], namely Vienna (1814-15), in which religious freedom was granted to Christian minorities and measures aimed at the improvement of the social status of the Jews were realized[7]; Paris (1856), where the Ottoman Sultan promised to grant protection to all his subjects regardless of their religion or race[8]; and Berlin (1878), in which signatories countries made religious freedom a condition for the recognition of a State[9]. It is only after World War First though, that minority protection was systematically prescribed[10]. Specifically, this new regime, born during the Conference of Versailles and put under the supervision of the newly-created League of Nations, was composed by special minorities treaties; minorities provisions included in some of the treaties signed with the defeated countries; general declarations made by some States like Albania at the moment of the entry to the League of Nations; and treaties relating to the territories of Danzig, Memel and Upper Silesia[11]. Moreover, other bilateral treaties were signed, which were not under the supervision of the League of Nations, but that included provisions concerning the protection of minorities[12]. Thus, even though since long ago minority protection has become a matter of concern for the international community and specifically, for international law, to date, no common consensus upon a definition of what the term "*minority*" means has been reached[13]. It has been argued that the absence of a binding definition is due to the fact that minorities face very different situations[14], or that an attempt to find a precise definition would only end up in leaving certain groups in certain countries out of the protection offered by minorities provisions[15]. Moreover, also the use of the term "*minority*" has been criticized, since this term refers to groups that are numerically inferior to a dominant group in a certain State, thus leaving out majoritarian communities that however do not enjoy a dominant position in their country[16]. For this reason, other terms have been suggested, such as "*social groups*" or "*communities*"[17]. To date though, the term minority is the most widely used in international law. Consequently, throughout the years, many attempts have been made to reach a common position upon the meaning of this term, some more successful and widely accepted than others.

One of the first definitions of this controversial word in the field of international law dates back to 1930, with the advisory opinion of the Permanent Court of International Justice, the predecessor of the International

[5] PETRIČUŠIĆ (2005: 2).
[6] *Ibidem.*
[7] SIMON (1997: 508).
[8] LŐRINCZI (2018: 4).
[9] PETRIČUŠIĆ (2005: 2).
[10] SHAW (1990: 20); SIMON (1997: 508); PETRIČUŠIĆ (2005: 2).
[11] SHAW (1990: 20).
[12] *Ibidem.*
[13] SHAW (1990: 14); PETRIČUŠIĆ (2005: 3).
[14] LŐRINCZI (2018: 1).
[15] PETRIČUŠIĆ (2005: 3).
[16] *Ibidem.*
[17] *Ibidem.*

Court of Justice, in the *Greco-Bulgarian Community Case*[18]. Here, the Court defines the word "*community*" as:

> "a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other"[19]

Already in this early opinion, some of the elements which will be later included in various definitions of the term "*minority*" can be found: the presence of a different race, religion or language and different traditions.
After the attempts of the Permanent Court, the main efforts carried out to come up with a proper meaning for the term "*minority*" happened after the Second World War. Following the massive violation of human rights that had taken place during the war period, avoiding a repetition of such a huge aberration became one of the first concerns of the international community. The creation of the United Nations was the biggest accomplishment carried out in realization of this aim. Unfortunately, the attempts to include a provision on minorities in the Universal Declaration of Human Rights, the first international quasi-binding document[20] on human rights, failed[21]. However, in 1950, the same year of the approval of the Universal Declaration, the General Assembly adopted a resolution, in which it stated that the problem of minorities had to be taken into account by the UN[22]. As a matter of fact, the UN was already taking into account the problem of minorities, having instituted in 1947 the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Said Sub-Commission was composed by 26 members who were independent experts acting in their personal capacity and who were chosen in a way that kept the geographic composition of the Sub-Commission balanced. Among its duties, the Sub-Commission had to make recommendations concerning the prevention of discrimination and the protection of minorities. as well as undertaking studies on minorities issues[23]. Using the first of its mandates, the Sub-Commission tried to put forward the issue of forming a definition of the term "*minority*" to the Commission on Human Rights, but failed in its objective three times[24]. Eventually, the Sub-Commission took the matter in its own hands and decided to initiate a study on the situation of minorities in the world. To properly carry out this project, a working definition of minority was developed. It stated that this term:

[18] Advisory opinion of the Permanent Court of International Justice, 31 July 1930, Series B, N.17, *Greco-Bulgarian Communities Case*.
[19] Advisory opinion of the Permanent Court of International Justice, 31 July 1930, Series B, N.17, *Greco-Bulgarian Communities Case*, cited in SHAW (1990: 21).
[20] The Universal Declaration on Human Rights cannot be considered legally binding since it does not create obligations for States, however it contains principles and rights that are part of international customary law and can thus be considered as binding. Moreover, it can influence domestic law, leading to the creation of national legislations compliant with the rights enshrined in the Declaration. For these reasons, it can be considered a quasi-binding legal instrument. HANNUM (1995: 289 ff.)
[21] SHAW (1990: 21). Resolution of the UN General Assembly, 10 December 1948, 217A(III), *Universal Declaration of Human Rights.*
[22] *Ibidem.*
[23] SHAW (1990: 21).
[24] SHAW (1990: 22).

> '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'[25].

Aside from the above-mentioned characteristics, another set of factors was taken into account for correctly defining the word, like the origin of a specific minority, whether if created by voluntary immigration or other means, and the number of people that were part of the so-called minority[26]. The definition thus ended up including both objective and subjective criteria, respectively, the different characteristics of the people and the willingness to maintain this diversity. However, not all the members of the Sub-Commission agreed on this definition. Specifically, the subjective criteria posed some issues, since some members believed that certain States could have used this clause to not protect a certain group, arguing that the latter did not wish to preserve its own characteristics[27]. Other critics instead argued that the "non-dominant" criteria, and stressing the difference between non-dominant groups and the majority, could hinder the efforts of assimilation carried out in some countries. Faced with these issues, in 1954, the Sub-Commission decided to postpone its study on minorities[28]. In the meantime, though, efforts were being carried out by the UN to create the International Covenants on Human Rights, *i.e.*, the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), destined to become two of the most important international documents for the protection of human rights. Aware of the relevance that they were bound to assume, efforts to include some kind of provisions on minority (in the ICCPR) were undertaken, with the Sub-Commission suggesting the formulation:

> "Persons belonging to ethnic, religious or linguistic minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language"[29].

Moreover, the Chilean government suggested a small amendment to be added at the beginning of the document, which would bring forward important changes; the sentence suggested was indeed: "*In those States in which ethnic, religious or linguistic minorities exist*"[30]. The inclusion of this addition prevented the establishment of new minorities, *i.e.*, that a group of new immigrants could affirm to be a minority, as well as avoiding that old groups that had never developed a "*minority conscience*" could change their minds and start to demand the protection granted to minorities. It was thus a sentence aimed at restricting the scope of the provision that the Sub-Commission had proposed[31]. But that was not the only drawback: seeing the importance of the drafts that were discussed, efforts were made to include a binding definition of the term minority, which could have put an end to this long-standing issue. However, the text that went forward did not reach this goal, but included only what was proposed by the Sub-Commission as modified by the Chilean addition[32]. The draft came at the attention of the Third Committee of the

[25] *Ibidem, see also* Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 19 April 1954, E/CN.4/703, *Report of the Sixth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.*
[26] SHAW (1990: 22).
[27] *Ibidem.*
[28] *Ibidem.*
[29] SHAW (1990: 23).
[30] *Ibidem.*
[31] *Ibidem.*
[32] *Ibidem.*

General Assembly in its sixteenth session in 1961. After some discussions, with some members still stressing the issue that recent immigrants should have been integrated rather than recognized the minority status, the draft was approved by Third Committee and it became Article 27 of the International Covenant on Civil and Political Rights, the most important provision in international law for the protection of minority groups[33]. It reads as follow:

> 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'[34].

Thus, while in this new key document for the international protection of human rights, minorities were recognized as beneficiary of one of its provisions, it remained still unclear which groups were included in that term. However, the approval of the Covenant, and in particular, the formulation of Article 27, was not the end of the quest for a minority definition, but rather a new starting point. Following its approval, in 1971 the Sub-Commission appointed Francesco Capotorti Special Rapporteur with a mandate to analyse the concept of minority. The Special Rapporteur presented his Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities to the Sub-Commission in 1977. In this text, he also suggested a definition of "*minority*", which became, and still is to date, the most widely accepted definition for this term, both in theory and in practice, even though it is not legally binding[35]. The Capotorti's definition reads as follow:

> "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"[36].

Capotorti came to this definition using as a starting point Article 27 of the ICCPR, with the aim of better specifying which were the minorities protected by this provision. As it can be seen, this new definition does not deviate excessively from the definition of "*community*" given by the Permanent Court of International Justice in the *Greco-Bulgarian communities* case, nor from the working definition put forward by the Sub-Commission. In all of these, we can find that both subjective and objective criteria are present. Moreover, they all stress that the members of a community must have different ethnic, linguistic or religious characteristics (objective criteria) which they wish to maintain (subjective criterion). In Capotorti's and the Sub-Commission's definition, a reference to the non-dominant characteristic of the group can also be found (objective criterion). By "*non-dominant*", it is not strictly intended a numerical inferiority, which, in Capotorti's definition is explicitly mentioned, but being in a subordinated position for what concerns political power, social, cultural and economic status[37].

While certainly this definition helped to specify which groups fell under the provision of Article 27 ICCPR, it did not answer completely to the question of a definition of the term "*minority*". Experts have indeed suggested that a further interpretation of Article 27 is required[38]. For example, Capotorti's

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[33] *Ibidem.*
[34] Resolution of the UN General Assembly, 16 December 1966, 2200A (XXI), *International Covenant on Civil and Political Rights.*
[35] PEJIC (1997: 670).
[36] SHAW (1990: 24).
[37] PEJIC (1997: 671).
[38] *Ibidem.*

definition explicitly excluded from the protection of the ICCPR non-citizens, underlining that Article 27 protects the "*nationals of the State*"[39]. However, the ICCPR is less strictly regarding this point, so much so that a literal interpretation of Article 27 does not seem to justify such an exclusion[40]. Indeed, although as explicated above, the addition "*In those States in which […] minorities exist*" was added to prevent immigrants from the enjoyment of minorities rights, efforts to have a formulation of Article 27 which officially excluded these groups of people were rejected[41]. Moreover, the Human Rights Committee, the treaty body which oversees the implementation of the ICCPR, published two general comments on the issue in 1986 and 1994. In the former, the Committee stated in clear terms that "*the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness*"[42] and that "*the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens*"[43]. In the latter Comment, specifically dedicated to the interpretation of Article 27, the Committee explained that the individuals that are protected under this article "*need not to be citizens of a State party*"[44]. The Committee thus seemed to modify and enlarge Capotorti's definition so to include also non-nationals among those individuals included in the term "minority", strengthening the scope of the protection ensured by Article 27. Moreover, in the same Comment, the Committee also analysed the meaning of the controversial phrasing "*exist*": it explained, that just as the enjoyment of the rights protected in Article 27 is granted to all the individuals regardless of their citizenship or nationality, not even permanent residence is a necessary requirement for protection. Thus, migrant workers or even visitors are granted the protection of Article 27 when in the territory of a State party[45]. With these sentences, the Committee is enlarging the scope of protection of the ICCPR. Lastly, the Committee also indicated that recognition of the existence of a minority does not rely on States but on the fulfilment of objective criteria[46].
While the two comments of the Human Rights Committee certainly helped clarify the meaning of Article 27 and better explain and integrate the definition of minority put forward by Capotorti, some aspects are still problematic to define. For example, Article 27 does not clearly state who is the holder of the rights that it ensures, whether the individuals belonging to a minority or the minority as a group[47]. Indeed, protection of minorities' rights can follow two general approaches, one is the individual rights approach, while the other is the group rights one[48]. The former revolves around the idea that individuals are the holders of minority rights provisions, the latter retains that minority groups as a whole are the holder of minorities rights. In practice, at the level of the States, the first approach translates into the idea of redressing a violation of minority rights when it occurs: thus, in this approach, the role of the courts is fundamental, since they represent the means through which the individual, who has experienced a violation of one of his rights can be compensated. In this model, the protection of rights happens *ex post*, after the violation has been committed. Therefore, the action of the courts aims not only at

[39] *Ibidem.*
[40] PEJIC (1997: 671).
[41] PEJIC (1997: 671).
[42] General Comment of the UN Human Rights Committee, 11 April 1986, CCPR/C/21/Rev.1 (1989), *General Comment N.15: The Position of aliens under the Covenant.*
[43] *Ibidem.*
[44]General Comment of the UN Human Rights Committee, 8 April 1994, CCPR/C/21/Rev.1/Add.5, *General Comment N. 23: Article 27 (Rights of Minorities).*
[45] *Ibidem.*
[46] PEJIC (1997: 673).
[47] *Ibidem.*
[48] VALENTINE (2004: 446).

addressing this specific misbehaviour but also at showing to all other possible violators what the consequences for a similar action will be, thus acting as a deterrent[49]. On the other hand, the group rights approach aims at granting certain posts in places of power, such as in governments, to representatives of minorities groups, rationally assuming that in this way, they will operate to guarantee the protection of the members of the groups they belong to[50]. This type of approach can be descried as prospective, since it will act prospectively to protect minority groups from any possible harm that may come their way, by the means of guaranteeing minority representation. On the contrary, the individual rights approach is responsive by nature, that is, it will start to protect minorities only after a violation of their rights has occurred, thus forming a response to this misbehaviour[51]. States can decide to follow one or the other of these approaches, without infringing the respect of democracy, both the approach are indeed compatible with this form of government[52]. For example, the United States and the UK follow the individual rights approach while others such as India, prefer the other. For what concerns the ICCPR and specifically the formulation of Article 27, it is not clear whether it considers minority groups or individuals as the beneficiaries of its provisions, but in interpreting the article, a middle ground between these two approaches has been preferred[53]. It is indeed recognized that this article does not protect individuals or minorities as a group, but minority rights are seen as a hybrid between these two schools of thoughts[54].

Another aspect of Article 27 which is difficult to point out is the reference to ethnic minorities. Indeed, while it is easier to point out who belongs to a religious or linguistic minority, establishing who is part of an ethnic minority might be more challenging[55]. Despite this ambiguity, this element was there to remain also in following definitions of minority, where the terms "linguistic, religious and ethnic" can be found. Specifically, years after the publication of Capotorti's definition, the Commission on Human Rights asked the Sub-Commission to prepare a new text with a definition of the term, having taken into account all the comments, ideas, studies on the topic. Thus, the Sub-Commission mandated another Special Rapporteur, Jules Deschênes, to come up with a new definition. Deschênes presented his study to the Sub-Commission in 1985, where he defined a minority as follow:

> "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"[56].

As it can be seen, Deschênes' definition does not significantly differ from Capotorti's one. As for his predecessor, Deschênes started to formulate the meaning of minority within the framework of Article 27 of the ICCPR.[57] Moreover, once again, the focus is on the citizens as being the only possible constituents of a minority. Indeed, in his Proposal, Deschênes explicitly stated

[49] VALENTINE (2004: 446).
[50] *Ibidem.*
[51] *Ibidem.*
[52] *Ibidem.*
[53] PEJIC (1997:673).
[54] *Ibidem.*
[55] *Ibidem.*
[56] Proposal of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 14 May 1985, E/CN.4/Sub.2/1985/31, *Proposal concerning a definition of the term "minority"*.
[57] SHAW (1990: 24).

that, regardless of the opinion of the Working Group of the Human Rights Committee, which explained that Article 27 of the ICCPR was bound to protect also non-nationals, he rejected this view, since the Working Group "*does not put forward any overwhelmingly compelling arguments*"[58]. Instead, he agreed on what previously stated by the Commission on Human Rights[59], namely that minority groups composed of aliens should not be included in a definition of "*minority*". Deschênes made the choice of following this latest view so to not encourage the creation of a divergence of interpretation between the Commission on Human Rights and the Human Rights Committee, hoping that the opinion of the Working Group would not be taken into account by the Committee itself[60]. As previously mentioned though, in two general comments, the organ would do exactly what Deschênes feared.

Other points of continuity between Capotorti's and Deschênes' definitions are the restricted number of the people belonging to the minority, its non-dominant position, the presence of different ethic, linguistic and religious characteristics and the sense of solidarity among the members of the minority itself. What is different is that Deschênes also included in the definition the existence of a "*will to survive*" and to "*achieve equality*". The Sub-Commission though, did not accept these new elements and the proposal was forwarded unapproved to the Commission[61]. Lastly, the latter decided to postpone the issue of a definition, deeming that it was not fundamental to the realization of a declaration on the rights of members of minorities within the framework of Article 27 of the ICCPR, the reason why the study was commissioned to Deschênes in the first place[62]. Therefore, to date, Capotorti's definition is the most widely accepted one and, as pointed out by various commentators, it is unlikely that any future international instrument will significantly change this formulation[63]. As proof of this statement, it is possible to analyze how minorities are defined in other regional documents issued after the Capotorti's definition. Indeed, Deschênes attempt was the last effort made at the international level to come up with a definition of this term, but at the regional level, further studies have been carried out in more recent years. For example, at the European level, the European Union, the Council of Europe and the OSCE have tried to provide an answer to this long-standing question. In the European Union, the issue of minority protection gained particular importance in the '80s, when territorial communities started to claim decisional and managerial autonomy.[64] Despite all the measures taken to increase the protection of these groups of people, no definition has been agreed upon. The same goes for the OSCE, where the efforts for detailing the term minority clashed with the idea of some experts that these attempts may only result in delaying the approval of documents concerning the protection of minorities[65]. However, the Council of Europe was more successful in its efforts. The Proposal for an Additional Protocol on the Rights of National

[58] Proposal of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 14 May 1985, E/CN.4/Sub.2/1985/31, *Proposal concerning a definition of the term "minority"*.
[59] *Ibidem.* Report of the open-ended Working Group established under Commission on Human Rights resolution, 14 March 1984, E/CN.4/1984/L. 5, *Further promotion and encouragement of human rights and fundamental freedoms, including the question of the programme and methods of work of the Commission; alternative approaches and ways and means within the United Nations System for improving the effective enjoyment of human rights and fundamental freedoms*.
[60] *Ibidem.*
[61] SHAW (1990: 24).
[62] *Ibidem.*
[63] SIMON (1997: 513).
[64] PUGLIESE (2019: 334).
[65] PETRIČUŠIĆ (2005: 4).

Minorities to the European Convention on Human Rights contained the definition of a "*national minority group*". According to the proposal, the expression "*national minority*" refers to a:

> "group of persons in a state who reside on the territory of the state and are citizens thereof; mainly longstanding, firm and long-lasting ties with a state; display distinctive ethnic, cultural, religious or linguistic characteristics; are sufficiently representative, although smaller in number than the rest of the population of the state or of a region of the state."[66]

Jean-Pierre Worms, Rapporteur of the Committee on Legal Affairs and Human Rights, explained in the report for the Proposal, that the choice of including this definition was due to the fact that "*there was a simultaneous need for sufficient precision to avoid confusion and sufficient generality to enable judicial decisions to be adapted to the great variety of situations*"[67]. The Rapporteur recognized the necessity of providing a definition of minority to enable a more precise and punctual application of the text. However, it was decided not to provide a definition for the term minority *per se*, which had proved very challenging, but in conjunction with the adjective "*national*": this decision was also motivated by the need to distinguish the type of minorities addressed in the text, given the complexity of the phenomenon and the different connotations given to terms such as "*people*" and "*communities*" in different parts of Europe[68]. The decision to specifically choose the word *"national*" can be explained considering that the expression "*national minority*" is already present in the European Convention of Human Rights[69]. Even considering this addition, the definition provided in the document still echoes the Capotorti's one: the element of citizenship; the presence of distinctive ethnic, linguistic and religious characteristics; and the small number of its members are all elements that can be found in both definitions. The element of citizenship, that the Human Rights Committee did not require to enjoy the protection offered by Article 27 of the ICCPR, is once again present. Consequently, Worms' idea seems more in tune with the interpretation given by the Commission of Human Rights and the definitions both of Capotorti and Deschênes. Worms explained this choice simply by stating that the rights of aliens, migrants and refugees are part of other fields of human rights law, thus not to be confounded with minority protection, an explanation which seems a bit insufficient, giving the debate going on in the Human Rights Committee in this regard. Controversial is also the fact that Worms included nomad people like Gypsies in national minorities, claiming that Gypsies are always citizens of a State[70]. This may not be true for all the nomads though, and also for not all Roma people, and it is not clear what should be done when interpreting the additional protocol and a nomad has no citizenship. However, years later, the Council of Europe and, more specifically, the Advisory Committee on the Council of Europe's Framework Convention for the Protection of National Minorities, reopened the discussion, explaining that minority protection should go beyond citizenship and be extended also to non-citizens when appropriate. Moreover, the Advisory Committee also pointed out that often this requirement was used by States as

[66] *Ibidem.*
[67] Report of the Special Rapporteur of the Parliamentary Assembly of the Council of Europe, 19 January 1993, Doc. 6742, 1403-15/1/93-2-E, *Report on an additional protocol on the rights of minorities to the European Convention on Human Rights.*
[68] *Ibidem.*
[69] Report of the Special Rapporteur of the Parliamentary Assembly of the Council of Europe, 19 January 1993, Doc. 6742, 1403-15/1/93-2-E, *Report on an additional protocol on the rights of minorities to the European Convention on Human Rights.*
[70] *Ibidem.*

a tool for excluding specific groups from the enjoyment of their human rights[71].

Going back to the issue of providing a definition of minority, aside from the report of the Committee on Legal Affairs and Human Rights, also the Commission for Democracy Through Law (also called Venice Commission), tried to find a solution to this problem in its Proposal for the creation of a European Convention for the Protection of Minorities. In this Proposal:

> "The term minority shall mean a group of persons which is smaller in number than the rest of the population of a State, whose members, who are nationals of that 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."[72]

Even in this case, the similarities with Capotorti's definition are evident. The small number of its members, the nationality of the State, the distinct ethnical religious and linguistic features and the willingness to preserve them. Even here, the element of citizenship is present but later on, the Venice Commission would recognize that a definition of minority should not limit the protection of minority rights only to those people who have a citizenship, but rather a new tendency to include also non-citizens has started to develop[73]. Unfortunately, neither the Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights and Fundamental Freedoms nor the European Convention for the Protection of Minorities managed to be approved by the Council of Europe, but these proposals show that Capotorti's definition offers the main basis for the construction of the concept of minority even at this regional level.

To sum it up, religious, linguistic and ethnic characteristics are some of the most-widely accepted elements constituting minorities; another factor mentioned is the smaller number of members of the group; its non-dominant stance, meant also in a cultural and political way; and other subjective criteria, like the willingness of the group to retain these peculiar characteristics. There are however, some criticisms that have been moved toward these most relevant characterizations. One is the numerical inferiority required to identify a group as a minority. The status of majority of black people in apartheid in South Africa is a clear example of this issue, and this complication was recognized also by Capotorti himself[74]. Another problem is the lack of precision: it is indeed challenging to identify what are linguistic, religious and ethnic characteristics. This particularly holds true for ethnic specificities, as it is complicated to define one's ethnic belonging, which can also be a politically constructed concept, as exemplified by the case of Thailand in which in the '40s royal edits helped shape ethnic characteristics and went as far as imposing the ways in which husbands and wives had to interact among each other. Moreover, the grouping "*ethnic, religious and linguistic*" risks to be underinclusive[75], leaving out many other characteristics such as disability, gender, sexual orientation or economic status. On the other hand, this formulation can also be regarded as overinclusive: following its criteria, the island of Aruba would have no real majority to speak of, and around 40 "*minorities*"[76]. While it is valuable that more and more peoples are able to enjoy stronger judicial protection, extending minority rights to too many

[71] PALERMO (2015: 25-26).
[72] Proposal of the Commission for Democracy Through Law, 8 February 1991, CDL (91) 7, *Proposal for a European Convention for the Protection of Minorities.*
[73] PALERMO (2015: 25).
[74] SIMON (1997: 513).
[75] *Ibidem.*
[76] *Ibidem.*

groups, like in this case, would end up achieving the opposite outcome. Specifically, it would paralyze the judicial system with an overwhelming number of cases regarding minority rights protection, thus preventing the grant of the necessary attention to those groups who are most in need of judicial protection. Another critic has been moved toward the subjective factors included in Capotorti's definition, namely the part of "*the sense of solidarity*" required to identify people belonging to a minority. This would indeed exclude two cases: the people who are afraid to self-identify as part of the group and those who do not identify because of their choice. The formers may try to hide their belonging to a minority not to face the repercussions of their origins. However, these people are those who need judicial protection the most[77]. On the other hand, there may be people who do not have any familiarity with the traditions and custom of their ethnic origin or they simply do not know about it at all, and still are negatively affected by that. The crucial point is thus how others treat minorities rather than their identification[78]. As Simon points out, if the courts give too much importance to subjective factors, then too many groups could demand protection from the State[79]. Thus, it will be more useful to categorize minorities using negative rather than positive factors, *e.g.*, holding into account the way in which they are treated by others[80]. Simon also points out that objective factors used in the definition might be as challenging and unnecessary[81]. What he suggests is simply to refrain from trying to provide a binding definition for such a complicated and fuzzy term, and focusing on granting judicial protection to those groups who are in need of it[82].

In fact, the quest for a binding definition seems to have come to a halt nowadays. Given the difficulties met during the various attempts to reach this goal and the challenge of providing a unitary definition for groups with strikingly opposite characteristics from one another, the approach generally followed at the international level is that of recognizing which groups are minorities in a pragmatic way[83]. The absence of a binding definition at the international level leaves to the single States the responsibility to recognize a certain group of its citizens as a minority and provide them with the adequate protection[84]. However, not always States have been able to identify and protect the minorities that existed in their territories, *e.g.*, as stated in Capotorti's report, many Latin American States found that the term "*minorities*" was inapplicable, since those groups with different characteristics were already treated as the majority of the population; France refused to recognize he existence of any ethnic group, and minority even more so, in its territory; and Thailand found that the Thai equivalent for the term "*minority*" had neither social nor cultural meaning[85]. For this reason, it has been suggested that the struggle to find a binding definition of the term "*minority*" should not cease, as to avoid a confusion regarding the contents of minority and minority rights, thus helping specify the extent and the level of protection accorded[86]. Keeping in mind this aim, it has been stated that also the issues related to the diversity of the conditions of minorities should not deter the experts from this project[87].

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[77] SIMON (1997: 516).
[78] *Ibidem.*
[79] *Ibidem.*
[80] *Ibidem.*
[81] *Ibidem.*
[82] *Ibidem.*
[83] PETRIČUŠIĆ (2005: 3-4).
[84] *Ibidem.*
[85] SIMON (1997: 511).
[86] PEJIC (1997: 675).
[87] *Ibidem.*

On the other hand, other scholars suggested that seeking definition is not worthy now that it is clear that the international consensus will hardly be reached and that the differences characterizing the singular groups are too vast to be resumed in a single definition[88]. This is the approach taken in the European Framework Convention for the Protection of National Minorities, where in its explanatory report, the problem of definition of a minority is addressed, underlining that no definition is included in the document and that:

> "it was decided to adopt a pragmatic approach, based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States"[89].

Thus, the pragmatic approach seems to be prevailing and the quest for the agreement over a binding international definition seems to have come to a stop after several years from its start.

1.2 Territorial, non-territorial, historical and new minorities

Notwithstanding the fact that the doctrine struggles with the definition of "*minority*" and a pragmatic approach has been more and more used, two macro-categories have been identified: "*historical, traditional, autochthonous minorities*" and the "*new minority groups stemming from migration*"[90]. This categorization was brought forward by the fact that, while minorities have been an issue for international law for quite a long time, the problem of protecting groups of people with different characteristics from those of the majority has become more and more relevant due to the mass migrations originated by the globalization[91]. Nowadays, countries are more multicultural than in the past and in some cases, they are prone to become "*Majority Minority States*", that is, States in which one constituency of people defined by race, ethnicity and/or religion, has lost its numerical superiority[92]. This future demographic scenario is currently looming over countries like United States, Canada and others in Europe and Oceania. Moreover, the current increasing of global temperature and the resulting raising of sea level and desertification of many areas of the planet are bound to render many cities and States inhabitable: as a consequence of this, it is estimated that approximately 1 billion people will be forced to leave their countries by 2050[93]. This migration will likely give rise to the presence, in the receiving States, of groups of people with different ethnic, religious and linguistic characteristics: in fact, new minority groups will likely be formed. Taking into account all these transformations of the contemporary era, it is understandable why the issue of minority and minority protection has regained international interest and why there has been the necessity to create a distinction between the minorities that existed also in the past and those new ones.
Consequently, on the one hand, there are new minorities originated by recent international development, on the other hand, historical minorities, also called autochthonous or traditional, that originated even centuries ago as a consequence of the redrawing of international borders[94]. Indeed, when, as a consequence of a war or due to the collapse of the previous structures of

[88] SIMON (1997: 511).
[89] Framework Convention for the Protection of National Minorities, Strasbourg, 1 February 1995.
[90] MEMO (2012: 30).
[91] *Ibidem.*
[92] GEST (2020: 1).
[93] Report of the Institute for Economics & Peace, September 2020, *Ecological Threat Register 2020: Understanding Ecological Threats, Resilience and Peace.,* p.2.
[94] MEMO (2012: 30).

power, new borders were decided, it happened that portions of a territory, that were previously under the same political structure, could fall under the rule of another power, and became part of a new territory in which they would consequently become a minority, due to their ethnic, religious or linguistic differences. The following regimes of minority protection originated to advance the rights of these groups and some of them are rooted in the link between territory and minority groups. Indeed, another important characterization of minorities is that of territorial or non- territorial. Historical minorities might be defined as *territorial* minority, since they have inhabited a certain portion of land for a long time conserving their peculiar traits notwithstanding the historical circumstances that brought them to be part of States inhabited by a majority with different characteristics. Not all minorities, though, share this strong attachment with the territory: indeed, there are some that are called *non-territorial* minority. They may share other characteristics of territorial minorities, such as peculiar ethnic, religious and linguistic traits, but they are not confined to a single territory[95]. This categorization is generally applied to new minorities, since they emigrated in various moments and in different portions of States' land.

Historical minorities are those that have mainly concerned international law and for which various systems of protection have been formulated throughout the years. The need to protect them derived from the fact that, while living in a territory under the political control of a State made them part of the State itself, their different characteristics questioned their memberships to the nation, presenting them as a threat[96]. Indeed, nation and State are two concepts that not always coincide: the first one refers to a community of people sharing common values and culture and/or religious, linguistic and ethnic characteristics; while the second is a political entity that exercises control over a territory whose boundaries are strictly identified. This explains how it is possible that nation and State cannot coincide, but instead, various nations can reside in a State, and, at the same time, a nation might not have a corresponding State. Those groups of people that are not affiliated with the majoritarian nation in a State end up being minority groups. Often, these communities have ended up being discriminated and isolated even more from the majority of the population, and sovereigns have looked at them as a threat for their control over the territory of the State. Particularly, this attitude has started to accentuate during the Modern era, specifically after the signing of the Peace of Westphalia (1648), date which conventionally symbolizes the passage to the modern world. It is generally accepted that with this treaty two fundamental principles of international law were created; the first one being that the State has a sovereign authority over its territory and the second referring to the idea that no State should interfere in the domestic affairs of another one[97]. The treaty seems thus to put an end to the medieval Christendom, characterized by a "universal hierarchical order controlled by the idea of universal empire"[98] and leaves space to a system of decentralized sovereign States, equal in their powers. The new-found sovereignty of the States could be, though, hindered by the presence of groups which did not completely identify with it. Particularly, the degree to which minorities where accepted or tolerated in the countries was also influenced by the approaches born after the Westphalian peace regarding the development of the concepts of nation and State[99]. Indeed, when the various new States began their journey

[95] MEMO (2012: 30).
[96] *Ibidem.*
[97] GROSS (2001: 261).
[98] MEMO (2021: 15).
[99] *Ibidem.*

toward the specification of their statal and national characteristics, not all them started from the same point. In western Europe, countries like France and England, at the time of Westphalia, already possessed a centralized power and a specific territory. What was missing though, was the idea of an England or French "*nation*" and consequently it was built *a posteriori*, after the creation of the State[100]. Because of that, this idea had to be more tolerant toward diversity, since it had to be able to include all the different groups of people living in the territory of the State[101]. As a consequence, all those living inside of the borders of the State were recognized as part of the nation for their civic belonging, rather than for their ethnic one: for this reason, the described approach has been referred to as "*civic approach*"[102]. The latter gave rise to a type a method of assigning citizenship called *jus soli, i.e.*, based on the place of birth of the single person, regardless of his or her ethnic origin[103].

On the other hand, other western European states did not yet enjoy clear political and geographical boundaries and, in these cases, national belonging had to be found elsewhere[104]. Pushed by the processes of unification and nation-building of states like England and France, these smaller and more decentralized territories started to follow into their footsteps, wishing to recreate the centralized power structures and territorial control that other countries had started to achieve. In these cases, though, the process of development of the nation had already started before the efforts of the sovereigns to build a centralized political structure[105]. Thus, the idea of nation had to be constructed not around the belonging to a certain well-defined and organized territory, which was missing, but on other elements common to all the population, namely culture and language. This approach has been defined as "*ethnic*"[106] and it was the one used by countries such as Germany and Italy, in which individuals could not find a sense of unity in their belonging to a *demos, i.e.*, a politically defined community[107] and were thus compelled to identify as one people in the sense of *ethnos, i.e.*, a community with the same ethnic, cultural and linguistic traits[108]. Therefore, in these States, citizenship came to be assigned according to the latest-mentioned criteria, and could only been acquired if at least one of the parents already had it *(jus sanguinis)*[109].

From the description provided of these two approaches, it is easy to understand that the different specification of nation and State will lead countries to establish different legal systems for the protection of minorities, but specific debates around the topic started to be addressed only later in time, when the structures of the nation-States were already coherent and relatively well-established[110]. However, right from the start, it was clear that in all western countries, regardless of the approach taken to the process of nation-State building, the willingness to maintain a unitary State was always present[111].

On the other hand, the last approach that developed in the three great multinational empires, the Ottoman Empire, the Habsburg Empire, and the Russian Empire[112] was more tolerant and accepting towards ethno-cultural

[100] MEMO (2012: 16).
[101] *Ibidem.*
[102] *Ibidem.*
[103] *Ibidem.*
[104] MEMO (2012: 17).
[105] *Ibidem.*
[106] *Ibidem.*
[107] NOWOTNY (2000).
[108] SALZBORN (2019).
[109] MEMO (2012: 17).
[110] SMITH (2013: 2).
[111] HACKETT (2015).
[112] MEMO (2012: 18).

diversity: In fact, these political entities, due to their vast dimensions, had to face the problem of minorities and minorities protection sooner than Western European States[113]. According to Memo, even though this polities existed also in the period after the Peace of Westphalia, their political structures contained elements typical of the modern era. In all them though, the concepts of *demos* and *ethnos*, at the basis of the process of nation and State building in modern States, were missing. Seeing the vast territory under their control, it is evident that all of these polities were multicultural, with different social, ethnic, religious and linguistic groups coexisting within the borders of each empire. This variety led these polities, until their fall after the First World War, to be populated by different "*non-State nations*"[114]. The general attitude of these empires towards different social groups was rather assimilationist or repressive but some exceptions can be found[115]. For example, in the Ottoman Empire, where Muslim citizens were recognized as the majority, in order to regulate the coexistence among different religious groups and to ensure that cultural and ethnic diversity was preserved, the Millet system was developed[116]. In the words of Ceylan[117]:

> "each millet [people with in common the same religion] had the legal right to use its own language, develop its own religious and cultural and educational institutions, collect taxes and even maintain judicial courts for trying members of the community in all cases except those involving public safety and criminal acts."

Moreover, non-Muslim citizens also enjoyed a certain level of personal freedom, especially in matters concerning births, marriages, deaths and inheritances. This ensured that the different religious communities could coexist pacifically among each other, as long as they respected the Ottoman administration and regularly paid taxes[118]. As it has been agreed by various scholars, the millet system was a classic example of pluralistic society, in which the minority groups were not victims of a forced assimilation but rather they could freely express their own culture[119]. As a consequence, it continues to be studied as a successful example of multicultural State.

On the other hand, in the Habsburg and Russian empires, movements that claimed the right to national self-determination were already present. Groups claiming this right mainly established their affiliation to the community by sharing the same ethnic characteristics, thus following an ethnic approach to the construction of the idea of "nation"[120]. In some cases, these minorities were concentrated in a specific territory, thus claiming it as their homeland; other times, they were more dispersed within the empire. However, even for those members of minorities that managed to live more compactly, getting territorial independence was rather difficult. Indeed, the ethno-geographic composition of the empire was so intermingled that individuating a territory in which the ethnic population was completely homogenous was a very challenging task[121]. This issue led two Austrian statesmen, Karl Renner and Otto Bauer, to formulate a theory regarding the possibility of developing a "*non-territorial autonomy",* arguing that the right to freely express one's culture should not be recognized on a territorial basis, *i.e.,* granting it to sub-territorial unities

[113] SMITH (2013: 2).
[114] MEMO (2012: 18).
[115] *Ibidem.*
[116] CEYLAN (2002: 247).
[117] CEYLAN (2002: 250).
[118] *Ibidem.*
[119] CEYLAN (2002: 246).
[120] SMITH (2013: 2).
[121] *Ibidem.*

individuated by homogenous ethnic characteristics, but to groups of citizens that freely claimed to belong to a specific community by joining a national register[122]. Successively, citizens written in these registers could proceed to elect governments which would deal with issues specific to one's culture, like arranging culture-based schools. This model proved to be highly influential in the Habsburg and Russian empires, but came to lose its appeal after the collapse of these structures of power[123]. It was however, a peculiar alternative compared to the idea of cultural assimilation that could be found in nation-States. Moreover, as in the Millet system of the Ottoman Empire, it ensured the possibility of self-governments for minorities, a concept not yet applied in Western Europe. Also, the mention of a non-territorial autonomy was at odds with the conception of minority protection that would be developed in Western Europe, where the legal system for minority protection has a particular attention for territorial minorities. As proof of this, it can be considered that the Western Allies at the end of the First World War upheld the principle of the self-determination of people on a territorial basis, even in the territories of the former Habsburg empire, in which, as mentioned above, a non-territorial model of self-government for minorities was already in place[124]. This decision however, was at odds with the pluralistic nature of the States born out of the fall of the empire, which included, within their borders, different ethno- minorities. Furthermore, the imposition of a model of "*unitary State*", where one ethno-group ruled over the others, was strictly linked to the worsening of the perception of minorities that came to be considered as detrimental to the State unity and potentially dangerous[125]. One exception to this development can be found in the Balkan States, Estonia, Lithuania and Latvia. There, forms of non-territorial autonomy were established and they were later deemed successful in reducing the tension between States and minorities[126]. On the other hand, in the new States in which the unitary model of State was imposed, situations of tension concerning minorities arose[127].

The territorial basis was also the criterion used by the new States formed in the territories of the former Russian Empire to rule over the issue of minorities. The Soviet regime born out of the ashes of the Empire decided to assign a specific territory, a homeland, to each largest ethnic group. However, even in this case, the ethno-geographic distribution of minorities did not allow to have homogeneous States from an ethnic point view: necessarily, each newly formed State had within its borders, different minorities, aside from the dominant one to whom the territory was allocated. For example, only in the territory of the Russian Republic, 86 minorities out of existing 127 did not have a State to call "homeland"[128]. Moreover, even those minorities who actually had managed to gain territorial autonomy did not live all in the same place: indeed, some of the members of the groups still resided in another State in which they had no autonomy. The only way to enjoy it was by moving to the territory assigned to the minority that they belonged to. This model of territorial autonomy was not ideal as well. The ones that seemed to benefit the most from it, were the ethnic Russians who were encouraged to identify their homeland with the USSR and whose language, Russian, became the language of international communication among the States of the former Empire[129]. This system proved to be far from ideal since it could not contain the

[122] SMITH (2013:2).
[123] *Ibidem.*
[124] *Ibidem.*
[125] *Ibidem.*
[126] SMITH (2013:3).
[127] *Ibidem.*
[128] *Ibidem.*
[129] *Ibidem.*

movements of ethno-nationalism that started to spread out in the union and in the single republics in the 1980s[130].

Overall, three treatments concerning historical minorities issues can be identified: one, more commonly used in Central and Eastern Europe, and described just above, is entitling them with non-territorial autonomy; the second one is recognizing to minorities specific rights that allow them to more easily preserve their specific traits and encourage their respect and protection, without posing any thought to autonomy; while the last one proposes giving territorial self-rule to those group who present different ethnic, religious or linguistic characteristics[131]. The second type of treatment of minorities protection developed also at the international level, particularly with the International Covenant on Civil and Political Rights at its Article 27, already discussed in paragraph 1.1; and at the regional level, for example with the treaties and conventions proposed by the Council of Europe. Aside from these provisions, historical minorities protection is also established at State level, in the different constitutions and laws of the various countries, which can entitle members of minorities to individual rights to practice their own culture, customs and religion and speak their own language, so to protect their peculiar characteristics from being assimilated by the predominant culture. Actually, minority protection, is still abundantly considered as State's appendage, seeing how the Westphalian paradigm of State's exclusively control over the territory still remains the paradigm used to frame this issue, and international organizations, while recognizing some rights to minority, tend to stay away from more contentious issues, such as autonomy[132]. Indeed, in the context of States which are strongly unitarian and in which the idea of State control over its territory is crucial, autonomy is more difficult to consider than in those places in which these characteristics were historically less strong.

In some cases, though, a certain level of autonomy has been conceded: specifically, three approaches to the issue can be identified, all of them relating to the nexus territory-ethnicity[133]. Indeed, as Palermo points out, territory is fundamental when addressing the issue of minority, since minorities can be identified as such, only according to their numerical inferiority in a specific space, *i.e.*, territory, and in relation to the scope of application of a law, which is in itself territorial. This, continues the author, means that even for those forms of minority's autonomy that are addressed as "non-territorial", territory remains indeed an important point of reference, since they also have a territorial scope of application and are a second-best form of solution when territorial ones are not available. The first of these approaches concerns ensuring self-government to those minority groups that, due to geographic and historical reasons are better protected against discrimination and their participation is better ensured through self-government. These minorities are living in specific territories which are therefore extremely homogenous from an ethic perspective, by fact or by law, and are part of another State due to historical circumstances: an example of this, are the Faroe Islands in Denmark, or the Åland Islands in Finland[134]. In some cases, self-government is also ensured in some territories in which homogeneity is ensured by law but in which different minorities reside nonetheless: in these cases, contrasts can escalate quickly and peaceful coexistence is more often threatened[135].

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[130] SMITH (2013:3).

[131] Report of the European Research Council, 2021, *Non-Territorial Autonomy as Minority Protection in Europe: An Intellectual and Political History of a Travelling Idea, 1850-2000.*

[132] PALERMO (2015: 29).

[133] PALERMO (2015: 15).

[134] *Ibidem.*

[135] *Ibidem.*

The second and the third approaches both describe situations of coexistence of ethnic and territorial elements. In the second approach, ethnic traits seem to be more relevant than territorial ones: territories are indeed identified with a specific culture and language, and the tie between them is significant. Moreover, in this approach, unlike in the one described above, the heterogeneity of the minorities inhabiting the territory is taken into account when making autonomy arrangements although the latter remain mainly conceived to protect the principal minority or minorities[136]. Examples of countries which took into account this system to deal with minorities issues are Belgium and Switzerland[137]. In a third case, the territorial element is more emphasized in the development of a form of autonomy, while the ethnic element, although necessary to start the process of territorial autonomy, finds a less relevant place in the self-government regime. In these cases, although the self-government regime began due to the pressure and the existence of ethnic minorities, it evolved including also citizens which do not share the same ethnic traits and who simply reside on the territory to which self-government was granted: examples of these cases are Spain, with its specific constitutional regime dealing with autonomous communities, and Scotland. In both these two cases, membership to a minority is reflected through the willingness of the citizens to be part of the group: as a proof of that, one can considered that the 2014 referendum for Scotland's independence was open to all residents, regardless of their ethnic traits[138].

In the second approach thus, minorities and the territories in which they reside are equally taken into consideration when making autonomy arrangements but the ethnic trait seems to prevail, seeing as territories tend to be identified with the language or other ethnic traits specific of the minority that inhabits them. Thus, this approach seems to be more "*ethnic*"[139], to name it with terminology already used above. On the other hand, the third approach relies more on territories *per se* in order to enforce a regime of autonomy and citizens, although not belonging to a minority, can enjoy the autonomy provided by the regime by choosing to become residents. In this sense, this approach can be named as "*civic*", seeing the lesser importance attributed to the ethnic elements to determine membership to the minority [140]. However, as Palermo points out, territorial autonomy is always framed as autonomy for the group, basically suggesting that even in the cases in which a civic approach seem to be prevailing, the importance of ethnicity is always crucial[141].

The idea of territorial autonomy developed mainly to regulate historical territorial minorities is now facing a series of elements which seem to strongly hinder the efficiency of this system: specifically, the emergence of new forms of institutional cooperation, like power sharing; the growing heterogeneity of the minorities residing in a single territory and the growing attention gained by the phenomenon and, lastly, the progressive erosion of the Westphalian paradigm and of the capacity and the adequacy of the State to control and deal with minority protection and autonomy on its own[142]. The first element refers to the growing importance gained by the mechanism of power sharing as opposed to the rationale behind majoritarian democracy. Power sharing aims at overcoming the majority rule, in favour of involving all groups in making decisions: either the groups are represented following an equality criterion in which each group has the same representatives; or following a proportional

[136] PALERMO (2015: 16).
[137] *Ibidem.*
[138] PALERMO (2015: 17).
[139] PALERMO (2015: 15).
[140] *Ibidem.*
[141] PALERMO (2015: 20).
[142] PALERMO (2015: 22).

one in which the number of representatives of each group depends on the overall members of it. This gives more importance to each group so that no one can overcome another when making a decision. This new method poses a threat to the majoritarian criterion following which minorities groups make decisions in matters they can regulate due to their autonomy, since it does not allow the majority of voters to make a decision but rather focuses in giving more power to the single groups, regardless of their predominance in a territory[143].

The second threat to the form of autonomy in analysis is posed by the growing attention to minority issues and to the increasing variety of groups present in a single territory. Territorial autonomy hardly takes into account this variety, rather preferring to concentrate the power in the hand of the prevalent minority group, an attitude which is starting to be obsolete, considering the new important fluxes of migration[144]. Furthermore, today's world is characterized by phenomena like globalization that have started to make nation States and the model of territorial autonomy more and more unsuitable. Territorial autonomy is hardly the best way to issue minority protection anymore, since these phenomena are having an impact on territories as well, for example, cross- border cooperation, a recently new phenomenon, could also prove to be a better form of minority protection[145]. In simple words, the nation State, with its idea of control over a determinate territory, seems to be incapable of dealing with a transnational issue which is affecting all the world and that has started to increase its flow. New forms of international cooperation, on the other hand, have started to address the issue; namely international and supranational institutions like the Council of Europe and the European Union are giving more and more thoughts to the problem[146]. This interest has been shown by the comments made by the Advisory Committee on the Council of Europe's Framework Convention for the Protection of National Minorities and the Venice Commission which noted how the reference to a territory is not necessary to recognize a minority, nor it is the reference to the requirement of citizenship[147]. On the other hand, also forms of non-territorial autonomy, which are however based on the territory, to the extent that is always the nation State ruling over what is within its borders, have proved to be not always apt to dealing with minority issues[148].

The situation further complicates when, to historical territorial or non-territorial minorities are added the new minorities, mainly originated by the new flows of migration typical of the globalized world which are generally directed from the Global South to the Global North, especially Europe and North America. While historical minorities have been living for long time in the territories of the States, new minorities are a newer addition to the ethno-geographic structure of the States they decide to reside in. For this reason, their claims and needs may be different from the ones of the historical minorities and the relation between them might be oppositive or collaborative, depending on the heterogeneity or homogeneity of their desires[149]. Specifically, it has been observed that, in some territories, historical minorities have tended to assume an ethno-nationalistic stance, basically opposing the presence of migrants in the territories they inhabited; while in other cases they were more lenient towards the new populations, advocating for the creation of an atmosphere of peaceful coexistence. In these cases, historical minorities

[143] PALERMO (2015: 22).
[144] *Ibidem.*
[145] PALERMO (2015: 24).
[146] PALERMO (2015: 25).
[147] *Ibidem*; see also *supra* p. 8.
[148] SMITH (2013: 6).
[149] MEDDA-WINDISCHER (2009: 1).

allowed the newcomers to practice their religion or speak their own language while encouraging their integration in the mainstream society. The likelihood of the development of an exclusionary or accepting attitude among historical minorities is influenced by the political, social, economic and historical background of the minorities themselves, and of the State they reside in[150]. As Kymlicha points out, at first, migration was seen as a threat to national minorities for a series of reasons, such as the temptation for the first to decide to integrate in the majority's culture and to follow the majority way of life. This would reflect in a strategic move for new minorities that, in this way, would be able to enjoy better mobility and greater economic opportunities, precluded to historical minorities that wanted to preserve their ethnic religious or linguistic characteristics. This last fact is particularly relevant, since by not wanting to learn nor continuing to use the language of the majority, minority members face more difficulties in finding a job or upgrade their employment possibilities[151], while the new migrants willing to use the majority language do not have to face this obstacle. However, the drawback for historical minorities is not only related to fewer economic possibilities: the new minorities, by deciding to pursue a greater level of integration compared to the historical ones, will leave the latter outnumbered and with less negotiating power against the majority[152]. Moreover, migrants can also be perceived as a threat by autochthonous minorities due to the interventions of the nation-States that have sometimes decided to assign to them territories in the lands inhabited in the major part by minorities, as a way to reduce historical minorities' power[153]. Aside from that, the willingness of new minorities to integrate into the mainstream society can also be used as a leverage by the nation-State against historical ones, claiming that since the new ones have had no serious problem in integrating, then historical ones should try to do the same. This problem is particularly relevant for what concern the right to self-government, that historical minorities struggle to obtain while new minorities do not show interest towards this form of self-rule[154]. However, as Kymlicha points out, it would be wrong to assume that this dynamic can never be changed or has not changed yet: indeed, while minorities in some cases have developed a form of ethnic nationalism, in other circumstances, other minorities developed forms of what the scholar calls "*post-ethnic nationalism",* which means that they accept the new minorities, allowing them to express their culture while not objecting their willingness to integrate into the mainstream society. According to Kymlicha, the likelihood that a minority will develop one nationalism over the other is not influenced by the economic, social and historical factors quoted above, but specifically by the relevance and the control invested on the historical minorities over the process of immigrant integration in the nation-State society. Particularly, minorities need to have a voice over the quantity of migrants allowed to enter the country, in order to ensure that they do not overwhelm the capacity of the society to integrate them. This control is also important to ensure that immigrants do not pose a threat to national minorities reducing their density in the territories in which they generally reside in[155]. Moreover, historical minorities also need to be taken into account when regulating the terms of integration of the new immigrants: specifically, the latter should be integrated, not only in the majoritarian society, but encouraged to be part of the minorities' culture and customs as well. For example, historical minorities may require that

[150] MEDDA-WINDISCHER (2009: 1).
[151] KYMLICHA (2003: 278).
[152] *Ibidem.*
[153] *Ibidem.*
[154] KYMLICHA (2003: 279).
[155] KYMLICHA (2003: 285).

immigrants send their children to school in which the minority language is the one used for teaching[156]. When both these requirements are met, Kymlicha suggests that integration among minorities will be facilitated and possible tensions and disorders avoided[157].

Finally, when immigrants arrive in a new society, it has to be seen whether they enjoy the same rights that protect historical minorities or if they are not properly recognized as minorities and do not enjoy the protection ensured by domestic and international laws. In general, when referring to universal human rights, there is no need to specify if the member of the minority belongs to an historical or new minority, nor it is important to establish whether the group resides in a specific territory or lives dispersed in a wider portion of land; they simply enjoy human rights for the fact of their existence[158]. On the other hand, other rights such as the right to use the minority language in courts or in the administration can be attributed only to a certain type of minorities, specifically to those who live compactly together, thus territorial minorities, regardless if they are new or historical. It has been argued though, that every minority should at least have recognized passive rights, like the ones to practice their own religion and speak their own language, but the struggle is how to deal with positive measures. For example, while recognizing the importance of granting negative rights, the Framework Convention for the Protection of National Minorities in its provisions and in the following interpretations given by its Advisory Committee, suggests to use a case by case approach (which takes into account the characteristics of the group and those of the State they are living in) when deciding if positive measures have to be applied, like, for example, granting the possibilities to have State-sponsored schools in the language of the minority group[159]. Another example is given by the Commentary on the United Nations Minorities Declaration by the Working Group on Minorities[160], where it is recognized that, while one should refrain from drawing a too strict and exclusionary line between new and old minorities, nonetheless it should be accepted that in the application of the Declaration old minorities should be privileged over new ones, seeing that they have resided for a longer period of time in the territory of the State[161]. In practice, under international law, only some minority rights have been recognized to new minorities, most importantly the general principle of international law of "*non-discrimination*" that is recognized to everyone[162]. However, it can still be seen that a differential treatment is being applied to old and new minorities. This is also true at the national level, where States sometime obstacle new migrants in their quest to obtain citizenship[163], an attribute which will more easily grant them the protection attributed to

[156] KYMLICHA (2003: 286).

[157] As Kymlicha suggests, these measures approved to avoid conflict situations, may be labelled as illiberal, and maybe they are. Nonetheless, they have, in various cases, proven to be successful and have ensured to strike a fair balance between the interests and the power of the minorities and those of the State they reside in, while also ensuring immigrant integration and peaceful coexistence among different ethnic groups, KYMLICHA (2003).

[158] MEDDA-WINDISCHER (2009: 3).

[159] *Ibidem.*

[160] Commentary on the United Nations Minorities Declaration by the Working Group on Minorities, 4 April 2005, E/CN.4/Sub.2/AC.5/2005/2, *Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*.

[161] Report of the UN Human Rights Office of the High Commissioner, 2010, HR/PUB/10/3, *Minority Rights: International Standards and Guidance for Implementation*, p. 5.

[162] *Ibidem.*

[163] Report of the UN Human Rights Office of the High Commissioner, 2010, HR/PUB/10/3, *Minority Rights: International Standards and Guidance for Implementation*, p. 5.

minorities[164]. This attitude though, seems to be unable to face the new severe migration waves which characterize the contemporary world, and different international institutions are urging states to revise the requirement of citizenship, asking to take into account also other criteria when deciding to whom granting minority rights protection[165].

To sum it up, while there is uncertainty over an agreed binding definition of the term minorities, different categorizations of minorities have been agreed upon, one referring to the distinction between historical and new minorities and the other which exploits the link between minority and territories, categorizing them as non-territorial and territorial. Historical minorities started to become an issue in the international arena after the formation of nation-states since, due to their different ethnic, religious or linguistic traits, they represented a threat for the new-found unity of the States. Slowly, different solutions have been developed to ensure that the unity of the States remained, while also granting protection to minorities. These solutions were also influenced by the type of nationalism that characterized each country and, in the end, three different approaches towards minority could be identified. The first was granting protection to each member of these groups, recognizing, among others, also the right to express their own culture. The other two approaches take into account the link minority-territory and provide a territorial autonomy to those territorial historical minority who live in a concentrated area and other forms of non-territorial autonomy which can be more useful for non-territorial minorities which tend to live more sparsely. All these solutions present some strengths and some weaknesses, but they all tend to leave to the single States the duty of dealing with minority protection. This is evident for the second and third approach, which imply an autonomy regulated by the nation State that concedes it, but also in the case of granting rights and protection, it is ultimately the State which is responsible for according these elements and it is always the State that gets to decide which groups can considered as minorities and that can consequently ripe the benefits of this membership. The situation has gotten more complicated in the past years when, to historical minorities, new migrants have added. The new flows of migrants are heavily increased by the globalization and there is growing concern about the future, since the modifications brought about by climate change are supposed to further strengthen this phenomenon. In the light of these developments, the categorization of the new minorities has been brought forward, to distinguish the new immigrants from the minorities that have resided in a territory for a longer period of time. New minorities may be different in their claims from historical ones, they may, for example, be more prone to integrate in the mainstream community and the relationship between the two minorities can be strained. Furthermore, when they arrive in a new country there is also the issue of their protection: many states tend not to consider these new migrants as minorities, thus restricting the level of protection that they can claim. Particularly, States tend to use as a motivation for this exclusion the absence of the requirement of citizenship. International organizations such as the UN and the Council of Europe have in different occasions and through the words of different bodies, asked States to follow a case-by-case approach and to not only consider citizenship when deciding to grant minority rights. Many times, though, the plead was left unanswered. Being sceptical to grant protection to new minorities casts some shadows on the effectiveness of the protection granted by the State to new minorities and

[164] Indeed, as pointed out in *para* 1.1 most international treaty and State laws concerning minority protection only attribute the rights derived from the membership to a certain ethnic, religious or linguistic group only to those people who are citizens of the State.
[165] See *supra* and *para* 1.1.

this fact, combined with the increasing number of migrants present in the European states further put at the risk the possibility of dutifully address the situation. Overall, the nation-State seems to be facing some problems in dealing with minorities protection, thus making one wonder whether international institutions may be more apt to address this transnational challenge.

1.3 The case of Roma people: non territorial, ethnic or national minority?

Minority protection seems, indeed, to remain an issue notwithstanding all the efforts made by the various states and the international community to ensure the peaceful coexistence of minoritarian groups among the majoritarian society. While protecting and integrating all types of minorities may result difficult due to their diversity, which, more often than not, is perceived as a threat, at the same time the situation which each minority faces is different, and some of them may experience particular hardship in being accepted by the majoritarian society. Particularly, there are cases in which minority affiliates tend to be excluded and criticized, since their membership to the minority group makes them, in the eyes of the other people, "bad" or dangerous. In simple terms, some minorities are more subjected to episodes of racism, and prejudices against them are stronger and more deeply rooted throughout the societies in which they live in. For these groups, it is quite difficult to become part of the State they choose as a residence; they tend to be emarginated, to have difficulties finding jobs and they are more prone to leave school. The embedded prejudices can date back to centuries and be still present in the receiving societies, thus preventing these minorities from being integrated even years after their arrival in the host countries. Moreover, the fact that they are not welcomed in the society and often relegated to low-paid jobs, will further strengthen their exclusion. One example of minority whose integration and protection has always been a difficult task, especially due to the extensive prejudices against them that are still deeply rooted throughout European society, is the Roma minority. This group, although part of the European society for a long time, has always struggled to integrate, and heavy distrust and reluctance towards them seem to be the predominant sentiments, so much so, that there is also a word used to describe this phenomenon, "*anti-Gypsyism*". In the words of the Council of Europe's European Commission against Racism and Intolerance, anti-Gypsyism can be defined as[166]:

> "a specific form of racism, an ideology founded on racial superiority, a form of dehumanisation and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatisation and the most blatant kind of discrimination".

As it can be seen, the definition clearly depicts the deepness of the anti-Roma sentiment that characterizes anti-Gypsyism, while also pointing out its long-standing nature. The seriousness and the scope of anti-Gypsyism is understandable if one considers that Roma people have been living in Europe for a very long period of time and they are the largest minority actually present in the continent. To be more precise, it has been estimated that 10 to 12 million of Roma live in Europe and in some states, like Bulgaria and the Former Yugoslav Republic of Macedonia they make up more than 9% of the

[166] Report of the European Union Agency for Fundamental Rights, 2018, TK-01-18-071-EN-N, *A persisting concern: anti-Gypsyism as a barrier to Roma inclusion* p.8.

population[167]. The greatest majority of them live under the at-risk-of-poverty threshold: according to a report made by the EU Fundamental Rights Agency, in the EU, this percentage amounts to 80%, while it is estimated that 50% of people between the age of 6 and 24 does not go to school and one third of them lives in a house without running water[168]. The anti-Roma attitude has strong historical roots and, today, racism against them is still widely accepted and does not carry the usual moral stigma associated with other forms of racism. This phenomenon has been labelled with the term "reasonable anti-Gypsyism"[169] and it can offer an explanation as to why, when people take a discriminatory stance against this minority, there is no public outcry of disdain or condemnation, but actually, a tacit, or sometimes vocal, acceptance. This anti-Roma sentiment has always been present since the first groups of Romani people set foot in Europe. While there is uncertainty regarding the paths of Roma migrations, it has been recognized that the first groups of Roma arrived in Europe and settled in its Eastern part by the end of the 14th century. Some of them arrived by crossing the Bosphorus and then the Balkans, others arrived from North Africa, and some others from Greece[170]. Regardless of that, it has been argued that all of them originated from India, from where, in small groups, they left throughout the years, finding new places to live in Persia and the Middle East, with linguistic evidence suggesting the departure from India dating back to 1000 years ago[171]. Throughout the years, they moved from Eastern Europe to other regions of the continent: by 1438 they were in Italy, France and Germany, then they went to Spain, Russia, Poland and by 1512 they had gotten to Sweden[172]. Wherever they arrived though, they faced discrimination and racism. In many cases they were prevented from conducting many businesses, so that they had to resort to theft. This contributed to the construction of a bad image of this ethnic groups, together with the fact that Roma resorted to fortune telling, a feature which strengthened the label of "different" already applied to them by the citizens of the countries they lived in[173]. Indeed, they represented a news in the European panorama: some of the main traits of their culture were totally opposite from the ones of the dominant groups, and, for this reason, their integration was not seen as possible, less yet advisable. Their nomad identity was perceived as at odds with the norms of common living in a society, hindering their integration. For all these reasons, they were, since the beginning, not accepted in the European societies and European States started to adopt a series of anti-Roma legislations[174]. The final product of the hetero-directed narration of Roma people was that of a group composed of criminals and thieves inapt to work and to live in society, and, later on, of a group characterized by a parasitic behaviour who used to rely on social welfare to survive[175]. Another trait of the prejudiced view regarding this minority was that they were dirty and ignorant[176]. To these negative stereotypes were added also more positive and romanticized ones, that saw them as violin players, colourfully dressed people

[167] Council of Europe, 2012, *Document prepared by the Support Team of the Special Representative of the Secretary General of the Council of Europe for Roma Issues.*
[168] Survey of the European Union Agency for Fundamental Rights, 2016, TK-AN-16-111-EN-N, *Second European Union Minorities and Discrimination Survey Roma – Selected findings.*
[169] Reference Paper of the Alliance against Antigypsyism, 2016, *Antigypsyism – a reference paper*, p.3.
[170] MCGARRY (2010: 10).
[171] MCGARRY (2010: 8).
[172] MCGARRY (2010: 12).
[173] *Ibidem.*
[174] MEMO (2012: 11).
[175] Reference Paper of the Alliance against Antigypsyism, 2016, *Antigypsyism – a reference paper*, p.3.
[176] MCGARRY (2010: 10).

with wild spirits and in search of freedom[177]. All stereotypes were however dangerous, since they confined the idea of a people to few characteristics which were not shared by all its members, nor were necessarily correct, but rather based on the view and interpretations of others. Such stereotypes though, were there to stay and still today are deeply rooted in the minds, the culture and the institutions of European people[178], notwithstanding the efforts put forwards by States and international institutions like the EU and the Council of Europe, the latter having started a pioneering action toward the fight against anti-Gypsyism. The new attention reserved to Roma people and to their struggle to coexist in the Western society had certainly become essential in the twenty first-century due, not only to the anti-Roma legislations that have always been present in Europe, but also to the "*O Baro Porrajmos*", literally the "*Great Devouring",* the programmed and systematic extermination of Roma people carried out under the Nazi regime[179]. Yet, in spite of the evidence, Roma community is still trying to argue that what happened to them under the Nazi constituted genocide and not, *simpliciter*, a crime against humanity[180]. Roma people were, indeed, exterminated because they were regarded as an inferior race, not simply because they were thought to be criminal, as confirms the fact that, before their extermination began, simply being Roma meant incarceration[181]. Aside from not being recognized as a genocide, the *Porrajmos* also received very little attention by the international community, although it has been estimated that between 250.000 and 2.5 million of Roma were killed[182]. After the *Porrajmos*, many of the remaining Roma went to live in Central and Eastern Europe where the communist regimes tried to integrate them in the society but by depriving Roma of their principal characteristics, such as nomadism, in favour of assimilating them within the mainstream society. In this way, under Communism, they were not discriminated against and were not the receiver of violence acts but the prejudices remained strong and could not be completely forgotten, as shows the fact that after 1989 and the fall of the Communist regimes, racism and violence started to resurface [183].

The history of the presence of Roma people in Europe is thus a long-standing path of discrimination, violence and persecution, intermediated with some unsuccessful attempts to assimilate them in the mainstream society. What is particularly worth noticing is that, probably no other minorities present in [184]Europe for as long as Roma face the same treatment and are regarded with such distrust. Indeed, even though minorities have always been perceived as a threat due to their difference, throughout the years they have come to find their place in the society, with some of them also facing no violent episodes. Roma, on the other hand, are an exception to this particular trend, even in cases in which their integration has been promoted through laws and various initiatives. The reason behind this phenomenon has been researched by different scholars and institutions, and different motivations have been brought forward. For some, the lack of integration is mainly due to the fact that Roma do not clearly fit into any of the categories reserved for minorities and as such, they tend to not be responsive to any of the policies carried out by States to facilitate their integration and protection. Indeed, they are

[177] MCGARRY (2010: 19).
[178] Reference Paper of the Alliance against Antigypsyism, 2016, *Antigypsyism – a reference paper*.
[179] MCGARRY (2010: 20).
[180] *Ibidem.*
[181] MCGARRY (2010: 24).
[182] MCGARRY (2010: 20).
[183] MCGARRY (2010: 24).
[184] MEMO (2012).

generally regarded as a non-territorial minority, due to their nomadic nature, and an historical one, since they have been living for a long time in the territories of many European States. However, they also share traits typical of the new minorities, since they are migrants who move throughout different countries[185], or at least some of them do, since others have tended to abandon the nomadic tradition. The fact that they do not fit clearly into any of these two categories means that also their legal situation, and consequently, the rights that they are granted are blurred and not well defined. As explained in the previous paragraph, indeed, often new migrants are not recognized the rights given to historical minorities and enjoy a less favourable legal protection. Aside from the fact that Roma might be seen both as pertaining to historical and new minorities, when talking about their protection, it should be kept in mind that the latter rests upon the legal status that is attributed to them and on the requisite of citizenship. Indeed, citizens tend to enjoy a high protection under the law, notwithstanding the fact that also those groups who are recognized as minorities can enjoy a specific regime of protection.

However, although living in Europe for centuries, many Roma have not taken a permanent residence, rather moving around different countries, in line with their nomadic tradition. This has posed some issues: while migration and the absence of a fixed settlement may be considered as the Roma way of living, the opposite holds true for the rest of the Western society, in which nomadism was abandoned early on and where legal regimes ensure greater protection to citizens. Roma, on the other hand, have always roamed throughout different countries, thus, they are more likely not to have been granted the citizenship of any state. This poses a threat to their protection: not only they are not considered citizens but, as explained in the previous paragraph, notwithstanding the most recent efforts of some international institutions to change this fact, one important requirement in order to enjoy the protection of minority rights is that of citizenship. Seeing the importance of this characteristic, the Council of Europe, among other international institutions, has repeatedly called upon states to respect their international obligations in the matter of citizenship, that is, ensuring its recognition to those people who have the right to obtain it, like Roma, who should be treated as full citizens of the States they live in[186]. However, this is not the case in many European states and elsewhere in the world: in Europe, only some States recognize Roma as their citizens, like Germany, where Roma people are granted the same rights of the other German citizens, Netherlands in which almost all Gypsies are of Dutch nationality, Greece, in which Greek citizens and Roma have equal status, and Hungary in which they are granted Hungarian citizenship[187]. Moreover, even possessing a citizenship does not protect this minority from episodes of discrimination and violence, that they still usually face. This fact did not even change with the creation of the European citizenship: it is enough to consider that, while the introduction of this requirement would ensure the freedom for the owners to roam free among European States, without any restriction, and the possibility to look for a job in the countries of arrivals, in the case of Roma, this migration was strongly discouraged by countries which did not like Roma immigrants to enter their territories. Particularly, some States have also complained to the European Commission that certain groups of people were abusing the right of free movement without fulfilling the correspondent responsibilities, namely work. Although in the document Roma are never mentioned, it has been argued that they were indeed the target of

[185] MEMO (2012: 31).
[186] Report of the Committee on Legal Affairs and Human Rights, 19 April 2002, Doc. 9397 revised, *Legal situation of the Roma in Europe.*
[187] *Ibidem.*

this letter[188]. If, on the one hand, not even the holding of citizenship can fully protect the Roma from discrimination and racism, ensuring their integration or at least their peaceful coexistence among the mainstream societies may result to be even more difficult in those countries in which they have no legal recognition. Having no legal status means they are not even granted the protection reserved to minorities but live without any specific rights granted by law. This holds true in states like Denmark, Armenia, Azerbaijan, Belgium, Bulgaria, Cyprus, Georgia, Turkey and Switzerland[189]. This does not mean that in these countries there are no efforts for the inclusion of Roma, simply that they are not recognized a specific status, for example as a national or ethnic minority, although the percentage of Roma living in these States is high enough to consider them as minority.

On the other hand, in other States, Roma are recognized as an ethnic or national minority. Before seeing how these categorizations apply to this particular group and which States consider them a national or an ethnic minority, it should be seen what these terms mean exactly. Some academics do not agree that there is a significant difference between them[190]: for example, the Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, highlights that, although the title of the Declaration seems to show that the latter prescribes different rights for the different types of minorities indicated, such distinction is non-existent. Indeed, while it does not exclude that the particular needs of specific types of minorities might be taken into account by States in the application of the provisions, the Declaration does not prescribe "*different content and strength*" for the rights of each minority, thus not providing a distinction between the two terms in analysis. Moreover, the Comment makes it even more clear that such distinction is not taken into account by stating that "*there is hardly any national minority, however defined, that is not also an ethnic […] minority*"[191]. On the other hand, another idea discussed in the literature recognizes a difference between national and ethnic minorities, namely that members of national minorities have a kin-State, or a State in which they are a majority, while the opposite is true for members of an ethnic one. Members of ethnic minorities do not have a kin State but they share some ethnic and/or cultural traits[192]. However, as explained in paragraph 1.1 is certainly difficult to point out ethnic minorities since ethnic traits may be more difficult to recognize than it seems. More practically, national minority is the term usually used at the European level when talking about minorities, as shown by the fact that the most important document of the Council of Europe for the protection of minorities is titled Framework Convention for the Protection of *National* Minorities[193] and that the European Convention on Human Rights also uses the term "*national minority*". In conclusion, there is still controversy

[188] MARTIN (2018: 20).

[189] Report of the Committee on Legal Affairs and Human Rights, 19 April 2002, Doc. 9397 revised, *Legal situation of the Roma in Europe.*

[190] MEMO (2012: 54).

[191] Commentary of the UN Economic and Social Council, 4 April 2005, E/CN.4/Sub.2/AC.5/2005/2, *Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*.

[192] MEMO (2012: 53).

[193] As stated in *para* 1.1, the Framework Convention for the Protection of National Minorities does not include any definition for the term minority, thus it is not possible to analyse specifically what it meant with the use of this term, but it should be remembered that this choice was taken so to encourage a case-by-case approach. The ultimate rationale was that of protecting as many minority groups as possible, so the idea of national minority should not be perceived as too restrictive, but rather inclusive.

over the exact definition of the term national and ethnic when linked to a minority, as well as there is no commonly accepted definition of what a minority is.

The confusion over these two terms is particularly evident if it is considered that Roma people are classified in some States as national and in other as ethnic minority, notwithstanding the fact that both definitions aim at describing the same group of people[194]. Moreover, in Hungary, Roma people were recognized up until 2015 as an ethnic minority, while now they are considered as a "*nationality*"[195]. In Bosnia Herzegovina, Croatia, Finland, Greece, Norway, Romania, Slovakia, Sweden and Ukraine, Roma people are considered as a national minority[196]. On the other hand, in Poland, United Kingdom and Portugal, Roma people are classified as an ethnic minority[197]. Finally, in some countries Roma people are considered both as an ethnic and a national minority: emblematic in this regard, is the case of Czech Republic, where the descendants of the Roma groups living in the territory are identified as a national minority, while the new Roma immigrants are seen as an ethnic minority[198]. For what concerns the level of protection granted by the recognition of being a "*minority*", this brings forth some rights which may vary from States to States, according to national legislations, but ensure nonetheless a certain level of protection: in the case of national minorities, also the Framework Convention for the Protection of National Minorities can be applied.

While most of the countries of the Council of Europe define Roma people either as a national or ethnic minorities, there are others in which they present a different legal status. Once again, it must be remembered that the different kinds of legal recognition are not purely a matter of semantic but rather imply different level of protection for Roma people, and thus, require the right attention. The cases in which Roma are not recognized as a particular group or a minority, then those in which there are qualified as ethnic or national minority have already been discussed. Aside from them, there are also a few other classifications present. One of them can be found in Macedonia, where Roma people are considered as a "*constitutional minority*", a *unicum* in the international panorama. In Macedonia, Roma people, together with other minorities[199], are free to express their culture since the national law protects their cultural, ethnic and linguistic identity. As recognized by the Council of Europe and its Advisory Committee to the Framework Convention for the Protection of National Minorities, the Macedonia legislation regarding Roma people is one of the most advanced in Europe and one of the highest examples of respect of international and European standards. Notwithstanding this fact, the application of the law is still not satisfactory and episodes of racism against the Roma community in Macedonia are still a reality[200]. Another case worth mentioning is that of Ireland, in which only the community of "*Travellers*" is indicated as "*indigenous group"* while the rest of the Roma people are not mentioned. Indeed, Roma people are not a homogenous group, but one composed of many different sub-groups: the term "*Roma*" is just the one that is conventionally used for describing the different communities that it includes and, according to the Council of Europe, it has to be understood as an umbrella

[194] MEMO (2012: 53).
[195] PAP (2015: 32).
[196] MEMO (2012: 55-60); Report of the Committee on Legal Affairs and Human Rights, 19 April 2002, Doc. 9397 revised, *Legal situation of the Roma in Europe.*
[197] MEMO (2012: 60-61).
[198] MEMO (2012: 62).
[199] Namely, the other minorities are Albanian, Turkish, Serb, Vlach, Bosniak and other people (MEMO 2012: 51).
[200] MEMO (2012: 51).

term[201]. On the other hand, the term "*indigenous people*" differs from the term minority in the highest emphasis posed, in the former qualification, on the stronger ties with the territory they inhabit, which date back to the pre-colonization period or to the establishment of the current boundaries of the State[202]. Ireland chooses this definition for Travellers precisely because it recognizes the long-standing nexus present between Travellers and the Irish territory. In terms of protection of this community, the Framework Convention for the Protection of National Minorities has been used more broadly also to protect indigenous people, it is thus reasonable to think that Ireland would apply this Convention also in the matters related to Travellers, thus granting the same rights attributed to national minorities. Finally, there are also cases in which, although Roma people are not granted specific rights because they are not recognized as being part of a national minority, a constitutional minority or an indigenous people, they still enjoy some kind of legal recognition, like it happens in France, Spain and Italy[203]. In France, they are recognized by a 1969 law as "*Gens de voyage*", while in Spain where it is not possible to recognize any minority in the domestic law, they are identified as "*Gitanos*". Finally, in Italy, notwithstanding the fact that the identification of a minority is mainly linked to the presence of a different linguistic element, Roma people are not recognized as minority (although they speak a different language, Romani) but at the regional level, they tend to be integrated into broader categories of people, such as stateless or refugees, and they are granted the additional rights and protection attributed to these broader groups[204].

To sum it up, throughout Europe, there are different legal status accorded to the same people, Roma. In some cases, they do not even have a special recognition, thus not being able to enjoy any particular rights. In other cases, they are either recognized as a national or an ethnic minority, in which the difference between these categorization blurs. In one case, they are recognized as a constitutional minority and in another one, as an indigenous people. Different types of legal status translate into different types of legal protection, some more enhanced than others. All of them though, do not seem to have put a stop to the episodes of violence and distrust against this community, nor seem to have improved its living conditions. Moreover, protection in law should also be compared to protection in fact. The implementation of the legislation has also to be carried out and not only remain on paper. It has been observed that sometimes States do not completely follow through with their national and international obligations in regard of Roma people, contributing to not dwindling the anti-Roma sentiment which is spread throughout Europe. Other have argued, though, that the fault of these measures is that they are mainly conceived for protecting territorial minorities and not non- territorial ones, like Roma[205]. Following this idea, models of autonomy conceived for

[201] The Council of Europe has stated that: "The term "Roma" used at the Council of Europe refers to Roma, Sinti, Kale and related groups in Europe, including Travellers and the Eastern groups (Dom and Lom), and covers the wide diversity of the groups concerned, including persons who identify themselves as Gypsies". Glossary of the Council of Europe, 18 May 2012, *Descriptive Glossary of terms relating to Roma issues*.

[202] Unlike for the term minority, the term "indigenous people" finds a commonly accepted definition in international law in the ILO Convention No. 169, where at article 1.B, indigenous people are defined as "peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions".

[203] MEMO (2012: 66).

[204] MEMO (2012: 67-69).

[205] *Ibidem.*

non-territorial minorities, and especially adopted in Central and Eastern Europe, could better meet the needs of Roma people and ensure a better respect of their rights and also a better integration among the mainstream society[206]. The aim of non-territorial autonomy is mainly that of ensuring a correct representation of minorities, rather than focusing on the protection of other rights, which is the main concern of other types of legal instruments, like international conventions. However, the rationale behind this kind of autonomy is that, through a correct representation in the national decision-making bodies, the non-territorial autonomy will lead to a boosting of the social inclusion of the minority groups, now able to make decisions that will ensure that also their interests will be taken into account when regulating domestic matters. Consequently, the process of social inclusion in the mainstream society will be facilitated and, once that objective is reached, protecting minorities rights will be easier and, at the same time, episodes of racism and intolerance against them will come to an end.

While, on the one hand, a regime which takes into account the non-territorial feature of Roma people may indeed seem the right solution, it has been observed, in countries where this model was actually applied, that the outcome was not always favourable, and it did not show great improvements in the living conditions of Roma people, which remained marginalized and the general sentiment towards them remained one of distrust and exclusion. Particularly, Smith analysed the case of Hungary, where forms of non-territorial autonomy were put in place but did not seem to provide a great improvement in Roma people's situation[207]. Specifically, Hungary was the first country after the fall of Communism to establish a model of non-territorial cultural autonomy through the Minority Law in 1993. The aim of this regulation was that of creating a system of self-governments of minorities which hold a legal status. After the modification of the Minority Law in 2015, this system is now composed of three levels: the local, regional and the national one, thus ensuring minorities representation at all the levels of the State[208]. It has been argued though, that this type of regime has some limitations which inhibit it from fully reaching its aim: namely, financial problems, the lack of interest for other rights such as political and cultural rights, the problem of having to identify with a minority to enjoy it (a choice that for some may be difficult to say out loud for fear of being the target of racist episodes) and the lack of representation outside of the specific minority bodies, like in the national parliament[209]. More specifically, for what concerns Roma, the model of cultural non-territorial autonomy has been criticized since it was not included in a broader strategy also aimed at tackling racist episodes and violence against this minority[210]. The final formulation was not comprehensive enough to correctly address the issue of Roma integration, which is hindered by a series of different factors and that requires actions on multiple fronts. Moreover, it has also being argued that the 1993 Minority Law could be seen as a strategy carried out by the Hungarian government to show

[206] A model of non-territorial autonomy was that developed and theorized for the first time by Bauer and Renner. It is a model of non-territorial *cultural* autonomy, which revolves around the idea of granting to specific subgroups which share common cultural and ethnic traits some autonomy, without taking into consideration their non-homogeneous geographical distribution throughout the state territory. It aims at ensuring that the freedom of practicing one's culture is not restricted to a territorial basis and it allows every citizen who perceives to be part of a certain minority to enjoy the benefit of it. See *supra, para* 1.2.

[207] SMITH (2013: 4).

[208] VIZI (2009: 123-124).

[209] VIZI (2009: 124-126).

[210] SMITH (2013: 6).

that it was trying to find a solution for Roma and other minorities issues while actually re-establishing the ethnic boundaries already present in the society[211].
Aside from the controversy pointed out by various scholars, the situation of the Hungarian society, as highlighted by a recent report, has shown how the situation of Roma has not improved, with this minority facing heavy difficulty in everyday life: actually, in some aspects, the situation has also worsened, like in the reduction of the barriers against justice[212].
In conclusion, the situation of Roma minority throughout Europe looks rather grim. Years of racism, violence and distrust are difficult to delete and this seems particularly true in this case. States have started to try to address the issue, with the hope of granting greater protection to this minority. However, still today, the controversial nature of Roma minority is evident in the different characterizations given to it and to different legal status which they enjoy. Moreover, even in cases in which they are recognized as an ethnic or national minority, their inclusion seems to be challenged; when regimes of non-territorial autonomy are put in place, the outcomes are still unsatisfying.
After having briefly analysed what is the legal status of Roma in various European States and what this entails, it will now be analysed which are the instrument and body of the Council of Europe responsible for the protection of minorities, and of the Roma minority specifically, in order to have a more comprehensive knowledge of the European legal panorama, of its strengths and of its weaknesses.

[211] *Ibidem.*
[212] KIRÁLY, BERNÁTH, SETÉT (2021: 2). The report also underlines how women and children pay the highest toll of discrimination, with a highly percentage of children subjected to school segregation and with women discriminated also in the access to healthcare, a problem exacerbated by the current pandemic. Also, legal awareness among Roma people is very low, which means that most of the time they do not even know which are their rights.

Chapter 2: Minority rights protection in the Council of Europe

In the previous chapter, an analysis of the term minority and of the measures carried out at national levels to ensure minority rights protection and autonomy have been presented. Moreover, a specific focus on the Roma minority has been included. What emerged from this analysis is that measures implemented at State level and the different national mechanisms used to ensure minority protection seem to be lacking. Therefore, in this second chapter, a regime of minority rights protection at the regional level, specifically, the one adopted by the Council of Europe, will be analysed.

Following the end of the Second World War, the problem of ensuring that all the atrocities happened during that period would never be repeated became a crucial issue in the development of international relations. The global community and its leaders, after facing, in less than fifty years, two global conflicts which had deeply devasted Europe, were keen to maintain peace in the continent and to ensure that the gross violations of human rights occurred specifically during the last war would not be repeated again. The solution to this problem though, had to be searched also at the international level, since national constitutions in many States had not been able to contrast the rising of violence. Indeed, even those constitutions which prescribed the protection of civil and political rights had been tramped out by the various nationalist and fascist movements which had spread throughout Europe and, thus, had not been able to defend their citizens. While on the one hand, the solution was searched at the national level with the introduction of rigid constitutions, which could not be so easily amended and did not allow the distortion of their original meaning, it was deemed necessary to provide other types of assurance. Particularly, it was considered wise to move at the international level the topic of protecting human rights, considering that their violation had become a phenomenon which characterised almost entirely the international community and did not have a merely national connotation. Following this reasoning, establishing an international organ capable of ensuring the respect of human rights worldwide become one of the most relevant topics of the post-war politics. At the global level, this understanding translated into the creation of the UN, that was attributed the twofold aim of maintaining global peace and overseeing that every State respect human rights in its territory. Inside the organization, many agencies were then created with the scope of protecting specific type of rights and/or specific groups of particularly vulnerable people, like minorities. Moreover, different declarations and documents were published, all calling for the protection of these rights. These would then become the most important international instruments in this field[213]. The need to move from the national level the task of protecting human rights was perceived also at the regional level. This is particularly true for what concerns Europe, the continent where, more than others, the horrors of the Second World War had taken place. The need to protect all European citizens from a repetition of the mass violations of human rights was one of the topics taken into account when dealing with post- war reconstruction. In this context, the struggle to realise this aim was deeply intertwined with the process which would lead to the creation of the European Union. As a matter of fact, the idea of regional integration which took hold in the continent found its *reason d'être* in the need of ensuring long-standing peace among the European States[214]; an

[213] By way of example, it is possible to consider the Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights, which are the components of the so-called International Bill of Human Rights, because of their importance in the fight for the protection of human lives.

[214] This is just one of the reasons guiding the process of European integration. Others motives that have been suggested are: the desire of ensuring common control over natural resources,

aim which was unlikely to be realised without, at the same time, protecting and defending human rights. Notwithstanding the strong link between peace and human rights, the latter topic did not find any place in the new born European Communities, but was rather devolved to the attention of another institution, created in the same period and specifically concerned on upholding the respect of human rights, rule of law and democracy. This institution was then called Council of Europe, and to date, it is the most important body at the European level in the fields that it was created to oversee. Its creation was explicitly proposed by Winston Churchill, then Prime Minister of the United Kingdom, who believed in the necessity of taking a regional approach to solve the problem of maintaining peace, and who, in one speech at the Zurich University in 1946, proposed to start with the creation of a Council of Europe[215]. Churchill believed that the process of European integration should have been carried out through what was called a unionist approach, that is, he favoured intergovernmental cooperation in order to reduce the quantity of power devolved to the soon-to-be international organisation. In this way, while working together at the international level, European States could retain their national sovereignty, a fact that has always been important for the UK[216]. However, not all shared this view: other main international leaders, among which many Italian, Belgian and French politicians preferred what was called a federalist approach: federalists were not worried about preserving national sovereignty but rather, they preferred the idea of creating a strong supranational union, where decisions were not taken at the unanimity but majority decision-making was preferred. Moreover, another approach, which was later deemed compatible with the federalist one[217], was functionalism, mainly encouraged by the French politician Jean Monnet, which saw European integration as the progressive devolution to the supranational level of "functions" normally exercised by the State, like control over the economy, the currency etc. The process of European integration had thus to face the issue of dealing with different paths and ended up being a compromise between the views of the exponents of the three approaches, even though the functionalist one seemed to prevail. In particular, for what concerns the creation of the Council of Europe, the struggle between these conceptions ended up influencing its institutional structure. It was decided that the Council would be composed of a Parliamentary Assembly ('PACE') and of a Committee of Ministers. The PACE was created as an answer to the federalist desire of pooling sovereignty together at the European level, since it represented a non-national and even possibly supranational element, while the Committee of Ministers was introduced to favour the unionist view that wanted the creation of a strong intergovernmental organ where each member State was represented, and where decisions on the most important topics were taken by unanimity. The introduction of this organ also made possible the membership of United Kingdom[218]. Indeed, with these two elements, a

especially those used for war productions, like coal and ore; the impossibility of European States to economically compete alone with the US, seeing how all European economies had been destroyed during the war; the loss of centrality and power in favor of States like the US and the USSR. WEIß (2017:5).

[215] WEIß (2017: 5).

[216] By way of example, it can be recalled that Brexit happened, among other reasons, because many people believed UK sovereignty to be threatened by the growing authority of the European Union. Aside from that, the UK has always been wary of the influence of the European Union in national law, and it has repeatedly hindered a further sharing of national competencies at the Union level, for example rejecting the possibility of adopting the single currency, euro. Moreover, still today, this State is criticizing the Council of Europe for what it sees as non- respect of national sovereignty. WEIß (2017: 16).

[217] TELÒ (2014: 113).

[218] WEIß (2017: 10).

satisfying accord for both parties could be reached. Moreover, there was also an agreement over the introduction of a European Court of Human Rights. A compromise was also the decision of locating the institution in Strasbourg: indeed, this setting was preferred since it was seen as symbol of reconciliation between France and Germany, who had long fought to gain control over the city and its region. In the end, the Statute of the Council was signed in 1949 by ten member States: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom[219] and the first sessions of the PACE and the Committee of Ministers took place in August of the same year. Through the years, the members of the institution grew to become the actual 47, as the Committee of Ministers decided to include also Eastern European countries and others, like Azerbaijan. In the first forty years since its creation, the Council was mainly concerned with standard-setting and monitoring, and its fields of action remained linked to the three great areas of human rights, rule of law and democracy.

2.1 The instruments used for protecting minorities and their limitations

Right from the start of its mandate, the Council of Europe has dealt with the issue of minority and minority protection, although the topic came to gain major attention after the fall of the Communist regimes in Eastern Europe, and the following spread of extreme nationalist movements and conflicts. Indeed, all of these phenomena put at further risk the minorities living in the territories of the Council of Europe's member States, as well as becoming a worry also for the European Union. As a consequence of this issue, the Council decided to adopt the Framework Convention on the Protection of National Minorities which entered into force in 1998 and, which, to date, has been ratified by the greatest majority of member States. The Convention also has an Advisory Committee set up in 1998 which oversees, together with the Committee of Ministers, the States' level of implementation of the Convention. The latter is seen as the most relevant document for the protection of minorities but there are also other specific instruments devised to protect this category, like the European Charter for Regional or Minority Languages, which, as the title suggests, is more concerned on protecting minority languages. Moreover, there are also other instruments used for the protection of minorities, although not specifically concerned with this topic, like the European Convention on Human Rights and the European Social Charter, which protects economic and social minority rights. Moreover, a specific organ, namely the Council of Europe's European Commission against Racism and Intolerance ('ECRI'), has been created with the role of protecting minorities and helping the fight against discrimination and intolerance[220]. Aside from this general overview of documents and organs, there are provisions put in place for specific minorities whose integration and protection has proven to be particularly challenging, like, for example, Roma people. The Council has always been concerned about the particularly worrisome situation that Roma people have to face and at the same time, is aware of the fact that this situation is still existing regardless of the efforts put forward by States, civil society and international institutions. In order to encourage the promotion of Roma rights and help states in the implementation of their obligations toward this particularly vulnerable minority, the Council of Europe has set up the Roma and Travellers Team and it has adopted a Strategic Action Plan concerned specifically with

[219] WEIß (2017: 13).
[220] HOLLO (2011: 131)

> "combating anti-Gypsyism and discrimination and supporting real and effective equality; supporting democratic participation and promoting public trust and accountability; supporting access to inclusive quality education and training"[221].

The Roma and Travellers Team is also responsible for supporting and carrying out peer-reviews of the different programs started by the Council of Europe concerning Roma minority. It is also worth mentioning the presence of the Ad hoc Committee of Experts on Roma and Travellers Issues ('CAHROM'). The Committee is formed by experts appointed by the member States and it has the duty of reviewing the implementation of national policies and identifying good practices, while at the same time creating guidelines for improving their applications. It also provides thematic reports concerning the main topics among which the Council of Europe structures its intervention in Roma related fields: anti-Gypsyism, Youth, Health, Culture and Education, Gender Equality, Governance and Political Participation, Housing, Legal Status, Statelessness, Policy and Strategy Development and Application, History and Holocaust. Among these topics, actions related to the working field "*Youth*" are considered particularly relevant, seeing the heavy discrimination faced by Roma children in access to education and to quality education; a fact which also hinders their capacity of securing high-skilled jobs in the future. Moreover, the discrimination and exclusion that they face from an early age is an obstacle to their political and civil participation. In order to prevent this outcome, the Council of Europe has launched different programs, among which, the most relevant is the Roma Youth Action Plan, mainly concerned with fighting discrimination against Roma children and youths and with improving their participation in the public life of cities and States. The Action Plan also improves the capacity-building of Roma organizations and movements.

As this analysis has shown, the Council of Europe has a wide and heterogenous plethora of instruments at its disposal in the fight for minority equality, which range from legally binding documents and a court of justice, to non-binding guidelines, programs and advisory committees. Notwithstanding this variety and the efforts put forwards by this international organization, there are always some drawbacks which could be modified for ensuring a more effective protection of minorities. This has been argued both for documents related to minority protection, like the Framework Convention, which has been accused of having weak wording and whose rights are non-justiciable[222], and for related committees and organs, like the European Court of Human Rights, responsible for the application of the European Convention on Human Rights. The latter, notwithstanding the fact that it is no strictly linked to minority, offers the legal basis for finding judicial remedy to discrimination and it has been interpreted by the Court in many cases in favour of Roma people's claims. At the same time, also non-binding instruments like the ROMED program have been considered as ill-planned in certain aspects, reducing the scope and the efficiency of the program itself. While the Council of Europe has thus been concerned over minorities and, specifically, Roma people's protection and integration for many years, there are still some drawbacks in its action that should be pointed out. Following this consideration, the rest of this chapter will be focused on analysing strengths and weaknesses of the main legal instruments used for the protection of

[221] Strategic Action Plan of the Council of Europe, 2019, PREMS117220, *Strategic Action Plan for Roma and Traveller Inclusion (2020-2025).*

[222] Proposal of the Parliamentary Assembly of the Council of Europe (PACE), 8 November 2011, AJDOC46, *An additional protocol to the European Convention on Human Rights on national minorities.*

minority rights in the Council of Europe. Then, the ROMED program will be taken into consideration, specifically considering what was the extent of its success and which were its main flaws. The general aim of this chapter is that of finding areas of improvements for the Council of Europe in its quest toward ensuring minority protection and specifically, Roma integration, as well as analyzing its successes and its strengths.

2.1.1 The European Convention on Human Rights and the European Court of Human Rights

The European Convention on Human Rights is the first comprehensive treaty concerning the protection of human rights to be approved after the end of the Second World War. Technically, the record should go to the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948; but the latter is a human rights treaty concerned on a specific issue, and resembles more an international criminal law treaty; while the Convention includes a wide range of rights, although some social and economic ones have been purposefully left out[223]. All the core rights included in the text of the Convention have been derived from the constitutions of the then member States and, like them, they are inspired by the Enlightening tradition[224]. The origins of the Convention and of the idea of creating a Court for Human Rights were already present in the process of creation of the Council of Europe itself. Specifically, the idea took hold during the 1948, in a conference of the Congress of Europe which was held in the Hague. In this occasion the Congress issued a "Message to Europeans" in which it asked for the creation of a Charter of Human Rights and of a Court of Justice which would supervise the implementation of said charter. This document was then started by the Council's Consultative Assembly on a draft prepared by the Legal Committee of the International Council of the European Movement that had been presented to the Committee of Ministers in July 1949. The work on the draft was later on continued by a Committee of Experts; a committee explicitly set up by the Committee of Ministers[225]. The Committee of Experts was unsure on the path to take to draft the Convention, with some preferring the one proposed by the Preparatory Commission, and others that preferred a new approach. In particular, the latter believed that the Convention shouldn't just set out a list of human rights, as the Preparatory Commission suggested, but that these rights had to be very detailed, as should the limitations they could face. In the end, the decision was remitted to the Committee of Ministers that once again delegated the matter, this time to the Conference of Senior Officials which adopted a compromise position, deciding to include in the proposal for a more detailed Convention some aspects of the other idea[226]. The final result is a text which follows a "*definition*" approach rather a "*enumeration"* one[227]. The definition approach was mainly sponsored by the UK representatives and it was preferred notwithstanding the many criticisms highlighted by other members, like Pierre-Henri Teitgen. The latter argued that explaining the possible specifications of a right was dangerous, since such an explanation was bound to leave out some cases, thus restricting the protection ensured by the Convention[228]. Nevertheless, the definition approach was approved and the

[223] SCHABAS (2015: 1).
[224] *Ibidem.*
[225] SCHABAS (2015: 4).
[226] *Ibidem.*
[227] SCHABAS (2015: 8).
[228] *Ibidem.*

Convention was finally signed. The rights that it protected though, were destinated to increase. In particular, in the following years, as series of Addition Protocols was approved and ratified, some of them ensuring greater respect of human rights, like Protocols 6 and 13 on the prohibition of death penalty, which was seen in contrast with the right to life. Moreover, other protocols have been suggested, among which one to improve the rights of national minorities, which was however never approved[229]. In total, 16 additional protocols have been added, six of them introducing new rights and others concerned with other issues. The most relevant are Protocol n. 6 and n.13, Protocol n. 11 which abolishes the European Commission on Human Rights, and Protocol n. 12 which enhances the scope of discrimination recognized by the Court.

For what concern the latter, it should be noted that, during the negotiation for the creation of the Convention, there was still a strong disagreement over the establishment of a court responsible for the application of the Convention, and over the right to individual petition. The compromise was thus reached with the creation of the Commission on Human Rights, an alternative that was more appreciated. The Commission had the authority to establish if there was a violation of a provisions of the Convention as well as giving opinions and encouraging friendly-settlements in case of a controversy. Also, individuals could petition the Commission but only if the State they were from had explicitly agreed to this procedure. This compromise concerning individual petition was applied to make the establishment of a court feasible: in order to realize this aim, it was agreed that the authority had to be specifically accepted by a member State by means of a separate declaration[230]. Consequently, the European Commission on Human Rights and the European Court of Human Rights were both included in the Convention, with the Commission becoming operational in July 1954, and the Court only in 1960[231]. The Commission was then abolished in 1988, when Protocol 11 to the Convention entered into force. Indeed, the latter ensured the possibility of lodging individual complaints against the European Court of Human Rights, thus making superfluous the existence of the Commission. In 1988, the European Court of Human Rights became permanent. Since then, the volume of its cases has faced a steep increasing, while in the previous years, its activity was much more reduced, also due to the fact that the Commission had the role of deciding which complaints could reach the attention of the Court. For what concerns the number of the judges, the Court has as many judges as members States, consequently, now it is composed of 47 members. The latter are elected by the PACE from a list of three members proposed by each State. In conformity with article 21a of the European Convention "the judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence"[232]. Although the link with the State of origin seems to be particularly relevant for their elections, the judges carry out their duties in their personal capacity and are prohibited from joining any association or political party, since this may put at risk their judiciary independence.

Since its approval, the Convention has been a relevant instrument for the protection of human rights in Europe. The Court receives more and more complaints and it remains the fundamental legislative body concerned with human rights at the European level. Notwithstanding all of this, both the

[229] SCHABAS (2015: 11).
[230] SCHABAS (2015: 8).
[231] *Ibidem.*
[232] *European Convention for the Protection of Human Rights*, Strasbourg, 4 November 1950.

Convention and the Court have been accused of having some shortcomings in the protection of human rights and also, more specifically, of minority rights.

2.1.1.1 ECHR limitations

One of the first critics moved to the Convention is the fact that its text is largely protecting civil and political rights, leaving out economic, social and cultural ones, thus reflecting an outdated and limited vision of what human rights protection might significate. Other limitations that have been highlighted concern as well the scope of the rights included in the text. This is particularly true for what concerns minority rights, which are not protected by the European Convention on Human rights ('ECHR') although they are a necessary piece of the puzzle of human rights protection. Other complaints refer to the way in which the Convention has been interpreted by the Court, namely how the doctrine of the margin of appreciation has been applied in a too wide way, or as the minimum standards are seen as the greatest effort that State should make, and not as the starting point they actually are. Finally, criticisms have been moved to the Protocols to the Convention. Before starting to analyse more in detail all of these complaints, it is worth noticing that, despite them, the system composed of the ECHR and the European Court of Human Rights ('ECtHR') is considered the most successful system of transnational justice for the protection of human rights[233]. This is also due to the fact that compliance with international standards has increased in member States, although in some more than others[234]. Only few European countries indeed, face recurrent serious human rights violations[235]. However, the latter are still happening every day, leaving room for the improvement also of the most celebrated system.
Aside from that, it must be taken into account that the Council of Europe itself has tried to address its shortcomings. For example, for what concerns the first critic mentioned above, the Council has created a new document, the European Social Charter, which specifically protects the type of rights left out by the Convention. This document places monitoring of State compliance under the scrutiny of the European Committee of Social Rights and the Charter is indeed legally binding for States, like the Convention. This has been considered a better alternative than simply adding other rights to the Convention, since the ECtHR is already facing a case overload which will only increase if more rights are introduced[236]. While, the counterargument to this criticism seems very convincing, other limits seem to be more difficult to address and to overcome. Nonetheless, in order to try to find a way forward, it should be first seen in detail what the main shortcomings of the Convention are, with a specific focus on those particularly affecting minority rights.

2.1.1.1.1 The non-related nature of the Convention to minorities

The first criticism which will be analysed in detail is the non-related nature of the ECHR to minorities protection. While it is true that the Convention does not specifically address minority rights, it should be noted that the term "*minority*" is mentioned once in its text, at Article 14[237], in which a general

[233] GREER (2018: 126).
[234] GREER (2018: 109-110).
[235] *Ibidem.*
[236] GREER (2018: 92).
[237] The text of Article 14 "Prohibition of Discrimination" reads as follows: "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

prohibition of discrimination is stated. This prohibition of discrimination is explicitly extended in a way that includes *national* minorities, thus following the general wording of the Council of Europe, which in its documents links the term "*minority*" with the adjective "*national*"[238]. Aside from this reference, the Convention remains silent on the destiny of these groups, thus not providing them with judiciable and substantive rights. Seeing how the ECHR is considered the most relevant document of the Council of Europe, this shortcoming seems to appear particularly worrisome. Of the same opinion is the PACE, which has tried various time throughout the years to extend the protection that the Convention grants to minority. In 1993, it presented through Recommendation 201 a draft protocol to the Committee of Ministers for an additional protocol on minority rights, which in 1996 was rejected. This attempt was just one of the many done by the PACE, like the proposed draft protocol in 1990, rejected by the Committee as well, and the ones brought forward in 2001 and 2011, that met the same fate[239]. Concerns over the lack of specific articles related to minorities have also been expressed by the Venice Commission, which found that there is an "unquestionable lacuna" in the Convention in this regard[240]. Contrary to the PACE, the Venice Commission tried to solve this issue not through the proposal of an additional protocol, but encouraging the creation of a European Convention for the Protection of Minorities which later became the Framework Convention for the Protection of National Minorities[241]. While certainly this new document helped increase the protection of minority's rights, it cannot be regarded as a perfect substitute for a more minority-oriented Convention, since there are many differences among the two documents and since the FCPNM has its own shortcomings, as it will be explained later on.

Without a proper protocol or the addition of minority rights, the focus of the Convention seems thus to be far from ideal for these groups. The inclusion of rights like those proposed by the PACE, *e.g.*, political rights, cultural rights, including the right to cultural autonomy, and the right to freely express one's nationality could fill the gap of minority protection in the Convention. However, it should also be noticed that the ECtHR, in some cases, has applied the Convention in a manner favourable to these communities, thus granting them the protection they were seeking. Moreover, while the ECHR does not confer any specific rights to minorities, it is nonetheless true that it enables members of these groups to enjoy, individually, some pertinent rights, like the one to education[242].

2.1.1.1.2 The margin of appreciation

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social origin, association with a national minority, property, birth or other status". European Convention for the Protection of Human Rights, Strasbourg 4 November 1950.

[238] See, *supra* chapter 1.

[239] *Ibidem.*

[240] Opinion of the Venice Commission, 12 February 1996, CDL-INF 003, *Opinion on the provisions of the European Charter for Regional or Minority Languages which should be accepted by all the contracting states.* In this opinion, the Commission refers particularly to the lack of protection for linguistic rights stating that: "The Commission agrees with the Assembly rapporteur that there is an unquestionable lacuna in the European Convention on Human Rights with regard to the special protection of the rights of linguistic minorities. Although Article 14 of the Convention together with Article 2 of the Additional Protocol does allow for some degree of protection in this area […] the Convention does not explicitly guarantee any linguistic freedom; moreover, the case law of the bodies of the Convention does not appear to specify that such rights might derive from the right to freedom of expression […] freedom of thought and conscience".

[241] Proposal of the Venice Commission, 8 February 1991, CDL (91) 7, *Proposal for a European Convention for the Protection of Minorities.*

[242] *Ibidem.*

Another criticism made to the ECHR regards the interpretation that it has been given, or better, the doctrine developed by the ECtHR regarding the way in which the Convention should be applied by member States. After all, the interpretation is certainly fundamental to determine the scope and the level of protection that the Convention grants in concrete. Indeed, even if the ECHR was the most thorough document for the protection of human rights, if the Court decided to interpret it in a restrictive sense, or to allow States to have considerable discretion in its implementation, the overall level of protection offered would be reduced. At first glance, the doctrine developed by the ECtHR may seem to do exactly so, and, thus, to be an instrument in the hand of States to circumvent the compliance with the articles of the ECHR. Indeed, the doctrine of the margin of appreciation implies that States have some discretion in the application of the rights put forward by the Convention, so that they can decide not to apply, or apply partially, some of them[243]. This space of manoeuvre has been created to accommodate the differences among the various legal systems of member States of the Council of Europe[244]. Indeed, it was difficult to find a common understanding of what human rights were, so that it was necessary to allow countries to maintain a certain autonomy in the application of the Convention[245], which can thus be seen as the lowest common denominator among the different legal human rights standards. Following this reasoning, once a common consensus over certain norms has been reached, the ECtHR should grant less discretion to the States, as it has been, indeed, in the cases of *Wingrove v. United Kingdom*; *X, Y and Z v. United Kingdom*[246].

The doctrine of the margin of appreciation however, does not imply that States can arbitrarily choose which rights implement and which not. The fact that they decided to bind themselves to the Convention means that they have some obligations that must always be respected. In particular, to avoid a misuse of this tool, the Court has established some criteria to be followed: one of them is the proportionality test. According to the latter, the State should demonstrate that the restrictive measures adopted were proportional, and that the same aim could have not been achieved without applying said restrictions. But what does proportional means? In this case, it refers to the capacity of striking a fair balance between the different interests at stake: the State should be able to demonstrate that in realizing the pressing social need which motivated the use of the margin of appreciation, a fair balance was struck between the need in question and the other conflicted interest protected by the Convention[247]. However, there are also some specific cases in which the Court tends to allow less discretion to States. This happens because some rights are seen as more worthy of protection than others, such, for example, those related to one's identity or existence: in these cases, the margin of appreciation granted is

[243] GREER (2000: 5).

[244] It must be remembered that the Council of Europe is primarily an intergovernmental organization, which relies on the consensus of its States Party to function properly. If members were to feel their sovereignty threatened by the ECtHR or if they perceived the provisions of the Convention as at odds with their national constitutions, they could also decide to leave the organization or simply refuse to implement the sentences of the ECtHR. This is a rather undesirable outcome (both for the ECtHR and for the Council of Europe in general) which, according to some scholars, can be prevented with the creation of the doctrine of the margin of appreciation. FOLLESDAL (2021: 128).

[245] FOLLESDAL (2021: 128).

[246] *Ibidem.* Judgment of the European Court of Human Rights, 25 November 1966, 17419/90, *Wingrove v. United Kingdom;* Judgment of the European Court of Human Rights, 22 April 1997, 21830/93, *X, Y and Z v. United Kingdom.*

[247] MCGOLDRICK (2015: 23).

narrower; as it is when restrictions apply to particularly vulnerable groups, like minorities[248].
In conclusion, the margin of appreciation is not necessarily detrimental to the protection of human rights, on the contrary, some scholars find that it should also be applied by other legislative bodies[249]. However, it has been argued that the ECtHR sometimes let States exercise it in a too much broader sense, thus not ensuring a fair balance between the interests at stake. Thus, the margin of appreciation looks like a double-edged sword which should be used very carefully.

2.1.1.1.3 The few ratifications of Protocol 12

Since the general aim of the Convention is that of protecting human rights, provisions against discrimination are a necessary feature to be included in this text. This necessity is answered by article 14 of the ECHR[250] which, indeed, prohibits discrimination against the rights and freedoms set forth in the Convention. This prohibition however, was deemed too weak, since it left out all the other rights which may have been recognised at the national levels but were not included in the ECHR. For this reason, it was proposed to add a protocol which extended the extent of the prohibition of discrimination to a wider set of rights, as it is in other international documents[251]. As a consequence of this reasoning, in 2000, Protocol n. 12 was adopted, which includes a *general* prohibition of discrimination[252]. As explained in the explanatory report[253],

> "The additional scope of protection […] concerns cases where a person is discriminated against: i. in the enjoyment of any right specifically granted to an individual under national law; ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner; iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies); iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot)".

As it can be seen, the explanatory report confirms the wider extent that the anti-discrimination clause now covers. It should be remembered though, that this does not mean that States are also obliged to ensure positive measures, but merely to refrain from doing any wrongs, namely, from carrying out discrimination. They are, thus, not required to enact measures that will prevent this behaviour. While this difference may seem inconsequential, it is actually very relevant: simply refraining from conducting discrimination is way less effective than also proactively engage in activities and take actions to prevent this phenomenon. Positive measures thus require a deeper commitment of the States, but they are more likely to generate the desired outcome. The

[248] MCGOLDRICK (2015: 25).
[249] *Ibidem.*
[250] See, *supra* note 234.
[251] Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 4 November 2000.
[252] Article 1 "General prohibition of discrimination" of Protocol 12 reads as follows: "1. The enjoyment of any right set forth by law 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. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1". Protocol 12 to the European Convention on Human Rights, Strasbourg, 4 November 2000.
[253] Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 4 November 2000.

explanatory report explicitly states that Article 1 of the new protocol does not oblige States to enact positive actions, but at the same time does not exclude it categorically: if for example, there is a lacuna in domestic law, the State is mandated to intervene[254]. It is understandable, though, that Protocol 12 did not introduce this requirement, since it would not have been the right place to introduce this new type of wide-ranging provisions of programmatic character[255]. Besides, there are also other international instruments that require States to intervene with positive measures[256]. Consequently, criticisms to Protocol 12, have not been made about its content, which was perceived as an important step forward in the fight for human rights, but on the few ratifications that the Protocol received.

Indeed, in order for States to be bound by each new protocol to the Convention, they have to ratify everyone. To date, 20 out of the 47 member States of the Council of Europe have ratified Protocol 12, while 18 have signed but not ratified it and 17 have neither signed nor ratified it[257]. Among the latter category there are also States like Turkey and the Russian Federation, which are often criticized for their non-compliance with human rights. The reasons behind this lack of consensus among member States vary from the presence of "unacceptable uncertainties" as expressed by the UK[258], to the fact that the Protocol was deemed superfluous, since national law was already prohibiting discrimination, as in the case of France[259]. While in some cases it is true that domestic legislation already provides assurances against discrimination, signing the Protocol does not seem superfluous. Indeed, in this way, the ECtHR would be authorized to oversee the respect of these provisions and citizens would have an additional means at their disposal to ensure that States comply with their obligations. The lack of a high number of ratifications has been lamented by different organs of the Council of Europe in various occasions, like, for example, by the PACE when affirming that the Protocol is a step forward in the fight against discrimination of national minorities which is however limited by the few accessions[260]. This is particularly worrisome in those States in which a strong system of legal protection of vulnerable groups is not in place. In these cases, it would be useful for citizens to bring their issues to the attention of the ECtHR, thus obtaining compensation for the lack of protection they have been subjected to.

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[254] Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 4 November 2000, p. 5-6.

[255] *Ibidem.*

[256] See, for example, the UN Convention on Elimination of All Forms of Racial Discrimination and the UN Convention on the Elimination of All Forms of Discrimination against Women.

[257] Particularly, the States that have ratified the Additional Protocol are: Albania, Andorra, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxembourg, Malta, Montenegro, Netherlands, North Macedonia, Portugal, Romania, San Marino, Serbia, Slovenia, Spain and Ukraine.

[258] Report of the UK Joint Committee on Human Rights, 31 March 2005, *Joint Committee on Human Rights Seventeenth Report,* paragraph 31. The Committee specifies that the decision of not ratifying the Additional Protocol relies on the Government and that the Committee advise s against this turn of events, claiming that "the Government should ratify Protocol 12 ECHR, and include it within the rights protected in the Human Rights Act, in order to provide protection in domestic law equivalent to the equality rights which bind the UK internationally, under the ICCPR, CERD, and the ICESCR. The rights enshrined in Protocol 12 are rights which the Government has accepted through its international commitments to human rights instruments. These commitments should in our view be given reality in national law through a free-standing right of non-discrimination".

[259] Answer to the French Parliamentary Question n. 2954 presented by Aude Laquet, November 14, 2017.

[260] Report of the Parliamentary Assembly of the Council of Europe, 8 November 2011, AJDOC46, *An additional protocol to the European Convention on Human Rights on national minorities,* p.6.

2.1.1.1.4 The interpretation of *minimum standards* as the maximum level of protection States should ensure

The criticism toward the doctrine of the margin of the appreciation is not the only one made about the interpretation given to the ECHR. Another relevant issue is that the rights and the obligations included in the Convention may be perceived as the maximum level of protection that States should grant to their citizens. Indeed, it may happen that States interpret the standards included as the *maximum* limit of their obligations, while, on the contrary, Article 53 ECHR[261] states otherwise. The Convention indeed has to be interpreted as a document setting out *minimum* standards of protection, that is, a minimum level that States must fulfil that does not signify the end of their efforts, but only the beginning[262]. Article 53 explicitly states that nothing in the Convention should limit the States from fulfilling other human rights obligations, whether national or international, thus encouraging them to see the Convention as a starting point towards a greater respect of human rights. This type of articles is not uncommon in international human rights documents: they are called "*saving clauses*" or "*most favourable to the individual clauses*"[263]. The aim of these provisions is that of ensuring, in case of a national law which sets a higher level of protection of human rights, the full respect of the latter and not of the international document which sets lower standards. On the contrary, States that offer, at the domestic level, lower standards of human rights protection are bounded to respect the provisions included in the international acts.
The most relevant issue that arises is that States may not understand or are not willing to understand this difference[264]. However, when delivering a judgement, the ECtHR takes into account the general framework of each State and, if national law offers higher protection than the Convention, a violation of the domestic obligations is not accepted. An aspect worth noticing though, is that, on the one hand, by prescribing only minimum standards, the current ECHR framework does not encourage States to upgrade their human rights obligations. Given the diversity of the legal systems of the State parties to Convention, identifying a common European ground which goes further than minimal guarantees is difficult for the Court, and that is why the minimum standard approach has been followed. However, on the other hand, the main aim of the Council of Europe is that of constantly increasing the respect of human rights. This dichotomy seems to remain insurmountable since States do not find an encouragement in the Convention to uphold and further develop their human rights legislations, but rather consider the ECHR as the maximum level of protection that they are asked to grant.

2.1.1.2 ECtHR limitations

A reflection on the limits of the ECHR would not be complete without a parallel one on the ECtHR. These two instruments for the protection of human rights are, indeed, strictly linked, since it is the duty of the ECtHR to ensure States' compliance with the Convention. In recent years, the criticisms moved to the ECtHR have been many, but they revolve around the same main issues: the high workload of cases, the implementations of the sentences mainly

[261] The text of Article 53 ECHR states that: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party".
[262] ANDREADAKIS (2013: 1189).
[263] VELAERS (2016: 267).
[264] POLAKIEWICZ (2016: 3).

relying on States and the legitimacy of the Court itself. The first point refers to the fact that, each year, many complaints are lodged against the Court, so many that it would be impossible to deal with all of them. By way of example, in 2017, the number of cases that were still pending amounted to approximately 80000[265]. The second criticism refers to the period after the delivery of a judgement: the implementation of the sentences mainly relies on the same States that have been found guilty of a violation, with the Committee of Ministers simply monitoring their compliance, a system that has shown to not work perfectly, as will be analysed later on. Another point of criticism concerns the legitimacy of the Court, which in recent years has been severely questioned. In the following paragraphs, all these limits and criticisms will be analysed, in order to have a clear understanding of the weaknesses of the ECHR system.

2.1.1.2.1 The legitimacy of the Court

Since the ECtHR is an international and, more specifically, a European organ, it is currently facing the challenges brought about by the spreading of neo-nationalist, neo-sovereigntist and anti-European movements. All the latter have in common the distrust toward an international organisation which they perceive as illegitimately imposing its authority to the detriment of national independence and sovereignty. Another related criticism is that the Court has systematically broaden the interpretation of the Convention, once more overstepping its role and threatening national sovereignty. This last argument has often been dismissed by mentioning the existence of the doctrine of the margin of appreciation, which was created to ensure the respect of national legislations[266]. At the same time, the margin of appreciation has been criticized as well, claiming that it is too widely used, to the point that sometime it is detrimental to the protection of human rights. Thus, there are two criticisms that seem to be to be at odds with each other but that are still moved to the Court. The doctrine of the margin of appreciation has already been analysed, and for what concerns the excessively broad interpretation given to the Convention, it might be useful to look at what Lemmens argues: citizens themselves are asking for it, so to see their rights better recognised and protected[267]. Following this interpretation, the Court could not be considered illegitimate, since it would be supported in its actions by national societies. Still, some States are more sceptical towards this organ[268] and neo-nationalist sentiments risk to put at further risk the legitimacy of the Court.

2.1.1.2.2 The exhaustion of domestic remedies and the workload of cases

Another point of concern that is often mentioned when analysing the ECtHR is that fact that, in order to lodge a complaint against this Court, all domestic remedies must have been previously exhausted, meaning that the claim has to have been brought before the attention of all the available domestic courts before reaching the ECtHR[269]. This measure is not a *unicum* in the panorama of international courts, but, rather, it is part of international customary law that

[265] LEMMENS (2017: 23).
[266] LEMMENS (2017: 26).
[267] LEMMENS (2017: 39).
[268] By way of example, it can be considered the case of the UK, where politicians also tried to modify the ECHR in order to reduce the scope of the Court. LEMMENS (2017: 23).
[269] In the case of the ECHR, the rule of exhaustion of domestic remedies is stated at Article 35.1 as follows: "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of four months from the date on which the final decision was taken.".

has also been defined by the International Court of Justice in one of its sentences[270]. The reason behind this principle is, once again, that of not infringing excessively on States sovereignty. In practice, though, this rule also ensures that national remedies have primacy over international ones, that can be accessed only later[271]. While some have regarded this principle as an obstacle to the access to international courts, and, in this specific case, to the ECtHR, some considerations must be made: firstly, it is true that the number of cases that can be brought to the attention of the ECtHR is limited, but is also true that some exceptions to this requirement can be made. Specifically, it has been recognised that domestic remedies must be ''*available*'', ''*effective*'' and ''*sufficient*''[272]. If not, then a person is allowed to lodge his complaint with the Court without previous exhaustion of internal remedies. Also, the exhaustion of domestic remedies needs not be unreasonably prolonged. Moreover, in general, the exceptions to this rule are very vague and international bodies have a large room for manoeuvre. In addition, the burden of showing that domestic remedies have been exhausted lies upon the State: the ECtHR also requires States to show examples of cases in which the remedy was successfully used by people in the same conditions of the applicants. These measures make easier for people to access the Court. On the other hand, there is an excessive vagueness regarding the exception that can be made to the rule of exhaustion of domestic remedies and, consequently, it is more challenging to understand when individuals are really entitled to access the ECtHR[273]. Finally, for as long as this rule will stay in place the number of cases that can reach the attention of the ECtHR will always be limited. However, this needs not be necessarily consider a shortcoming: if, on the one hand, national remedies maintain primacy over the international ones, on the other hand, this rule allows the Court not to get mired into a too heavy workload of cases, which would be impossible to address. This is even more of an issue if one considers that the Court is already occupied with a significant caseload. According to the ECtHR's statistics for 2020, the total amount of pending applications on 31 December 2020 amounted to 62000, and the judgements delivered only to 871, following a negative trend which can be observed in Graph 1[274]. The court also explains in this report that there has been a decrease in the number of cases brought before the ECtHR but, notwithstanding this fact, the productivity was lower, thus increasing the existing pending applications. Starting from 2010, the productivity of the Court has followed a negative trend, with a decrease in the number of judgements delivered, while over the years, the number of complaints lodged against it has followed a positive trend[275].

This excessive workload cannot be dealt with by the Court efficiently, as the Court itself is very well aware of. Measures to contrast this issue have been put in place, but their effectiveness seems rather scarce: for example, in 2009, the Court developed a priority policy, in order to speed up the processing and

[270] In the ELSI case, the International Court of Justice defined the rule of exhaustion of domestic remedies with the following sentences: "For an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success." ROMANO (2013: 561).

[271] ROMANO (2013: 563).

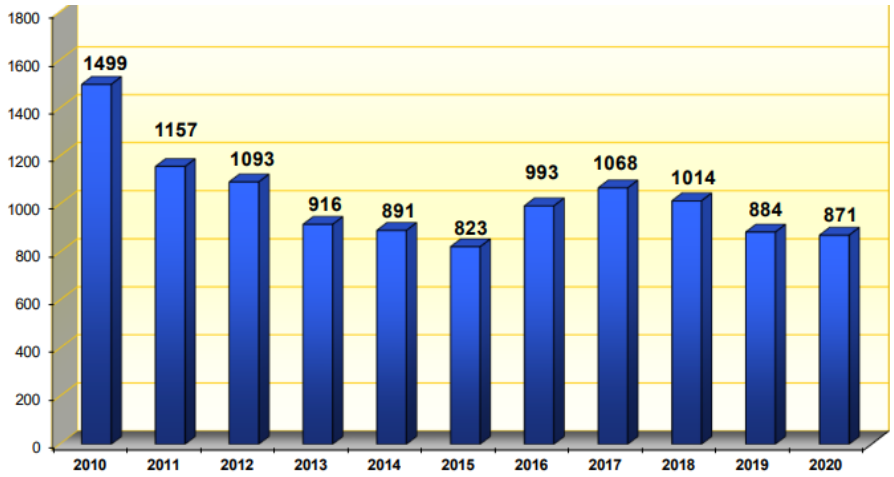
[272] ROMANO (2013: 565).

[273] *Ibidem.*

[274] Analysis of the European Court of Human Rights, January 2021, *Analysis of Statistics 2020.* To be specific, as explained in this report, the number of judgements delivered in 2020 amounts to 1901, but since large proportion of these applications were joined, the number of judgments *actually* delivered amounts to 871.

[275] *Ibidem.*

Graph 1 Number of judgments since 2010 Source: European Court of Human Rights, January 2021, Analysis of Statistics 2020



adjudication of the most important and urgent cases. The policy consisted in assigning each case to one of the 7 categories created, according to the "*urgency*" attributed to each complaint[276]. These categories ranged from including cases where there was a serious, imminent risk for the applicant, to including those complaints that were manifestly inadmissible. A case was judged inadmissible also when the Court had already pronounced a judgement on an identical case[277].

Moreover, the *Interlaken* process was also started in 2010, which consisted in a series of reforms aimed at speeding up the work of the ECtHR. Together with Protocol 14 to the Convention, which allowed cases to be assigned to smaller judicial formations, it was thought to reduce the workload of the Court[278]. Notwithstanding these efforts though, it should be considered that the Court is still overburdened with cases (the slight decrease registered in 2020 is most likely due to the COVID19 pandemic) and it seems to have already slowed down its productivity, as the decrease in the number of judgments delivered shows.

2.1.1.2.3 The implementation mainly relying on States

Even when the Court manages to issue a judgement on one of the numerous cases lodged with it, it is not certain that it will be thoroughly implemented. Indeed, one of the criticisms ventured against the Court, relies on the way in which the implementation mechanism is structured. Always following the exigence of not infringing excessively on national sovereignty, States have been chosen as the main actors of the implementation process. Thus, they have to ensure the fulfilment of the obligations arising from the sentences, while the role of the Council of Europe and, more specifically, of the Committee of Ministers is only that of monitoring. While, on the one hand, this ensures the countries' willingness to accept the scrutiny of the Court, a fact which would have hardly been accepted otherwise, on the other, this puts a lot of

[276] Report of the European Court of Human Rights, 5 May 2013, *The Court's Priority Policy*.
[277] Guide of the European Court of Human Rights, 31 March 2011, *Practical Guide on Admissibility Criteria*, p. 27.
[278] Report of the Council of Europe, November 2020, PREMS 049220, *The Interlaken Process*, p. 22.

responsibility on States, which may not be willing to respect their obligations. This is particularly true when States do not agree with the judgement of the ECtHR, or if, more simply, they consider too expensive in terms of time and/or cost to carry out the implementation process. The first circumstance, as will be better analysed later on, has sometimes occurred in relation to the ECtHR judgements concerning minorities rights. Other times, a State may fulfil its obligations, but with many delays, thus, in the meantime, failing to protect the individuals affected by the judgement. This failure results from the lack of implementation of "*individual measures*", that is, measures aimed at addressing the violation of rights which the person has experienced and which usually amount to the payment of a compensation. However, the failure also results from the lack of implementation of "*general measures*". They consist of provisions, like the amendment of a law, aimed at ensuring that a repetition of the same violation does not occur to other individuals aside from the applicants[279]. So, the lack of implementation of a judgement does not simply concerns the appellants, but society as a whole, or, at least, all those people who are in the same situation of the applicants. A correct implementation of the ECtHR sentences is thus fundamental. This importance has also been recognised by the Council of Europe itself, which has tried to ensure a larger State's compliance. One of the biggest steps taken in this direction is the approval of the already mentioned Interlaken Process, which had the objective of making implementation swifter and more accurate. Particularly, the process established as series of measures like: allowing a quicker submission of action plan designating the measures to be undertaken by the States; improving State mechanisms for the coordination of the different measures necessary to ensure execution, and the nomination of coordinators responsible for the necessary cooperation in the execution process. Moreover, new working methods have been used by the Committee of Ministers to oversee the efforts made by the States, like the speedier publication of relevant documents, the increased guidance provided to States and the increased communication between relevant stakeholders[280].

In order to see if the measures implemented by the Council of Europe have been successful, one can analyse the recent report concerning the Interlaken Process. Indeed, when the Interlaken Declaration was approved in 2010, it was asked to the Committee of Ministers of submitting, before the end of 2019, a report regarding the effects of the Declaration, to see if the innovations included in the process had proved to be successful in facilitating the work of the Court and the implementation of the sentences, or if, on the other hand, a radical change was necessary[281]. This report, which is now available, concludes that[282]:

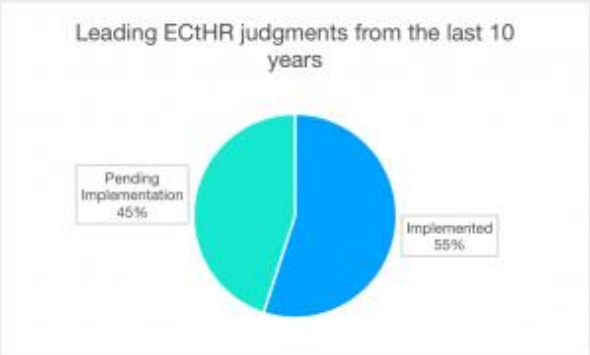
> "The Interlaken reform process, backed by the effects of Protocol No. 14 and the contributions of all stakeholders, was crucial for the system and has led to significant advances, which also bode well for the system's capacity of meeting new challenges and to consolidate and further develop the progress made. The necessity of a new major revision of the system is therefore not apparent".

This positive judgement though, has been accused of casting the matter in a too much favourable light[283]. While it is true that the last 10 years have seen some significant improvements because the measures introduced by the

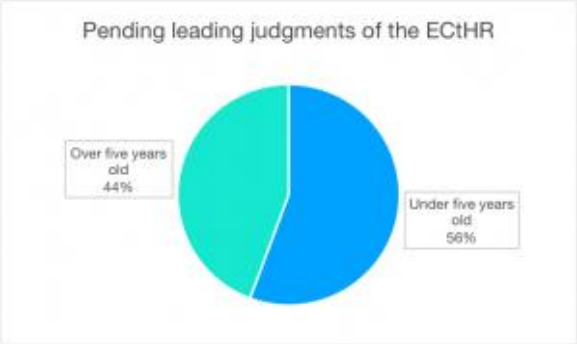
[279] STAFFORD (2019a: 1).
[280] Report of the Council of Europe, November 2020, PREMS049220, *The Interlaken Process*, p. 24.
[281] Ibidem, p. 19.
[282] Ibidem, p. 24.
[283] XENOFONTOS (2020: 1).

Interlaken Process have reduced the number of non-implemented sentences, nevertheless this number still reaches a critical threshold[284]. As highlighted by Stafford[285], the excessive optimism shown in the report may also be generated by a different method that the ECtHR started to use in 2017 to count how many sentences were actually implemented and how many had still to be complied with. To better understand this point, an important difference should be introduced: the ECtHR may have to face different cases concerning the same issue, that is, repetitive violations of a specific right in a specific member State. The first case that introduces a new problematic is defined as "leading case" while similar others that follow are addressed as "repetitive cases". Up until 2017, a case was considered closed when the States had taken both individual measures, thus granting a compensation to the applicant, and general measures. However, in 2017, the system changed and a case started to be considered closed when individual measures had been taken for that case and for all the connected repetitive ones, but general measures had still to be implemented. In this way, many cases were considered closed, but not because of a rise in States commitment, but due to a change in the counting method[286]. Therefore, another way to analyse how the implementation process is going is needed. One way could be taking into account the progress made on the leading cases: if one leading case is not implemented, it means that many other repetitive ones are still pending too. Specifically, the number of repetitive cases associated to a leading one may vary from few to more than one thousand. As it can be seen in Graph 2, the number of the leading cases of the last ten years that have yet to be implemented is quite significant.

Graph 2 Leading ECtHR judgements from the last 10 years. Source: STAFFORD 2019B



Graph 3 Pending leading judgements of the ECtHR. Source: STAFFORD 2019B.



[284] STAFFORD (2019B: 1).
[285] STAFFORD (2019A: 1).
[286] STAFFORD (2019A: 1).

At the same time, it can be seen that many judgments still pending date back to more than 5 years ago (Graph 3). While it is true that some cases may require longer lengths of time to be implemented, it is highly unlikely that changing a law may take more than five years. This means that States are simply unwilling to implement any measure.
All this being said, the new reforms introduced by the Council of Europe, while favouring the dialogue between States and the ECtHR and contributing to improving the implementation process, have not completely and thoroughly addressed the issue, which still remains a serious cause of concern.

2.1.2 The Framework Convention for the Protection of National Minorities

Moving away from the ECHR and the ECtHR, is now time to analyse another instrument of the Council of Europe, more specifically conceived for protecting minorities, the Framework Convention for the Protection of National Minorities ('FCPNM' or Framework Convention). It was written within the Council of Europe by the ad hoc Committee for the Protection of National Minorities ('CAHMIN') under the authority of the Committee of Ministers, and was then adopted by the latter on November, 10 1994, while it entered into force on February 1, 1998[287]. To date, it has been ratified by 39 out of the 47 Member States of the Council of Europe, signed by 4 and neither signed nor ratified by other 4 States[288]. One of the limits of this document is immediately evident if one looks at its origin: the FCPNM was created as a result of the rejection of the PACE's recommendation concerning the drafting of an additional ECHR protocol on minorities[289]. Being born out of States' refusal to develop a stronger minority protection regime, the new text had to be more nuanced in order to be approved. Therefore, it may seem to represent a suboptimal solution right from the start. Nonetheless, it is the first multilateral convention which spells in detail minority rights and the corresponding States' obligations, while also being the first multilateral treaty on the protection of national minorities in Europe. Moreover, it has been appraised for its role in the development and codification of legally binding minority standards[290]. Indeed, the FCPNM is programmatic in nature, and only sets general principles which will have to be realized by States through means of their choice[291]. These principles cover a variety of guarantees granted to minorities, including linguistic and educational rights, establishment of religious institutions, participation in public life, and preservation of cultural identity[292]. Specifically the FCPNM is composed of a preamble and five sections, the first dealing with general principles, like recognizing the protection of minorities as an integral part of the international protection of human rights; the second representing the main operational part and

[287] Report of the Parliamentary Assembly of the Council of Europe, 8 November 2011, AJDOC46, *An additional protocol to the European Convention on Human Rights on national minorities,* p.7.
[288] Signatory States are Belgium, Greece, Iceland and Luxembourg; while those countries who have neither signed nor ratified it are Andorra, France, Monaco and Turkey.
[289] *Ibidem.*
[290] EIDE (2009: 120).
[291] The term "framework convention" comes from international environmental law where the term refers to "a normative regime containing general principles and policy goals, whose concrete and precise modalities of realisation need to be determined at a later stage, by further international agreements". PENTASSUGLIA (1999: 418).
[292] PENTASSUGLIA (1999: 419).

containing the obligations that States are required to implement, like the prohibition of discrimination; the third including important principles on the interpretation of the Convention, like the prohibition of interpreting the obligations of the Convention as allowing individuals to engage in activities that might jeopardize the territorial integrity and political independence of a State; the fourth dealing with the implementation mechanism and the last section highlighting that the FCPNM is an open treaty to which non-member states of the Council of Europe may join with an invitation from the Committee of Ministers[293].

2.1.2.1 FCPNM limitations

As already said before, notwithstanding its achievements, the success of the FCPNM is reduced by the limits which scholars have pointed out. It has been already highlighted that the regime of minority rights protection put in place by the FCPNM is more nuanced than what members of the PACE aimed to achieve: as a consequence of that, the text of this document has been accused of containing many sentences formulated with a too weak wording. Moreover, the rights included are not immediate obligations to carry out, like in the case of the ECHR, but they are progressive standards, to be realised at a pace mostly set out by States themselves. In addition, they are not even justiciable, meaning that there is not a court like the ECtHR responsible for ensuring that States are meeting their obligations, thus depriving citizens of a way to actively gain respect for their human rights. Finally, another criticism moved to the FCPNM is that of not including a proper definition of the term minority, thus not clearly identifying who the Framework Convention is protecting. All these issues will now be analysed, in order to better understand how they limit the effectiveness of the FCPNM and the overall level of the protection that it aims at ensuring.

2.1.2.1.1 The weak wording of some articles

One of the most widespread criticisms regarding the FCPNM relies on the way in which some of its articles are formulated. The PACE, in one of its recommendations for the creation of an ECHR additional protocol on minorities rights, recognizes that, while the FCPNM is undoubtedly a great step forward in the fight against discrimination, it is reduced in its effectiveness, and therefore not enough to give minorities the guarantees they require. It explicitly states that the Convention is "not incisive enough to afford protection to minorities"[294]. The PACE also gives some examples of cases in which the formulation of the articles is too vague to actually provide a guarantee for minority rights. These are: at Article 9 the use of the term "*as far as possible*", in relation to the duty of States to ensure that minorities can create and use their own media; at Article 12, the wording "*where appropriate*" in relation to the measures States should establish in the field of education to ensure that minorities can have knowledge of their history and of the majority's one; and at Article 18, the wording "*where necessary*" in relation to the duty of the Parties to encourage other States to respect minority rights[295]. Other examples may be those of Articles 18.2 and 14, the first using

[293] HOFFMAN (2009: 5).
[294] Report of the Parliamentary Assembly of the Council of Europe, 8 November 2011, AJDOC46, *An additional protocol to the European Convention on Human Rights on national minorities*, p.8.
[295] *Ibidem;* Framework Convention for the Protection of National Minorities, Strasbourg, 1 February 1995.

the expression "*where relevant*", referring to establishing transfrontier cooperation and the second using "*as far as possible*", in relation to the State duty to ensure that minorities are taught their own language in the schools they attend. Aside from these specific cases, the structure of the entire Framework Convention contains limitation clauses that weaken the entire document, like "*States undertake to promote the conditions necessary"* and "*States undertake to adopt adequate measures*"[296]. One the one hand, these formulations may be considered as fitting a document which aims only at establishing general principles, leaving the States to decide how to better carry them out. Indeed, in the Explanatory Memorandum to the FCPNM, it is stated that the provisions included are purposefully more generic so to allow room for manoeuvre to States. On the other hand, though, the margin left to the States risk to be so wide that the implementation of the FCPNM may deviate from the general scope of the Council of Europe, that is, establishing a core standard of European values[297]. In practice, the weak wording of the FCPNM put at risk its implementation, since States may interpret its articles in a minimalist way that does not increase the protection of minorities. What would counterbalance this tendency, could be the creation of an effective body mandated to judge States' behaviour, or of a court of law which could be addressed by individuals, which, however, does not exist.

2.1.2.1.2 The non-justiciability of the rights included in the Convention and the implementation process

Indeed, contrarily to the ECHR, the principles included in the Framework Convention are non-justiciable, meaning that there is not a court which individuals can address to seek compensation and justice when they feel that the State has violated their minority rights. The absence of an international judge is then coupled with the impossibility of relying on the rights protected by the Framework Convention in domestic courts. Indeed, the legal standards included in the document are not addressed specifically to minority groups but, rather, to States[298]. It has been argued that non-justiciability is a weakness of the Convention, however, it has also been suggested that this feature is justified by the structure of the document itself which establishes general principles, therefore more difficult to use as a legal basis in a court. Moreover, there are other ways in which States' compliance can be assured, for example through an effective monitoring system. The one that the FCPNM puts in place relies on the Committee of Ministers, which is helped in its duty by the Advisory Committee to the FCPNM. The monitoring procedure is based on States reports examined by the Advisory Committee which can also, before delivering its opinion, request additional information from a state party; receive information from other sources such as individuals and non-governmental organizations and hold meetings with government representatives and other persons[299]. The Committee of Ministers, taking into account the opinion of the Advisory Committee, writes its conclusion, which include recommendations to the States on how to improve minority rights protection. Moreover, there is also a follow up procedure through which the Committee of Ministers keeps the dialogue open with State parties, encouraging the implementation of its recommendations[300]. However, this

[296] PENTASSUGLIA (1999: 419).
[297] PENTASSUGLIA (1999: 420).
[298] Report of the Parliamentary Assembly of the Council of Europe, 8 November 2011, AJDOC46, *An additional protocol to the European Convention on Human Rights on national minorities*, p.8.
[299] HOFFMAN (2006: 4).
[300] HOFFMAN (2006: 13).

system has been criticized as well, specifically for its excessive lack of transparency. Indeed, the duration of the confidential stage of the monitoring cycle has been accused of lasting too long. Moreover, there is also an apparent lack of adequate statistical data on the number and geographic distribution of minorities, a fact which has the ability to hamper the implementation process[301]. In sum, an important criticism to the FCPNM relies on the non-justiciability of the rights that include, which precludes the individuals to rely on them in courts. On the other hand, another monitoring process has been put in place which could potentially overcome this issue, ensuring that States conform their practice to the recommendations written by the Committee of Ministers. Even this system though, has its shortcomings, so that, in the end, the implementation mechanism is partly flawed.

2.1.2.1.3 The non-direct applicability of the progressive standards

Another point of criticism that has been brought forward is the non-direct applicability of the progressive standards included in the FCPNM. As already highlighted, the nature of the Convention is programmatic. If on the one hand, this translates into a monitoring system which shies away from considering these rights justiciable, as explained in the paragraph above, on the other, this also means that these standards are non-directly applicable. The non-direct applicability means that States have to undertake a series of measures in order to fulfil their obligations, a process that may take a while. The concept of progressive realization has not been introduced by the FCPNM but, rather, it is a common feature of human rights treaties concerned with economic, social and cultural rights. The reason behind this principle is that these types of obligations need more financial resources in order to be correctly implemented. Moreover, the specific context of the States may require additional time to accept the changes necessary for a correct implementation [302]. While, on the one hand, this suggests that States may take their time in fulfilling their duty, on the other, the principal of the progressive realization does not have to be misinterpreted: States must always respect the rights included in the Convention since the moment they ratify it. Indeed, the FCPNM imposes an immediate obligation to take appropriate steps towards the full realization of minority rights. Moreover, inactions or indefinite postponement of measures are not justifiable and as stated by Article 2 of the FCPNM: "the provisions of this Framework Convention shall be applied in good faith […]". Also, Article 22 refers to the fact that nothing in this Convention can limit existing rights. This implies that States should put their greatest efforts, according to their social context and resources, in realizing the FCPNM's progressive standards.[303]. In sum, while it is true that States can implement the obligations of the FCPNM in a wider stance of time, depending on their resources, on the other hand this does not mean that States can postpone their duty forever, but, rather, they have to immediately start working to realize these aims. Therefore, the presence of progressive standards does not seem a huge impediment to the realization of the Convention, but rather a measure which takes into account the reality of the situation in which members States are, acknowledging that they vary and that some States may take more time to fulfil their obligations than others. Once again, the important feature to take into account is the monitoring process: it

[301] HOFFMAN (2006: 13).
[302] Factsheet of the United Nations High Commissioner for Human Rights, December 2008, Fact Sheet No.33, *Frequently Asked Questions on Economic, Social and Cultural Rights.*
[303] Guide of the Minority Rights Group international, March 2006, *Framework Convention for the Protection of National Minorities Opportunities for NGOs and Minorities*.

is necessary that the FCPNM monitoring mechanism constantly keeps States under scrutiny while encouraging them to comply with their obligations.

2.1.2.1.4 The absence of a definition of minority

The last criticism taken into account in this analysis refers to the lack of a proper definition of minority in the text of the Framework Convention. As already explained in Chapter 1[304], the drafters of the document preferred to adopt a "*pragmatic approach*" while discussing this issue, considering the difficulty met in the international arena on agreeing over a common definition of the topic. The Council of Europe, indeed, specifically recognised the impossibility of finding a common ground, and thus simply avoided to prolong the discussion, deciding not to include any definition[305]. If, one the one hand, this allowed the FCPNM to be approved faster, on the other, it did not prevent the issue of a minority definition to rise again. Indeed, in practice, States, as well as the Committee of Ministers and the Advisory Committee, have to agree on which groups to consider minorities, in order to ensure that none of them is left without the proper protection. Particularly, as for all the Council of Europe's documents, national minorities are the subjects of the Convention that should be defined. The addition of this adjective may seem to narrow down the uncertainty concerning this term: however, as highlighted in paragraph 1.3, it is difficult to find a proper definition for the expression "*national minority*" as well, and the same groups, like in the case of Roma people, may be consider a national minority in one State and as a different type of minority in another one. Consequently, it has been agreed that States can decide, explicitly or implicitly, the scope of the application of the Convention. This happens at the moment of the ratification, through a specific declaration, or later on, during the reporting process. The declarations can include a list of criteria which a group has to respect in order to be recognised as a minority or they can, more simply, state the names of the groups which can enjoy the rights set forth in the Framework Convention, like in case of Spain who apply the Convention only to Roma people, although they are not considered a national minority. Six States also recognise citizenship as a requisite for enjoying the protection of the FCPNM[306]. The idea that each State party can decide over the national scope of application of the Convention has been supported by the Advisory Committee which thus decided to adopt a pragmatic and flexible approach. However, while States enjoy this margin of appreciation in order to take into due account the specific circumstances prevailing in their countries, their choices have to be conformed to the general principles of international law and, more specifically, to Article 3 of the FCPNM[307]. Moreover, the declarations made by the States at the moment of the ratification may be considered as reservations, which, according to international law, have to be compatible with the object and the purpose of the Convention[308]. In sum, the Advisory Committee has recognized that States

[304] See Chapter 1, paragraph 1.1.
[305] Framework Convention for the Protection of National Minorities, Strasbourg, 1 February 1995.
[306] These States are Austria, Estonia, Germany, Poland, the former Yugoslav Republic of Macedonia and Switzerland. Estonia recognizes some rights also to some groups of non-citizens; EIDE (2009: 124).
[307] Article 3 states that "1. Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice. 2. Persons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well as in community with others".
[308] EIDE (2009: 124).

can decide to whom the Convention should apply as long as the reservations made are compatible with international law and do not threaten the nature of the FCPNM itself. However, the Advisory Committee is always prone to include as many minority groups as possible.
One issue that particularly stands out is whether the protection of the FCPNM can be extended also to new minorities[309]. In this case, the Advisory Committee has adopted once again a flexible approach, leaving States to decide article by article whether it can be applied to new minorities or not. However, some articles like, for example, Article 11.3 are explicitly conceived for historical minorities[310]. On the other hand, Article 6.1 is clearly referred to new minorities as well[311]. Moreover, a third type of articles can be interpreted as to include also new minorities, like Article 3. In the end, thus, the decision is remitted to the States, although the Advisory Committee has welcomed the choices of including new minorities in the scope of application of the FCPNM[312].
In sum, some have worried over the fact that an absence of a specific definition of national minority might have hindered the application of the Convention. The Advisory Committee and the States have reached an agreement over this issue, leaving States to decide which groups fall under the scope of the Convention, while the Advisory Committee remains in charge of monitoring the entire implementation process[313]. Seeing the difficulty in finding a commonly accepted definition of the term minority, this solution appears to be a solid compromise. However, inevitably, some groups will be left out, especially new minorities, which are rarely allowed to enjoy the benefit of a minority protection regime, notwithstanding the fact that the Advisory Committee is always encouraging an inclusive approach.

2.1.3 The European Charter for Regional or Minority Languages

The European Charter for Regional or Minority Languages ('ECRML' or the Charter) is the first and only international binding treaty concerning minority language protection. It establishes a common legal framework for States to develop their language policies and was adopted in 1992 while it came into force in 1998, with the aim of protecting historical regional languages and minority languages in Europe[314]. To date it has been ratified by 25 States, signed by 9 and nor signed nor ratified by 13 States[315].

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[309] As explained in Chapter 1, new minorities are most likely to not be extended the protection offered by national and international instruments concerning minority rights.
[310] HOFFMAN (2006: 17). Article 11.3 states that: "In areas traditionally inhabited by substantial numbers of persons belonging to a national minority, the Parties shall endeavour, in the framework of their legal system, including, where appropriate, agreements with other States, and taking into account their specific conditions, to display traditional local names, street names and other topographical indications intended for the public also in the minority language when there is a sufficient demand for such indications". As it can be seen, the text explicitly mentions "areas traditionally inhabited", thus necessarily narrowing the scope of protection to historical minorities.
[311] HOFFMAN (2006: 17). Article 6.1 states that: "The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media". The mention of "all persons living in a territory" clearly includes new minorities as well.
[312] HOFFMAN (2006: 17).
[313] HOFFMAN (2006: 7-8).
[314] Report of the Parliamentary Assembly of the Council of Europe, 8 November 2011, AJDOC46, *An additional protocol to the European Convention on Human Rights on national minorities*, p.8.
[315] States that ratified the Charter are: Armenia, Austria, Bosnia and Herzegovina, Cyprus, Croatia, Czech Republic, Denmark, Finland, Germany, Hungary, Liechtenstein, Luxembourg,

The idea of creating a document protecting minority languages has always been part of the political European debate. In the '80s, the Conference of Local and Regional Authorities in Europe started to draft a European Charter of Minority Languages but the works went slowly until the '90s[316]. At that point, such an instrument was needed to better administrate the difficult situation arisen after the end of the Cold War. The ECRML was born shortly after. Its main purpose is cultural, since it aims at protecting minority languages as a threatened aspect of Europe's intangible heritage[317]. It is peculiar in its structure, and the approach that it follows has been defined as "*à la carte"*, since it allows States Party to decide which obligations will be binding for them, disregarding the others[318]. This fact, not unheard of in international law, has however drawn some criticisms, since this selective ratification has been accused of potentially undermining the ambitions of the document, with States only opting for few obligations. Notwithstanding this threat, the ratification process has proven otherwise, with States opting for ambitious goals[319]. Moreover, it should be noted that only the third section of the Charter is actually open to selective ratification, while the other sections are always binding. Indeed, the Charter is composed of five parts, the first highlighting the general scope of the document; the second stating the principles applicable to all languages, like the protection of regional or minority languages in education, mass media and in the public sphere; the third section, as mentioned above, including more substantive provisions (more specifically, 68 articles with a total of 98 measures in support of the languages designated for protection): the fourth explaining the monitoring process and the fifth regulating matters related to ratification and signature of the document[320]. For what concerns the scope of the application, that is, which languages are granted the protection of the ECRML, there is an important feature to highlight. While in the FCPNM only some articles can be applied exclusively to historical minorities, and others concern also new ones, for the ECRML the situation is different. Indeed, the Charter explicitly applies only to the languages of historical minorities, seeing how its general aim is that of protecting and preserving the languages traditionally spoken throughout Europe, as explicitly stated by the Council of Europe itself [321]. Moreover, not all these languages are covered by the provisions of the Charter but, once again, States can decide which ones include under part 3[322].

2.1.3.1 ECRML limitations

This is one of the limits that critics often reproach to the ECRML. Indeed, its unique stance as the only international binding treaty on minority languages did not spare it from criticisms which now, more than 23 years after its entry into force, are still present. In the following paragraphs, those perceived to be the weakest points of the treaty will be analysed. Before starting, it should also be mentioned that even the relatively low number of ratifications of the treaty

Montenegro, Netherlands, Norway, Poland, Romania, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Ukraine and United Kingdom. Eight other states have simply signed it: Azerbaijan, France, Iceland, Italy, Malta, Moldova, Russian Federation, and North Macedonia.

[316] OETER (2014: 62).

[317] Explanatory Report to the European Charter for Regional or Minority Languages, Strasbourg, 5 November 1992, p. 2.

[318] OETER (2014: 62).

[319] *Ibidem.*

[320] Factsheet of the Council of Europe, 2015, PREMS154214, *Factsheet on the European Charter for Regional or Minority Languages.*

[321] *Ibidem.*

[322] OETER (2014: 68).

may be interpreted as a limit of the Charter itself. To date, as mentioned above, 22 States out of 47 have not ratified the treaty, thus leaving many minorities' languages without a specific protection. Aside from that, other points of concern have been pointed out, related to nature and the structure of the Charter. Particularly, the ECRML is ideated in such a way as to not create rights for minorities, neither individual nor collective; thus, not allowing individuals to use it as base in a judicial proceeding. Moreover, the stance of the protection is always vague since it is difficult to point out what exactly are regional and minorities languages. This means that some languages may be left out of the scope of the protection of the ECRML. Notwithstanding these criticisms, it should be noted that the Charter has encouraged States to change their legislation and to improve measures to uphold the protection of minority languages[323]. Moreover, it has been argued that the monitoring process has helped States to understand the value of their minority languages and their importance for the common cultural heritage, thus encouraging them to step up their protective efforts[324].

2.1.3.1.1 The non-creation of individual or collective rights

Contrary to the ECHR, the ECRML does not entitle individuals nor groups to any specific right. This may seem a contradiction, but, actually, the protection of regional and minority languages can not only be achieved by granting rights to the speakers of these linguistic communities. Indeed, the Charter manages to protect minority languages adopting a different solution, *i.e.*, setting out standards, which States are expected to reach. The reason behind this choice is that the various drafting groups understood from the beginning that language protection could not be achieved by merely using a human rights approach. This is explained if one considers that, in order to realise this aim, specific positive actions are required, like ensuring educational offers, and formulating these actions into absolute human rights was too challenging[325]. On the contrary, a *à-la-carte* approach seemed more promising, since it allowed States to choose the extent of their obligations, taking into account and respecting their different resources and sociolinguistic situations[326]. However, a result of this approach is that the Charter does not protect minority groups, nor single people belonging to them, but it is merely created to establish standards for the formulation and implementation of language policies. Consequently, the primary goal of protection is not minorities as groups or individual members belonging to them, but "*languages*" as a cultural phenomenon[327]. Of course, putting in place a regime of minority language protection has a direct effect also on the speakers of said languages, thus, it can be affirmed that minorities language speakers are indirectly protected by the Charter, making it a human rights treaty nonetheless[328]. However, language maintenance is the primary objective of the Charter, not speakers' rights. Accordingly, speakers and languages are the object of the protection written in the ECRML, not linguistic communities or minorities[329]. In line with this approach, the ECRML avoids making any reference to

[323] OETER (2014: 68).
[324] MEMO (2012: 113).
[325] OETER (2018:70).
[326] *Ibidem.*
[327] OETER (2018:72).
[328] *Ibidem.*
[329] *Ibidem.*

collective rights, but, in practice, it cannot avoid protecting minorities as well, as the reading of Article 8.1 shows[330].
In sum, while conceived for protecting minority and regional languages and not their speakers, the ECRML manages nonetheless to ensure, indirectly, a certain level of protection for language communities. Thus, this fact does not seem to seriously limit the scope of the Charter, which is not conceived as a human rights treaty but rather as legal yardstick against which evaluating States' language policies[331].

2.1.3.1.2 The ambiguities regarding the identification of minority or regional languages

Aside from this, further criticisms have been brought forward. One of them refers to the ambiguities concerning the identification of minority or regional languages. This is particularly relevant for the general provisions contained in Part II of the Charter, which are always binding in their entirety for a State Party[332]. For now, it should be considered that, generally, as explained in paragraph 2.1.3, the choice of what languages are protected by the ECRML, and, specifically by Part II, falls upon each State[333]. This feature makes the Charter similar to the FCPNM, since, also for this document, the decision of including a minority under the scope of the Convention rest on States Parties. Allowing States with a margin of appreciation in decision-making is a strategic choice of the Council of Europe, since its intergovernmental nature forces it to rely on the willingness of member States to let it carry out its functions. However, contrary to the FCPNM, the ECRML provides a definition of the object of its protection, namely regional or minority languages: Article 1 indeed, specifically states that[334]:

> "For the purposes of this Charter: a "regional or minority languages" means languages that are: i traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population; and ii different from the official language(s) of that State; it does not include either dialects of the official language(s) of the State or the languages of migrants […]".

As clearly stated in the definition, neither the languages spoken by the new migrants, nor dialects fall under the scope of the Charter. However, even with this definition, it is not always easy to establish which languages should be taken into account. For first, drawing a line between a language and a dialect can be challenging. There are indeed, certain dialects that greatly differ from the language spoken at the national level and that may be considered as a

[330] Article 8.1 provides a series of measures relating to the field of primary education which have to be implemented by States. One last clause explicitly provides that: "to apply one of the measures provided for under i to iii above at least to those pupils whose families so request and whose number is considered sufficient". This seems to show that in the end, young students and their families are granted the right to make decisions in the education field. OETER (2018:72).
[331] OETER (2014: 67).
[332] Part III of the Chapter and the relative criticisms will be addressed in the next paragraph.
[333] Article 2 of the ECRML states that States must "apply the provisions of Part II to all the regional or minority languages spoken within its territory and which comply with the definition in Article 1".
[334] European Charter for Regional or Minority Languages, Strasbourg, 5 November 1992. In the Explanatory Report to the Charter, this concept is further specified as to non-including the languages spoken by the "non-European groups who have immigrated recently into Europe and acquired the nationality of a European State" but "territorial languages, that is to say languages which are traditionally used in a particular geographical area". Moreover, the Report recognizes that the decision of not including a detailed list of minority languages was motivated by the idea of it being "widely disputed". Explanatory Report to the European Charter for Regional or Minority Languages, Strasbourg, 5 November 1992, p. 4-6.

language as well. At the same time, it is not always easy to determine what a "new migrant" is. In some cases, a certain group can live for many years on the territory of another State and still not be recognized as a historical minority. This fact may reduce the scope of application of the ECRML, leaving out a series of dialects and migrant languages which could potentially fall under its protection.

2.1.3.1.3 The non-applicability of Part III to Romani language and others

While the previous paragraph mainly concerned Part II of the Charter, other criticisms have been moved to Part III, which contains the most substantive provisions regarding minority languages. As explained in paragraph 2.1.3, this part is composed of different obligations, among which the States have to select the ones that they want to be bound by. States Parties are not constrained in this choice but for what established in Article 2.2 of the Charter, namely that each State has to choose "a minimum of thirty-five paragraphs or sub-paragraphs including at least three chosen from each of the Articles 8 and 12 and one from each of the Articles 9, 10, 11 and 13"[335]. The articles mentioned are particularly relevant since they deal with topics like, respectively, education, cultural activities and facilities, judicial authorities, administrative authorities and public services, media, economic and social life. Aside from being able to ratify only certain measures, States can also decide which languages include under the protection of Part III. This is substantially different from what happens under Part II: there, each minority languages recognized by the States benefit from the protection of the Charter, so the only minorities languages that are left out are those who are not recognized as such by States[336]. For what concerns Part III, States get to decide the provisions they want to implement and for which minorities languages they will be effective. If, on the one hand, this ensures that States will be more prone to accept the provisions of the Charter, on the other, some minority languages will be left out from the protection of the most substantive provisions. This is a worrying outcome. Moreover, it should be noted that often, the languages most in need of protection are not covered by Part III, as in the case of the Romani one. According to the Council of Europe, two thirds of the countries who ratified the Charter decided to extend only the general protection of Part II to Romani language, with only one third opted to extend the coverage to Part III[337]. Moreover, the Committee of Experts, recognized that a large number of countries implement weakly the provisions of Part III for Romani[338].
Thus, in terms of effective protection granted to minority languages, the mechanism developed for Part III seems to leave room for improvement.

2.1.4 Non-binding instruments- the ROMED program

The previous analysis was concerned with highlighting the structures and the intrinsic limitations of the main documents developed by the Council of Europe with the aim of protecting minorities. They are regarded as the most powerful instruments in the hand of this institution, seeing how they are legally binding for the States that decide to sign them. However, they are not

[335] European Charter for Regional or Minority Languages, Strasbourg, 5 November 1992.
[336] The previous paragraph explained which are the languages left out, namely some dialects and languages spoken by non-historical minorities.
[337] Report of the Council of Europe, 28 April 2020, *States Parties to the European Charter for Regional or Minority Languages and their regional or minority languages*.
[338] MEMO (2012: 112).

the only tools at the Council's disposal. Indeed, the latter has developed a series of initiatives, strategies, guidelines, programmes etc., that, while not having a binding character, can be useful tools to foster minorities integration. Particularly, it will now be analysed one of the most important programmes developed by the Council of Europe to promote the integration of a specific group, Roma people. The ROMED programme (ROma MEDiation) started in 2011. It is a program realised by the Council of Europe in collaboration with the European Commission Directorate General for Education and Culture and it is, to date, composed of two phases, ROMED 1, or the so-called "European training program on intercultural mediation for Roma communities" and ROMED2 or "Democratic governance and community participation through mediation"[339]. As the name of the project itself suggests, the program aims at ensuring a greater integration of the Roma community in the mainstream society by means of intercultural mediation, a tool which the Council of Europe often uses[340]. The ideation of this specific mediation effort was a response to the Council of Europe Strasbourg Resolution on Roma[341], which, in turn, was born as a reaction to the 2010 French action plan against "*illegal migrants*" which legitimized the demolition of Roma camps. The French decision was accused of being specifically targeted to Roma people, and not all migrants not meeting France's residency laws, as France claimed. Faced with this situation, the United Nations, the Council of Europe and other organizations asked France to rethink this policy, while the European Commission threatened to start an infringement procedure[342]. Even if, in the end, this country accepted to back down from its stance, the international community decided nonetheless to endorse a series of measures in favour of Roma integration, among which the creation of the ROMED program. At first, the latter aimed to[343]:

> "improve the quality and effectiveness of the work of school, health, employment and community mediators, with a view to supporting better communication and co-operation between Roma and public institutions (school, healthcare providers, employment offices, local authorities, etc)".

Moreover, it had the threefold objective of: "promoting intercultural mediation to improve the communication between Roma and public institutions; integrating a human rights-based approach to the mediation process and supporting the work of mediators"[344]. The ROMED1 was thus mainly devoted to train the new mediators; and to institutionalise this role as a specific occupation. The program lasted from 2011 to 2013 and was then followed by ROMED2, which instead of focusing on single mediators, aimed at creating the so-called Community Action Groups, that, is groups of voluntary Roma citizens which accepted to work in an open, transparent and democratic way to enhance communication between Roma community and local authorities[345].

ROMED has both been praised for the positive results that it brought about and criticised for some structural aspects. In the following paragraphs, both its achievements and its limitations will be analysed. The choice of analysing also its main positive results was motivated by the fact that the non-binding

[339] KÓCZÉ (2019: 195).
[340] KÓCZÉ (2019: 185).
[341] The Strasbourg Declaration on Roma aims at tackling Roma discrimination in various fields, like education, access to healthcare and justice, employment and housing. Declaration of the Council of Europe, 20 October 2010, CM 133-final, *The Strasbourg Declaration on Roma*.
[342] KELLEY & EDWARDS (2017: 183).
[343] KÓCZÉ (2019: 195).
[344] KÓCZÉ (2019: 196).
[345] KÓCZÉ (2019: 197).

character of the programme may lead to deem it not being worth of consideration. The programme was however successful in certain aspects, and it has had a positive influence on following mediation programs. However, there are also some pitfalls that will be highlighted. Once again, the aim of this analysis is to show the main improvements that the Council of Europe could carry out to better tackle the discrimination of minorities, and in this case, of the Roma minority specifically.

2.1.4.1 ROMED achievements

The analysis will start from the main positive achievements of the ROMED program in its entirety, thus taking into account both its phases, ROMED1 an ROMED2, while sometime accounting for differences and different results achieved in each phase.

2.1.4.1.1 The production of significant documents

One of the positive outcomes of the ROMED program is the production of significant documents, which can facilitate future initiatives of intercultural mediation, concerning both Roma people and other minorities[346]. Among them, it is worth noticing the presence of a training curriculum for mediators as well as a code of ethics to establish core principles to enhance service quality[347] and practical tools for mediators. The training curriculum is the ROMED1 Trainer's Handbook which consists of a comprehensive framework elaborating on key concepts. The handbook is built around the core principles of the ROMED1 mediation approach, namely: cooperation, intercultural mediation, human rights, and participatory planning[348]. Moreover, there is also the document "Experiencing ROMED: A Legacy for Improved Participation of Roma Communities" which offers insights and a comparative overview of how different Roma communities reacted to the program. This report finds that the ROMED2 program was particularly successful in sparkling the involvement of Roma with the local community but also in empowering those who were part of the Community Action Groups. In the end, it presents the ROMED program as a methodology that can be used for further projects and programs of intercultural mediation[349]. In the end thus, the ROMED program seems to have already established a positive legacy in the forms of documents which can be used for further integration attempts.

2.1.4.1.2 The influence on member States' policies

Aside from this, the ROMED program also helped member States improve their policies concerning Roma and Roma integration. This is particularly significant since States may be reluctant in pursuing policies, applying measures and passing laws directed at promoting better living conditions for this specific minority. Anti-Gypsyism, as already explained in Chapter 1[350], is widespread throughout Europe, and it has a strong and relevant influence in policy-making. Thanks to the efforts made by the ROMED program though, States started to incorporate mediation as an interventionist tool via their

[346] CLARK (2017: 2).
[347] CLARK (2017: 6).
[348] KÓCZÉ (2019: 195).
[349] Report of the Intercultural Institute of Timisoara, March 2017, *Experiencing ROMED: A Legacy for Improved Participation of Roma Communities.*
[350] See paragraph 1.3. Moreover, as will be explained in Chapter 3, anti-Gypsyism finds another manifestation in the unwillingness of member States to implement the sentences of the European Court of Human Rights in topic related to Roma integration and protection.

National Strategies for Roma Integration ('NSfRI')[351]. The Council of Europe sees this new development as a positive step and one that will secure greater involvement of Roma in the decision-making processes that have a direct impact on their lives[352]. Moreover, it should also be highlighted that States, both Europeans and non, decided to introduce in their countries systems of mediation inspired by the ones developed under the ROMED program. Some of these States are also inhabited by a large number of Roma people, which tend to live separately from the society, like in Ukraine, Romania, Bulgaria and Kosovo[353]. Thus, the ROMED program provided an additional tool for member States in their struggle for Roma integration. The effectiveness of this specific instrument has been proved throughout the years also by the European Commission, who recognized the success of using mediators for improving Roma standards of living, like those concerning healthcare[354].

2.1.4.1.3 The good impact on practice and training of mediators

Moreover, the last achievement taken in analysis concerns the benefit that mediators gained from the program in terms of training, but also in terms of recognition by public bodies of the worthiness of their work. This statement is justified if one notices the sheer number of mediators that were involved in the mediation training events and their professional certification: over 1500 mediators in more than 25 countries, with the majority of these coming from Roma backgrounds[355]. Moreover, as pointed out by the Council of Europe, the perception and awareness of the importance of the role of mediators has increased also among the most sceptical public bodies, in view of the irrefutable commendable work they were doing trying to bridge the gap between Roma communities and the mainstream society[356]. In this way, States started to take in greater consideration a profession which can help in the fight for Roma integration.

2.1.4.2 ROMED limitations

Notwithstanding the achievements analysed above, the ROMED program has also been repeatedly criticized. The various points that have been brought forward concern the development of the program, its structure, and the working conditions of mediators. Others have also criticized the idea of a program based entirely on *intercultural* mediation, arguing that "this framework occludes the broader socio-economic, political, and historical contexts which have contributed to the marginalization of the Roma"[357]. In the following paragraphs, the main criticisms will be analysed, so to have a comprehensive knowledge of both the strengths and the weaknesses of this

[351] The National Strategies for Roma Integration are strategies which each member State of the European Union has to publish since 2011, when the European Commission decided to propose this initiative in order to foster Roma integration. The Strategies revolve around four main areas: education, employment, healthcare and housing, that is, those aspect of everyday life in which Roma face a higher level of discrimination. They are periodically reviewed by the Commission itself, which then produces annual reports (available until 2020), using information from each country, as well as from civil society, international organizations and the EU Fundamental Rights Agency.
[352] CLARK (2017: 6).
[353] *Ibidem.*
[354] Communication of the European Commission, 30 August 2017, 458 final, *Communication from the Commission to the European Parliament and the Council: Midterm review of the EU framework for national Roma integration strategies*.
[355] CLARK (2017: 6).
[356] *Ibidem.*
[357] KÓCZÉ (2019: 197).

mediation effort. This analysis can be useful also for outlining the future structure of a hypothetical ROMED3 phase[358].

2.1.4.2.1 The precarious working conditions of mediators and their complicated relation with the communities

The analysis starts from the role that made possible the development of ROMED, the mediators. Notwithstanding their centrality and the fact that, as explained above, due to the success of the ROMED program, States started to have a greater consideration of mediation as an occupation, the working conditions of mediators employed by the ROMED were lacking. Moreover, also the training they received could not present them with all the instruments and knowledge necessary to carry out their duties, and mediators were often too dependent on community leaders to successfully complete their tasks. As pointed out by the Roman sociologist Kyuchukov[359], while the program brought great results, one must consider the conditions in which mediators had to operate, which were precarious and characterized by low wages. Moreover, mediators were assigned very small tasks, or, in alternative, they had the constant necessity of relying on someone else to complete their jobs, also due to the lack of a proper training, lack of support in performing their jobs and inconsistent evaluation[360]. In the end, thus, the success achieved by the ROMED relied, in part, on the mediator's personal qualities[361].
Another criticism concerning the role of mediators revolves around their use as a "*buffer*" by local institutions to avoid a direct contact with the Roma communities[362]. Indeed, Roma mediators could establish a contact with the main exponents of the community in which they wanted to facilitate the integration of the Roma themselves. In this way though, the risk was that the main community would never get to participate in the integration process. Moreover, the presence of mediators led public authorities to believe that they had done enough for Roma people, thus feeling exempted from providing them with any further services[363].

2.1.4.2.2 The lack of reference to the socio-spatial segregation of Roma

Moving away from the criticisms concerning mediators, it will now be analysed a point of concern regarding the structure of the ROMED itself. Kóczé argues that:[364]

> "instead of providing a mainstream and inclusive social, educational, health, and employment service, the program tends to create a detached institutionalization of Roma mediation which legitimizes, sustains, and reproduces the socio-spatial exclusion of the Roma."

This criticism is strictly linked to previous one analysed above. The use of mediators to avoid a direct contact with the community also translates in the fact that the Roma community and the mainstream one continued to be detached from one another. The mediators bridging the gap between them can be perceived as a successful tool of integration, while, in reality, in this way, the socio-spatial segregation of Roma continued. This may look like a paradox, since the main aim of ROMED is that of fostering social cohesion,

[358] CLARK (2017: 7).
[359] KYUCHUKOV (2012: 375).
[360] CLARK (2017: 7).
[361] *Ibidem.*
[362] *Ibidem.*
[363] KÓCZÉ (2019: 201).
[364] KÓCZÉ (2019: 199).

however, as argued by Picker, programs like ROMED may actually end up releasing the opposite of what they want to achieve, because they can sustain, promote and reproduce spatial segregation[365]. To ensure that this does not happen, each social inclusion program should develop specific measures to prevent this type of risk. However, this is not the case for ROMED, which consequently fell victim to this scheme. In this way, the program also ended up legitimizing the social-spatial segregation which it should have overcome in order to ensure social cohesion[366].

This analysis has shown which are the main pitfalls of some of the most important instruments used by the Council of Europe to protect minority rights. Starting from the ECHR and the ECtHR and then moving to the FCPNM, the ECRML and the ROMED program, it has been shown that all these instruments, while strengthening minority conditions and their protection, may still be largely improved. In the next chapter, the specific case study of the ECtHR and the Roma minority will be analysed, in order to understand how this Court ensures States compliance with their obligations towards this group. Roma have been chosen because they represent a particularly vulnerable minority, as already mentioned. The Court, on the other hand, has been selected for its relevant jurisprudence on Roma, for the fact that is the only court of the Council of Europe before which citizens can lodge complaints and because the system composed of the ECtHR and the ECHR is considered as the most successful system of transnational justice for the protection of human rights[367]. Therefore, an analysis of its shortcomings can be seen as a starting point for a further reflection on the path to take to strengthen minority protection.

[365] KÓCZÉ (2019: 200).
[366] KÓCZÉ (2019: 200).
[367] GREER (2018: 126).

Chapter 3 The ECtHR and the protection of Roma rights

In the previous chapters, a reconstruction of the different international attempts to provide a binding definition of the term "*minority*" has been presented. This analytical effort has been carried out with the aim of understanding which is the interpretation that the international community gives to the term, while explaining the different labels given to the specific categories of minority, such as territorial and non-territorial, historical and new. Moreover, a specific analysis of the Roma minority has been carried out. In this way, it was possible to understand the level of discrimination faced by this group. Moreover, it clearly emerged that Roma do not fit precisely into any of the categorisations generally used for minorities[368]. However, notwithstanding the different labels attached to this group in various States, a common feature remains: discrimination is high everywhere. Seeing how States are still struggling with ensuring Roma integration and protection, the focus of the analysis has moved to the international level, taking into account the regime of minority protection developed by the Council of Europe. Therefore, the second Chapter has analysed the main instruments used by this institution to protect minority rights. This analysis has showed which are the weaknesses of said regime, while pointing out the strengths of the different documents taken into account. Now, on the basis of the findings of the previous chapters, the analysis will continue with an in-depth focus on how the European Court of Human Rights deals with Roma cases. In this last Chapter therefore, various important sentences of the Court will be analysed. First, housing rights will be taken into account. Roma people face a heavy discrimination in this regard, due to the fact that sometime their lifestyle involves nomadism and living in trailers, a fact that clashes with the way of living of the other European citizens, who considers Roma housing arrangements as backward. The Court, on the other hand, is trying to ensure the respect of the Roma way of life, extending the interpretation of the ECHR to include also housing rights. Then, health rights will be taken into analysis. Even in this field, Roma deal with discrimination on an everyday basis, facing many challenges to access healthcare services. Then, education rights will be studied: unfortunately, Roma children are often allocated to specific classes or schools, in a manner which amounts to a *de facto* segregation. The impact of this kind of treatment on youth people is particular worrisome, for the psychological trauma that may derived from being emarginated since such young age and for the impossibility of obtaining a valid education and therefore, having the necessary qualifications to obtain high-skilled jobs. Even in these cases, the ECHTR delivered some ground-breaking judgements which also overruled the decision of national judges, ensuring the possibility for Roma people to attend normal schools. Lastly, cultural rights and Roma cultural identity will be taken into account. Preserving these rights is particularly relevant, since Roma people, being a minority, are at risk of being assimilated into the mainstream society, losing their traditions and customs. The ECtHR has tried to put a stop to this practice, delivering judgments which took into account Roma cultural peculiarities. More generally, the next Chapter will analyse how the jurisprudence of the Court has evolved from the initial cases, following a path which ensures an always greater protection of the Roma minority. Notwithstanding this improvement, as it will be shown, the ECtHR's judgments are still imperfect, with many scholars pointing out various shortcomings.

[368] For example, some States consider them ethnic minorities, while others national ones. Other times they fit into other categories. See Chapter 1, *para* 1.3.

The aim of this Chapter is that of having a more in-depth knowledge of one of the most important organs of the Council of Europe in the field related to the protection of one of the most discriminated minorities throughout the European history: Roma. By analysing the evolving approach of the Court, it will be showed that, more and more, the ECtHR has been able to improve the protection of Roma rights. However, also the pitfalls of its reasoning will be taken into account. In the end, this dissertation will show what is the effective level of the protection offered to minorities by the Council of Europe, with a specific focus on the ECtHR and the Roma minority.

3.1 Housing rights

The analysis starts by considering what discrimination Roma people face in the access to housing rights. Then, the action of the ECtHR in this field will be taken into account.

By right to housing, we mean the right to have *adequate* standards of living, which include more than four walls and a roof. Indeed, we include living in houses which are safe, not overcrowded or substandard[369]. Moreover, according to the United Nations Committee on Economic, Social and Cultural Rights adequate standards of living can be ensured when there is, among other things, protection from forced evictions or the arbitrary destruction and demolition of one's home; availability of services, like safe drinking water and adequate sanitation; affordability, that is, if house prices are not so high as to prevent someone from buying a house or rent it; accessibility, meaning that a house is not adequate if it does not satisfy the specific needs of the people, like minorities or people with disability who should live there; cultural adequacy, meaning that houses must respect the expressions of cultural identity; and, lastly, when equal and non-discriminatory access to adequate housing is ensured[370].

Generally, minorities, indigenous people, people with disabilities and LGBTQ+ people are more often discriminated in the access to adequate housing[371]. This is due to sentiments like racism, ableism, xenophobia and homophobia which hinder their opportunity of buying or renting a house. To face this issue, different instruments have been adopted at the international level, among which the ICESCR[372], while at the level of the Council of Europe, the European Social Charter at Article 31 specifically recognizes States' obligation to ensure the right to housing[373]. Notwithstanding the existence of various international instruments concerning the topic, data regarding the right to house paint a worrying picture. As the Council of Europe highlights, "many States fail to address these rights obligations within national legislation […]. Some have difficulties in defining and enforcing a minimum

[369] Issue Paper of the Council of Europe, April 2008, Comm/HDIssuePaper 1, *Housing Rights: The Duty to Ensure Housing for All*.

[370] Factsheet of the United Nations High Commissioner for Human Rights, 2009, no.1, *The Right to Adequate Housing.*

[371] Report of the European Federation of National Organisations Working with the Homeless ('FEANTSA'), 2021, *FEANTSA's input for the United Nations Special Rapporteur on housing discrimination and spatial segregation*, pp. 2-7.

[372] Housing rights are recognized at the international level in the 1948 Universal Declaration of Human Rights and in other international instruments like The International Convention on the Elimination of All Forms of Racial Discrimination and the UN Convention on the Elimination of All Forms of Discrimination Against Women.

[373] European Social Charter (Revised), Strasbourg, 3 May 1996. Article 31 states that: "With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: 1 to promote access to housing of an adequate standard; 2 to prevent and reduce homelessness with a view to its gradual elimination; 3 to make the price of housing accessible to those without adequate resources".

standard of housing rights protection, or in securing the resources for effective State action"[374].
Once again, the Roma minority is particularly discriminated in this field. Their wrong treatment is particularly evident in the categories of *acceptability* and *cultural adequacy*: Indeed, as often recognized by the Council of Europe[375] and other international institutions, including the United Nations Committee on Economic, Social and Cultural Rights, this group is often discriminated and has difficulties in finding settlements adequate to their customs and traditions.

3.1.1 The discrimination faced by Roma concerning the right to live in their traditional manner

Indeed, as often mentioned before, the traditional lifestyle still practiced by some Roma people rarely find acceptance among the mainstream society. This nomadic lifestyle is perceived as too much at odds with the sedentary life carried out in Europe. This weariness is often translated in discrimination and in the impossibility of being authorized to occupy lands with their trailers. The problem has been brought to the attention of the Council of Europe several times and in 2004 an important recommendation acknowledging the issue was published[376]. In this document the Council of Europe recalled that:

> "Member states should affirm the right of people to pursue sedentary or nomadic lifestyles, according to their own free choice. All conditions necessary to pursue these lifestyles should be made available to them by the national, regional and local authorities in accordance with the resources available and to the rights of others and within the legal framework relating to building, planning and access to private land".

Moreover, the Council approached the topic of Roma camps, the settlements where Roma tend to live together in trailers or in other vehicles. Often, these camps are characterized by scarce hygiene, with no safe drinking water and the lack of other utilities such as energy. Moreover, they remain illegal settlements, being that, often, they are not regulated by national legislations. Regarding this, the Council agreed that:

> "The public authorities should make every effort to resolve the undefined legal status of Roma settlements as a precondition for further improvements. Where Roma camp illegally, public authorities should use a proportionate response. This may be through negotiation or the use of legal action. However, they should seek, where possible, solutions, which are acceptable for all parties in order to avoid Roma from being excluded from access to services and amenities to which they are entitled as citizens of the state where they live"[377].

Notwithstanding these efforts, Roma housing rights continue to be violated: by way of example, it can be recalled the case of forced eviction of Roma from Roma camps conducted in France in 2009[378], or the complaint filed by Amnesty International before the European Human Rights Committee,

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[374] Issue Paper of the Council of Europe, April 2008, Comm/HDIssuePaper 1, *Housing Rights: The Duty to Ensure Housing for All*, p.6.
[375] Issue Paper of the Council of Europe, April 2008, Comm/HDIssuePaper 1, *Housing Rights: The Duty to Ensure Housing for All.* See also, Recommendation of the Committee of Ministers, 23 February 2005, no. 4, *Improving the housing conditions of Roma and Travellers in Europe.*
[376] Recommendation of the Committee of Ministers, 23 February 2005, no. 4, *Improving the housing conditions of Roma and Travellers in Europe.*
[377] *Ibidem.*
[378] KELLEY and EDWARDS (2017: 183).

regarding the appalling housing situation of Italian Roma[379]. Considering this dire scenario, the ECtHR has helped the fight against discrimination, committing itself to ensure fairer living conditions to this vulnerable minority.

3.1.2 The protection offered by the ECtHR

The non-availability of cultural adequate housing, the impossibility of legal occupation due to the opposition of States and the illegally forced evictions carried out against Roma have been issues at the forefront of the ECtHR jurisprudence relating to the Roma minority. This is, notwithstanding the fact that the ECHR does not specifically recognise a right to housing. Therefore, the Court had to derive an entitlement to qualified housing through persistent litigation and the use of a more comprehensive approach, as will be better analysed in the next paragraph[380]. However, the efforts of the Court in this regard started to be carried out years after the first cases on Roma and housing rights were brought before the Court itself. At the beginning, when ruling over this matter, the Court took a cautionary approach, refusing to overrule the decisions of national judges. The first string of cases mainly concerned Roma and Travellers who lived in the UK. Among them, there were those of *Jones v. UK*[381] and *Smith v. UK*[382]. In the former, the applicant complained over the impossibility to be granted a planning permission to station his caravan on a plot of land he owned, while in the latter, the applicants complained over the lack of Roma sites where they could station their caravans and over the absence of remedies for this issue[383]. In both cases, the ECtHR could have established a failure of the UK to respect Article 14 ECtHR, which establishes the prohibition of discrimination and of Article 8.1, where the right to respect a person's home is expressed. However, both times, the Court recognized that these allegations were ill-founded, since the applicants' complaints touched upon issues of policy making in which the Court could not interfere. On a following sentence, *Chapman v. UK*, where the applicants complained over the refusal for planning permission to station residential caravans on land owned by them, the Court held that "any interference with the applicant's rights was proportionate to the legitimate aim of preservation of the environment" and thus not in violation of Articles 8 and 14[384]. However, not all judges agreed on this last point: on a joint dissenting opinion, Judges Pastor Ridruejo, Bonello, Tulkens, Lorenzen, Strážnická, Fischbach and Casadevall, concluded that the balance stroke between the need to protect the environment and the right to house of the applicants should be more in favour of the latter. Moreover, the judges' view was that Article 8 "imposes a positive obligation on the authorities to ensure that Gypsies have a practical and effective opportunity to enjoy their right to respect for their home, and their private and family life, in accordance with their traditional lifestyle", which the UK had not carried out[385]. Moreover, the judges recalled that, notwithstanding that in previous judgements the Court refused to recognized a violation of Article 8, there was then a growing consensus among the member States of the Council

[379] Complaint to the European Committee of Social Rights, 18 March 2019, No. 178, *Amnesty International v. Italy*.
[380] DOBRUSHI and ALEXANDRIS (2017: 456).
[381] Judgement of the European Court of Human Rights, 7 May 1990, 14837/ 89, *Jones v. UK*.
[382] Judgement of the European Court of Human Rights, 4 September 1991, 14455/ 88, *Smith and Others v. UK*.
[383] DOBRUSHI and ALEXANDRIS (2017: 457).
[384] Judgement of the European Court of Human Rights, 18 January 2001, 27238/95, *Chapman v. UK*.
[385] Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Lorenzen, Strážnická, Fischbach and Casadevall, 18 January 2001, 27238/95, *Chapman v. UK*.

of Europe which recognized the special needs of minorities and an obligation to protect their security, identity and lifestyle. Therefore, the Court had the duty to take into account this new development and ensure greater protection to minority rights.

3.1.2.1 The interpretation of Art. 8.1 ECHR

This dissenting opinion opened the path for a new perception of Roma housing rights. While in the previous cases analysed, no violation of the Convention was found, later similar cases brought before the ECtHR were interpreted in a completely different way. Specifically, the meaning attributed to Article 8.1 began to shift. As mentioned above, the ECHR does not specifically recognise a right to housing, but Article 8.1 states that "everyone has the right to respect for his private and family life, his home and his correspondence"[386]. Building on this provision the ECtHR has been able to recognize the existence of a right to housing, with all the specifications that this term may entail. It did so through a process of derivation which took place in various judgements, and which slowly came to ensure a greater protection to Roma minority, as well as to being applied to other minorities and people[387]. Indeed, although the Court started by denying the violation of Article 8.1 in cases of forced evictions of Roma or refusal to grant planning permission, in time this perception changed and such measures came to considered as in contrast with Article 8.1. A ground-breaking case in this regard is *Connors v. UK*[388], in which the Court recognized that the eviction of the Gypsy applicant carried out without the prior securing of a judicial decision on the merits of the case amounted to a violation of Article 8[389]. Starting from this decision, the following jurisprudence concerning housing rights tended to recognize more frequently a violation of Article 8.1, and general measures were taken by States to enforce this specific provision. For this continuous evolution, which tends to recognize greater protection to the Roma minority, the approach of the Court can be defined as "evolutionary".
In the following paragraphs, a specific case brought before the attention of the Court will be analysed. In this way, it will be possible to understand how the ECtHR tries to secure housing rights; which are the most advanced steps taken at the moment; and which are the greatest difficulties still to be faced. The same approach will be used also for other rights that will be taken into account later in this Chapter; namely health, education and cultural rights.

3.1.3 Case study: *Yordanova and Others v. Bulgaria*

The first case study that will be analysed is *Yordanova and Others v. Bulgaria.* The applicants resided in a Roma settlement situated on municipal land in Sofia, Bulgaria. The majority of them had been living in this place since the 1960s, with a small number of families moving to the area in the 1990s. The houses they owned were makeshift and did not respect any security requirement, for example, the applicants had not access to safe water and other

[386] European Convention on Human Rights, Strasbourg, 4 November 1950.
[387] DOBRUSHI and ALEXANDRIS (2017: 456).
[388] Judgement of the European Court of Human Rights, 27 April 2004, 66746/01, *Connors v. UK*.
[389] This judgement is certainly fundamental. Indeed, after it, the ECtHR started to considered in violation of Article 8 some behaviours which were previously deemed respectful of the ECHR. Moreover, it is the first cases in which the court recognizes the right to a culture adequate housing for Roma people. In view of its importance and considering the strict link with cultural rights, this case will be analysed later on, as a case study regarding the ECtHR and cultural rights.

utilities. Moreover, these structures were built without any authorization, and, due to their poor conditions, could not be legalized without substantial reconstruction. In the 1990s, tension started to grow between the Roma and the non-Roma population, with the latter asking for the destruction of the so-called "Sofia ghettos". Even many politicians took part in this debate, but nothing was done until 2005. Then, the district mayor ordered their forcible removal, with domestic courts holding that this action was lawful. The mayor publicly stated that it was not possible to find alternative housing for the Roma people involved, since they had not registered to the category of people in need of a house and had thus to wait in line to be assigned a new habitation. However, following the intervention of the European Parliament and that of the Council of Europe, the eviction procedure was suspended[390]. The applicants affirmed that their eviction could amount to inhuman and degrading treatment contrary to Article 3 and violate their right to respect for their homes under Article 8. They further complained, relying on Article 13, that the authorities failed to consider proportionality issues and, relying on Article 14, that their removal would be discriminatory. They also complained that Article 1 of Protocol No. 1 (which protects property) would be violated[391]. Before the Court delivered its final judgements, relevant elements of international material on the issue of Roma minority and housing rights in Bulgaria were considered. Particularly, the Court took into account the decision of the Council of Europe's European Committee of Social Rights which stated that Bulgaria had already violated Article 16 of the European Social Charter, which establishes the right of families to appropriate social, legal and economic protection[392]. To reach its conclusion, the Committee found that the Bulgarian legislation allowing the legalization of illegal constructions set conditions "too stringent to be useful in redressing the particularly urgent situation of the housing of Roma families"[393]. Moreover, in 2007, the Committee of Ministers of the Council of Europe adopted a resolution in which it noted that Bulgaria was aware of the too strict conditions imposed on the Roma minority and that a new plan to overcome this issue would be implemented[394]. Therefore, Bulgaria already knew that the legalization of the makeshift Roma settlements was impossible under the too strict current legislation, but decided to carry out the eviction process nonetheless. Evictions are unfortunately common among member States of the Council of Europe and this case does not seem to vary much from previous ones dealing with the topic of forced Roma evictions. However, some important elements were introduced by the Court, as it can be seen in the following paragraphs.

3.1.3.1 The achievements- The evolutionary approach of the Court

As already explained above, the Court had a rough start in ensuring Roma housing rights protection. The first cases concerning this issue were declared inadmissible or in non-violation of the ECHR. However, slowly, the Court changed its mind. Specifically, since *Connors v. UK* the Court started to

[390] Judgement of the European Court of Human Rights, 24 September 2012, 25446/06, *Yordanova and Others v. Bulgaria.*

[391] Article 1 of Protocol 1 states that: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law".

[392] European Social Charter (Revised), Strasbourg, 3 May 1996.

[393] Decision on the Merits of the Council of Europe's European Committee of Social Rights, 18 October 2006, 31/2005, *European Roma Rights Centre v. Bulgaria.*

[394] Judgement of the European Court of Human Rights, 24 September 2012, 25446/06, *Yordanova and Others v. Bulgaria.*

develop a jurisprudence which found a violation of Article 8 in those circumstances of forced eviction, denial of planning permission and non-availability of cultural adequate housing. Moreover, in the analysed case, interim measures were applied for the first time. In this way, even though the final judgement took six years to be delivered, the applicants could enjoy an immediate relief. Therefore, the Court seems to be on a steady path toward the improvement of Roma rights, working hand in hand with States to increase their respect of the Convention and their efforts to ensure a correct integration of this minority.

3.1.3.1.1 The acknowledgement of Article 8 as protecting Roma rights

Following the applicants' complaints, the Court decided to establish first whether the enforcement of the removal order would interfere with the rights protected by Article 8. In order to do so, the Court had to prove if the interference of the removal order was lawful and necessary in a democratic society. For what concerns the former, the ECtHR found that it was in the national authorities' power to establish this order, since the houses were not respecting any safety requirements and could not be considered in compliance with the standards requested by national laws. However, this fact alone would not be enough to consider legitimate the measure taken by Bulgaria: the "necessary in a democratic society" criterion had to be fulfilled too. Indeed, a national interference in the right to house can be considered "necessary in a democratic society for a legitimate aim if it answers a pressing social need and, in particular, if it is proportionate to the legitimate aim pursued"[395]. In this regard, the Court explained that, while a wide margin of appreciation is recognised to States when implementing their economic, social and cultural policies, this margin is narrowed when "the right at stake is crucial to the individual's effective enjoyment of intimate or key rights"[396], as in the case of the rights protected by Article 8. In particular, since eviction is the maximum form of interference in the right to house, the applicants were allowed to have their eviction examined by an independent tribunal, in order to show the proportionality of this action. The ECtHR found that the proportional criterion was not met, because Bulgarian authorities had not tried to take any alternative and less invasive measures to solve the issue. Specifically, there was no proof that alternative methods of dealing with the risks relating to the lack of access to utilities had been studied seriously by the relevant authorities. Moreover, the authorities disregarded the risk of the applicants becoming homeless, labelling it as "irrelevant". Furthermore, the Court noted that "the authorities have refused to consider approaches specially tailored to the needs of the Roma community on the ground that such an attitude would amount to discrimination against the majority population"[397], thus creating a contradiction with the idea of developing specific programs aimed at fostering Roma inclusion. In conclusion, the Court established that "the disadvantaged position of the social group to which the applicants belong could and should have been taken into consideration […]. This has been recognized by the Bulgarian authorities in their national and regional programs but that did not result in practical steps being taken in the present case"[398]. Moreover, the

[395] Judgement of the European Court of Human Rights, 24 September 2012, 25446/06, *Yordanova and Others v. Bulgaria, para* 117.
[396] Judgement of the European Court of Human Rights, 24 September 2012, 25446/06, *Yordanova and Others v. Bulgaria, para* 118 (ii).
[397] Judgement of the European Court of Human Rights, 24 September 2012, 25446/06, *Yordanova and Others v. Bulgaria, para* 128.
[398] Judgement of the European Court of Human Rights, 24 September 2012, 25446/06, *Yordanova and Others v. Bulgaria, para* 132.

Court also found that the reviewed eviction procedure published after 2005/2006 had the same limits as the previous one. Therefore, it concluded that Bulgaria had violated Article 8 of the ECHR.
In order to grasp the fundamental differences between the reasoning of the Court in this case and in previous ones, it may be useful to draw a comparison with *Chapman v. UK*. While in both cases, the Court explicitly stated that Article 8 does not impose any positive obligations on States to ensure that everyone is living in a proper house, this assumption seems to be more respected in *Chapman* rather than in *Yordanova*, where the Court held that, nonetheless, such an obligation can arise when necessary to secure shelter to particularly vulnerable individuals[399]. In this way, the ECtHR seems to accept the development of an international consensus over the reduction of the margin of appreciation granted to States when referring to vulnerable minorities. In *Chapman*, on the other hand, the "Court [was] not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation"[400]. Moreover, in *Chapman*, the Court put more emphasis on the fact that the applicant was unlawfully occupying municipal land, while in *Yordanova*, it was more concerned on the initial and prolongated State's inaction toward this illegal occupation. Furthermore, while in *Yordanova* the Court complained over the lack of initiative of the *State* in finding an alternative and less invasive solution to the problem of unlawful settlement, in *Chapman* the Court mainly focused on the efforts made by the *applicant* to find an alternative place to stay, which were equally deemed lacking. Therefore, the burden of ensuring an alternative housing arrangement shifted: now it is the State that carries it, instead of the applicant. Moreover, in *Chapman*, not even the fact that, according to statistics, there was a lack of local authority sites available for Gypsies in the country as a whole seemed to sway the Court's judgement in favour of the applicant. Indeed, the ECtHR commented on these findings saying that: "it may be noted that many Gypsy families still live an itinerant life without recourse to official sites and it cannot be doubted that vacancies on official sites arise periodically"[401].
The different considerations made in these cases show why the Court's approach can be considered as evolutionary. In *Yordanova*, the Court ruled in favour of the applicants, recognizing the violation of Article 8, while in a previous similar case, the result reached was the opposite. By changing its approach, the ECtHR managed to ensure a greater level of protection to the applicants, following the path put forward by some of its judges when writing their dissenting opinions. However, the different interpretation given to Article 8 was not the only progress made.

3.1.3.1.2 The granting of interim relief under Rule 39

In *Yordanova*, for the first time, the Court put forward a new measure for protecting the right to house of the Roma minority. This new intervention was certainly ground-breaking and had an impact on the jurisprudence of other international judicial and quasi- judicial bodies, like the Inter- American Commission on Human Rights ('IACHR') and the United Rights Committee which echoed the decision of the Court, respectively in 2010 and 2011[402].

[399] DOBRUSHI and ALEXANDRIS (2017: 463).
[400] Judgement of the European Court of Human Rights, 18 January 2001, 27238/95, *Chapman v. UK*, *para* 94.
[401] Judgement of the European Court of Human Rights, 18 January 2001, 27238/95, *Chapman v. UK*, *para* 111.
[402] The IACHR decided to follow into the ECtHR's footsteps and grant precautionary measures while calling upon the Haitian authorities to refrain from forcibly evicting IDPs from their

Under Rule 39, it ordered the implementation of interim measures, requesting the Bulgarian authorities to refrain from carrying out the execution of the domestic court's decision pending the proceedings before the Court[403].
Interim measures are urgent measures which apply only where there is an imminent risk of irreparable harm. They are therefore exceptional measures. Generally, the Court grants them only when there are orders of expulsion and extradition, which are suspended until the delivery of the judgement. The most typical cases are those where, if the expulsion or the extradition process takes place, the applicants would fear for their lives or would face ill-treatment, contrary to Article 3 of the ECHR. The fact that the ECtHR recognized the application of Rule 39 in a case concerning the right to housing shows that the Court recognized the great importance of this matter, especially for the Roma minority. Moreover, in the specific case of *Yordanova,* the interim measures allowed the applicants to not become homeless, while at the same time ensuring that their familial ties were not severed. Also, the families had strong ties in the neighbourhood and kids attended local schools: with the application of Rule 39, they could afford to carry out these activities. The importance of maintaining these ties was also recognized by the Court in its judgement, when it stressed that the continued and undisturbed presence of the applicants in the same area should be considered as a reason for not continuing with the eviction process[404]. Indeed, Article 8 also protects the right to family life, which would be endangered with this extreme measure. While waiting for the judgement, the application of Rule 39 allowed the applicants to protect their community life. This certainly a great step forward in the protection of Roma minority and in general of the rights contained in Article 8: one can consider that in the case of *Chapman*, the Court held that the applicants should have looked for another place to stay, while in *Yordanova*, the ECtHR also applied interim measures to avoid the eviction.
The importance of protecting familial and community ties was also recently reaffirmed by the Court with the sentence *Terna v. Italy*[405], where the Court found a violation of Article 8 when the Italian authorities failed to make the necessary efforts to ensure the respect of the visiting rights of the applicant, the grandmother of a Roma grandniece with whom she had lived since the girl was born. The grandniece was then entrusted to the care of the Italian social services since the grandmother was deemed uncapable of dealing with the child. However, she was granted visiting rights, a measure which Italy failed to respect. The applicant also lamented a violation of Article 14 of the ECHR, claiming that there was a racist rational at the basis of the decision of the Italian court to take the grandniece away. The ECtHR did not recognise a violation of this right, claiming that no ethnic-based criterion was used to justify the removal of the child, not taking into account the fact that statistic data show that Roma kids are more often removed from their families than non-Roma ones. However, it is worth noticing that the Court is putting a lot of effort into ensuring the respect of family life, both with the application of interim measures and with the sentence just analysed. Therefore, it is reasonable to hope that, in the future, this attitude will ensure a greater respect of the Roma families and of Article 8 ECHR in all the Council of Europe's member States.

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camps as well as to provide adequate shelter to those who had already been evicted. The UN HRC instead, requested from the Bulgarian government to desist from forcibly evicting the Dobri Jeliazk Roma Community. DOBRUSHI and ALEXANDRIS (2017: 462-463).
[403] DOBRUSHI and ALEXANDRIS (2017: 462).
[404] PERONI and TIMMER (2012).
[405] Judgement of the European Court of Human Rights, 14 January 2021, 21052/18, *Terna v. Italy.*

3.1.3.2 The problem: The reluctance of Bulgaria to implement the judgement

Notwithstanding the progressive stance adopted by the Court in this ruling, a sentence can really improve the conditions of the applicants only if the State fully implements it. As already explained[406], countries are sometimes reluctant to carry out their duty in this regard. Bulgaria is no exception to this trend. As it can be gathered by the government's argumentations, Bulgaria seemed to take in little consideration the future of Roma and their right to housing. For example, the government labelled as "irrelevant" the possibility of Roma people becoming homeless due to the eviction procedure[407]. Moreover, local authorities gave some interviews in which they clearly sided against the Roma settlers: for example, the mayor of the Ovcha Kupel district in Sofia stated that "the nuisance that a Roma settlement would create [if Roma families were to move into his district] would surpass by far the inconvenience that a refuse tip would create". He also stated that "Roma families could not expect to live among the citizens as they did not have the necessary culture"[408]. As it can be seen, these sentences show that Bulgarian authorities are not ready to accept Roma as part of their society, since they make comments with a clear racist connotation. Aside from this point, the reluctance to fully implement the judgement is exemplified by the fact that Bulgarian authorities told the Court that a finding of a violation of the Convention would send the wrong message to the rest of the Bulgarian society which expected the law to be applied to all equally[409]. This judgement is in contrast with the specific needs of a minority, whose vulnerable nature has to be taken into account.

All these facts lead to believe that the Bulgarian authorities will implement the sentence begrudgingly, if at all. Firstly, they seem to oppose the idea of a Roma integration in the majority community, secondly, from a merely practical point of view, they would gain more popular consensus by not implementing the judgement, seeing how the Bulgarian society has very strong prejudices and racist believes against the Roma minority. Unfortunately, this prevision seems to be true. Notwithstanding the clear judgement of the Court, Bulgarian authorities continued to carry out forced evictions against Roma settlers. This led to another case been brought before the Court, *Aydarov and Others v. Bulgaria*[410], which, once again, concerned the forced eviction of Roma applicants. This time, notwithstanding the Court's warning not to carry out this procedure otherwise it would have triggered Rule 39, the Bulgarian authorities decided to proceed[411]. Moreover, as reported in the EOIA survey, between 2012 (the year in which the *Yordanova* case was judged) and 2016, Bulgarian authorities carried out 399 demolition orders related to houses owned by Roma families- 90% of all demolition orders issued in this period[412]. According to the European Society Foundation[413]:

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[406] See *supra, para* 2.1.1.2.3.

[407] Judgement of the European Court of Human Rights, 24 September 2012, 25446/06, *Yordanova and Others v. Bulgaria, para* 42.

[408] Judgement of the European Court of Human Rights, 24 September 2012, 25446/06, *Yordanova and Others v. Bulgaria, para* 46.

[409] DOBRUSHI and ALEXANDRIS (2017: 464).

[410] Judgment of the European Court of Human Rights, 2 October 2018, 33586/15, *Aydarov and Others v. Bulgaria.*

[411] DOBRUSHI and ALEXANDRIS (2017: 465).

[412] Memorandum of the European Society Foundation, February 2017, *Violations of EU Law and Fundamental Rights by Bulgaria's Discriminatory Treatment of Roma in the Area of Housing,* p. 10.

[413] *Ibidem.*

> "The execution of these demolition orders left the Roma families homeless, as the municipal authorities did not provide alternative accommodation even for children and vulnerable adults. In many of the cases, the buildings were demolished without prior notification of the exact date of the execution of the orders. As a result, the affected Roma families were not able to save their furniture and other personal belongings, including personal documentation".

Therefore, Bulgaria continued to disrespect the judgement issued by the Court, hindering all the progress that the ECtHR made with its evolutionary approach. This shows that the Court alone is not capable of ensuring the respect of the Convention, but relies on the States for its implementation. Notwithstanding this fact, the approach of the Court, if reiterated over time and supported by NGOs and the general public, can also influence Member States' practices and lead to a greater compliance with the ECtHR's judgements and with the ECHR in general.

3.1.4 Housing Rights and Italy

In order to better understand the topic of housing rights and Roma people, it is useful to analyse Roma settlements in Italy, where the phenomenon of Roma camps is widespread and has drawn a lot of public attention due to the poor hygienic conditions characterising these settlements. As previously recalled, Amnesty International, among other NGOs has shed some light on this specific issue[414]. Moreover, it should be noted that, beside not meeting sanitary and safety standards, Roma camps are also illegal. In 2015, a sentence of the Civil Court of Rome recognised the discriminatory character of camps built exclusively for Roma people, which violate national and European laws[415]. Notwithstanding this judgement, Roma camps are still a reality today in all the territory of the State. According to a recent report, there are 109 formal, that is, legally allowed Roma camps in Italy, and even more informal ones[416]. Very often, Italy evicts people living in these settlements, however, it does not always provide a proper alternative place to stay.
Seeing how these evictions may be seen as in violation of Article 8, as in the case just analysed, *Yordanova and Others*, the ECtHR has intervened to protect Roma settlers. In this regard, two recent important cases must be mentioned, concerning respectively the Camping River Roma camp and the Roma camp of Via Ponte Riccio, Giugliano. In the case of the Camping River camp, the Rome mayor mandated the eviction of all the people living in this settlement, without granting another accommodation. The ECtHR therefore, as already done in *Yordanova and Others*, decided to apply interim measures, after being urgently appealed by a Roma-based NGO, Associazione 21 Luglio. With a swift response the Court delivered interim measures aimed at stopping the eviction procedure[417]. However, the Italian authorities carried out the eviction nonetheless, on the grounds that there was a hygienic-sanitary emergency. Therefore, the warning of the Court went unanswered. A more positive outcome can be found in the second similar case concerning the eviction of a Roma camp in Giugliano. There, the eviction of the Roma families living in the camp was ordered by the mayor of the city on the ground of public health and safety. This order was carried out on May, 10th 2019. Six days later, three Bosnian citizens living in the camp brought the matter to the ECtHR and they made a request to the Court under Rule 39 of its Rules of

[414] See *supra*, note 379.
[415] Sentence of the Civil Court of Rome, 30 May 2005, 17035/2012.
[416] Annual report of tAssociazione 21 Luglio, 2021, *Rapporto annuale- L'esclusione nel tempo del Covid: Comunità Rom negli insediamenti formali e informali in Italia*, p. 26.
[417] Press Release of Associazione 21 Luglio, 2018, *Corte Europea sospende sgombero Camping River con un ricorso sollevato da Associazione 21 luglio.*

Court for an interim measure to require the State to provide them and their families with adequate accommodation and to suspend any further eviction[418]. With a swift response, the Court decided to grant the request of the three applicants, "indicating to the Italian Government that it should provide temporary accommodation for the minors involved and their parents, without separating them"[419]. This time, the Italian authorities seemed willing to respect the indications of the Court, offering temporary housing solutions and access to sanitary services. The ECtHR favourably viewed the Italian actions and decided to revoke the interim measures[420]. In this case, the intervention of the European body seems to have made a difference, protecting the Roma residents of the Giugliano's camp. Once again, the application of Rule 39 and the evolutionary approach of the Court presented a solution to a problem which, most likely, would not have been solved otherwise. Even the European Committee of Social Rights intervened on the matter of Roma evictions, urging Italy to ensure that evicted people are always granted other accommodations and that the eviction procedures do not impose inhuman conditions on the people involved[421]. Unfortunately, though, Roma camps' situation in Italy is still worrisome. Eviction procedures continue to be carried out very often, and Roma are generally not offered any other accommodation. This is coupled with the strong anti-Roma sentiments widespread in the country which also led to approval in 2008 of what was called an anti-Roma legislation, that ensured greater power to local authorities in order to fight the emergency situation created by the presence of Roma[422]. Since 2012, new measures more favourable to the Roma minority have been adopted, like the National Strategy for Roma Inclusion, which however remains still mostly on paper[423]. Moreover, the Covid19 pandemic has exacerbated the already existing difficulties linked to living in camps and the anti-Roma behaviour widespread in the country[424].

In sum, the Italian situation is similar to the previously analysed one regarding Bulgaria, since in both States the evolutionary approach of the Court is limited by the action of the national authorities. However, also some positive developments have been carried out in both States, like the respect of the interim measures. It remains to be seen whether the reiterated approach of the Court will further influence Member States' practices and lead to a greater compliance with the ECtHR's judgements and with the ECHR in general.

3.2 Health rights

Moving forward, it is now time to analyse another type of right and how the ECtHR protects it in relation to the Roma minority. The right to health contains various specifications and does not merely refer to having access to healthcare services and hospitals. It is an inclusive right, which contains, aside from what just mentioned, other aspects, like the access to safe drinking water and adequate sanitation, safe food, adequate nutrition and housing, etc.

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[418] Decision of the European Court of Human Rights, 20 May 2019, no.179, *Italian Government must provide temporary accommodation for Roma children and their parents evicted from a settlement.*

[419] *Ibidem.*

[420] Press Release of Associazione 21 Luglio, 6 May 2019, *Il monito della Corte Europea al Governo italiano sortisce i primi effetti a Giugliano in Campania.*

[421] Press Release of Associazione 21 Luglio, 9 July 2019, *Sgomberi di comunità rom: il Consiglio d'Europa ammonisce lo Stato italiano.*

[422] Italian Presidential Ordinance, 30 May 2008, no. 3678, *Disposizioni urgenti di protezione civile per fronteggiare lo stato di emergenza in relazione agli insediamenti di comunità nomadi nel territorio della regione Campania.*

[423] GIACOBINI (2019).

[424] ARDOLINO and MISCIOSCIA (2021: 2).

Moreover, the right to health includes freedoms, like the right to be free from non-consensual medical treatment, such as medical experiments and research or forced sterilization[425]. Furthermore, it includes entitlements, such as the right to a system of health protection providing equality of opportunity for everyone to enjoy the highest attainable level of health, access to essential medicines, maternal, child and reproductive health, equal and timely access to basic health services, the provision of health-related education and information and participation of the population in health-related decision making at the national and community levels[426]. Lastly, health services, goods and facilities must be provided to all without any discrimination.
At the level of the Council of Europe, the protection of health is enshrined in Article 11 of the European Social Charter. Other international documents which protect the same right are the ICESCR[427], at Article 12, and the 1979 Convention on the Elimination of All Forms of Discrimination against Women at Articles 11 (1) (f), 12 and 14 (2) (b)[428]. The fact that a document concerned with women rights specifically includes a provision regarding health is not surprising, since women, among other categories, are more likely to be discriminated in the access to healthcare[429]. Indeed, although the right to health should be granted to all, some people still face discrimination. States are bounded by their international obligations to ensure that this does not happen and to promote and protect this right. Moreover, in at least 115 States, national constitutions protect the access to healthcare. However, there are many instances in which States failed their task. Furthermore, the ongoing COVID19 pandemic has exacerbated the issue. The reduced access to healthcare has once again disproportionally impacted those categories more at risk, like women and minorities[430]. In general, the pandemic has reduced the access to healthcare services, both because the latter were paralyzed by the growing number of COVID19 patients and because people feared they could get infected if they entered a hospital[431]. Seeing how, after more than two years from its start, the pandemic is still going on, it is vital that patients can return to regularly visit their doctors. It is even more important that the struggle to ensure equal access to healthcare for everyone is not further stalled and the most important achievements are not erased by the recent circumstances.
In the following paragraphs, the conditions of the Roma right to health will be analysed, while also taking into account how the pandemic has worsened their already existing exclusion. Then, the way in which the ECtHR protects this minority will be analysed. It is important to see what point has been reached by the Court, and how and to what extent this body has managed to protect the rights of this vulnerable community. From there, it is possible to see which are the next steps to take, keeping in mind that the pandemic has further exacerbated the situation and a positive action is even more urgent.

3.2.1 The discrimination faced by Roma in access to health services

Since before the outbreak of the pandemic, Roma situation in the access to healthcare services was in dire conditions. As already explained, minorities tend to face more discrimination in this field and the Roma make no exception

[425] Factsheet of the World Health Organization, 2008, no.31, *The Right to Health*.
[426] *Ibidem*.
[427] International Covenant on Economic, Social and Cultural Rights, New York, 16 December, 1966.
[428] Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979.
[429] GOYENECHE (2021).
[430] NÚÑEZ, SREEGANGA and RAMAPRASAD (2021: 1).
[431] NÚÑEZ, SREEGANGA and RAMAPRASAD (2021: 2-3).

to this general trend. The situation is bad in every member State of the Council of Europe, and more generally, in all the States in which Roma reside. Moreover, it should also be considered that some categories, such as women and children, are even more vulnerable. The World Health Organisation ('WHO') has recognised that this minority is in a state of vulnerable to ill-health[432]. This organisation has also joined the efforts of the European Union and various UN agencies in the Decade of Roma inclusion, an initiative aimed at improving Roma socio-economic conditions, but to date, the problem has even worsened. The lack of access to healthcare intersects with the discrimination that Roma face and with the high rate of poverty and employment among this community. The latter have a direct impact on health, since the lack of financial resources for high price medicines, treatment and transport constitute significant obstacles for Roma who seek care. Moreover, very often, these people do not possess a birth certificate or other relevant documents, therefore they cannot access public services, including healthcare[433]. As a consequence, mortality rates are particularly high, as well as life expectancy at birth and infant mortality. Roma people's overall life expectancy years are estimated to be between 5 and 20 years lower than the others'[434]. Moreover, the recorded average age of death in 2011 was 59.2 years for Roma men compared to 65.6 years for non-Roma men and 63 years for Roma women compared to 80.2 for non-Roma women[435]. Furthermore, the latter are more likely to die while giving birth compared to the rest of the women in Europe and birth mortality is very high. Some researchers estimate that Roma's infant mortality rates and health levels are similar to these of the majority population in 1970s[436]. It is difficult to carry out a more precise analysis since health data relating to the Roma minority are often lacking, inconsistent or not available, another issue which hinders the development of a correct response[437]. Throughout the years, various initiatives have been developed to counteract the lack of access to healthcare, but the results have been very modest. As already mentioned, the Decade of Roma Inclusion was put forward. Aside from that, the WHO has carried out country-specific activities on Roma health[438]; the European Commission, among other activities, has promoted the National Roma Integration Strategies[439], which also concern the health topic; while the Council of Europe has issued a recommendation on better access to health care for Roma and Travellers in Europe[440], and it has published two important thematic reports on the topic[441]. Notwithstanding all these efforts, the COVID19 pandemic exacerbated the

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[432] Initiative of the WHO Regional Office for Europe, 2012, *Improving the health of Roma in the* WHO *European region: A new initiative of the WHO Regional Office for Europe*.
[433] ALEXIADOU (2018: 264).
[434] Study of the European Public Health Alliance, December 2018, *Closing the Life Expectancy Gap of Roma in Europe*, p.5.
[435] *Ibidem.*
[436] Study of the European Public Health Alliance, December 2018, *Closing the Life Expectancy Gap of Roma in Europe*, p. 8.
[437] Study of the European Public Health Alliance, December 2018, *Closing the Life Expectancy Gap of Roma in Europe*, p. 9.
[438] Initiative of the WHO Regional Office for Europe, 2012, *Improving the health of Roma in the WHO European region: A new initiative of the WHO Regional Office for Europe,* p. 5.
[439] See *supra* note 349.
[440] Recommendation of the Committee of Ministers of the Council of Europe, 2006, no. 10, *Recommendation to member States on better access to health care for Roma and Travellers in Europe.*
[441] Thematic report of the CAHROM, September 2016, no. 7, *Thematic Report on Roma Health Mediators*; Thematic report of the CAHROM, December 2019, no. 28, *Thematic report on the role of the national health institutions in promoting Roma health- with a focus on health-related research, vaccination, pre-natal and natal care, Roma health mediators and disabled Roma persons.*

already dire situation. Roma have been scapegoated and accused of spreading the virus and racist episodes toward them increased[442]. Moreover, the forced lockdown which has interested all the population throughout Europe has resulted for them in an increased and unjustified police control, as it happened especially in Bulgaria and Slovakia, where the police has been monitoring Roma camps with drones and where checkpoints for monitoring the movement of inhabitants were set up in several Roma settlements although the number of infected people was no higher than in the rest of the country[443]. Moreover, due to the extreme poverty in which they usually live, Roma are more likely to die due to COVID19: this is because they live in overcrowded settlements, where practicing social distancing is challenging. Moreover, often, they have no access to drinkable water, and in some countries (like Spain, Bulgaria and Hungary) where testing for COVID19 is conditioned on health insurance coverage, a significant portion of the population cannot access this service[444]. Also, vaccination uptake is very low among Roma[445]. It has been reported that only 9% of Roma in Hungary and 11.5% in North Macedonia are willing to get vaccinated. In Slovakia, the figure is even lower at as little as 1%[446]. This is due to misinformation, lack of available vaccines and mistrust toward health authorities, especially in those countries with a history of forced sterilization of Roma women[447]. As a consequence of this, many Roma people have died due to COVID19, with young people dying more often than non-Roma youngsters[448].
The analysis of these recent events shows the necessity of ensuring an equal access to healthcare for all. Therefore, the protection offered by the ECtHR in this regard will be now taken into account.

3.2.2 The protection offered by the ECtHR

Although the ECHR mainly protects civil and political rights, and not economic, social and cultural ones, the ECtHR has adjudicated on several health-related issues in its case law. Basically, as for what it did for housing rights, the Court was able to interpret some of the provisions of the Convention in a way that also covers the right to health, although the latter is never specifically mentioned in the text of the ECHR. On the other hand, in the European Social Charter, the right to benefit from the highest possible standard of health attainable is established along with the right to receive medical assistance[449]. The Court especially dealt with cases of forces sterilization on women, which happened quite often especially in the territory of the former Czechoslovakia. The judgement of the Court helped develop an innovative path towards ensuring the protection of Roma women and their free and informed consent to sterilization. On the other hand, some further steps have to be taken to ensure that these practices are recognized as a violation of Article 14 of the Convention, as will be explained later on. In the next paragraph, the articles used by the Court to protect the right to health will be analysed. Once again, it is worth remembering that the cases brought before the Court revolve mainly around claims of forced sterilization. Recently

[442] DUMITRU (2021).
[443] Report of the Open Society Foundation, 2021, *Roma in the Covid-19 Crisis: An Early Warning from Six EU Member States*, p. 4.
[444] Report of the Open Society Foundation, 2021, *Roma in the Covid-19 Crisis: An Early Warning from Six EU Member States*, p. 5.
[445] HOLT (2021).
[446] *Ibidem.*
[447] *Ibidem.*
[448] *Ibidem.*
[449] European Social Charter (Revised), Strasbourg, 3 May 1996.

however, the Court delivered an important first judgement concerning the Roma right of access to clean water and sanitation. In *Hudorovič and Others. v. Slovenia*[450] the Court recognized that Article 8, recognized that the right to health may impose to States positive obligations to provide access to clean water. Specifically, the ECtHR accepted that a "persistent and long-standing" lack of access to safe water may trigger the State's positive obligations[451]. However, the Court found that in this specific case no violation of that Article had occurred, even if the applicants did not have access to clean water. However, it has been argued that this judgement may turn in an important achievement for the Roma community who often does not have access to utilities[452]. This would be even more important now that washing hands has become one of the recommended actions to tackle COVID19.

3.2.2.1 The interpretation of Articles 3 and 8 ECHR

In its judgements concerning the right to health, the Court has often recognised a violation of Article 3, the prohibition of torture, and Article 8, the right to private and family life. As already pointed out, these cases mainly deal with the practices of forced sterilisation carried out on Roma women. Starting with the case of *V.C v. Slovakia*[453], that will be analysed more in detail in the next paragraph, the Court recognised that such practice was against Article 3, since it amounted to degrading treatment. Indeed, the doctors who carried out the procedure did so without the prior and informed consent of the patient. Moreover, the Court pointed out that this procedure had aroused in her feelings of fear, anguish and inferiority and therefore was in violation of Article 3. In the following cases, like *N.B. v. Slovakia*[454] and *I.G. and Others v. Slovakia*[455] the Court came to the same conclusions, also because the facts were very akin. Moreover, in all these cases, the ECtHR recognized a violation of Article 8, since the procedure of sterilization clearly had an impact on the private and family life of the patients, given that they are not able to bear children anymore. The fact that this procedure was carried out without their consent constitutes, in the Court's opinion, an infringement of Article 8. On the other hand, under no circumstances the Court recognized a violation of Article 14, the principle of non-discrimination. Indeed, the Court did not acknowledge a strict link between the nationality of the victims and the forced sterilization. Therefore, it held that it was not necessary to examine separately the violation of Article 14. Moreover, in *N.B. v. Slovakia,* the Court stated that "it cannot be established that the doctors involved acted in bad faith, that the applicant's sterilization was a part of an organized policy, or that the hospital staff's conduct was intentionally racially motivated"[456]. This last point drew some criticisms since it has been argued that there was a strict correlation between the ethnicity of the applicants and the procedure that they were forced to undergone, as will be better explained later on[457].

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[450] Judgement of the European Court of Human Rights, 7 September 2020, 24816/14 and 25140/14, *Hudorovič and Others. v. Slovenia.*
[451] *Ibidem.*
[452] DAVID (2020).
[453] Judgement of the European Court of Human Rights, 8 February 2012, 18968/07, *V.C v. Slovakia.*
[454] Judgement of the European Court of Human Rights, 12 June 2012, 29518/10, *N.B. v. Slovakia.*
[455] Judgement of the European Court of Human Rights, 13 November 2013, 15966/04, *I.G. and Others v. Slovakia.*
[456] Judgement of the European Court of Human Rights, 12 June 2012, 29518/10, *N.B. v. Slovakia, para* 121.
[457] See, *infra, para.* 3.2.3.2.

Having said that, the specific case of *V.C v. Slovakia* will now be analysed, in order to better understand the reasoning of the Court.

3.2.3 Case study: *V.C. v. Slovakia*

V.C. v. Slovakia case opened the path for future decisions of the ECtHR on the merits of forced sterilisation of Roma women. For this reason, it can be considered a ground-breaking case, and it will be the focus of this analysis. For first, the circumstances of the case will be taken into account. The applicant, V.C., is a Roma woman who was sterilised while hospitalised in a public hospital in Slovakia. She was there to deliver her second baby and, while in labour, she was informed that she had to undergo a Caesarean section. Then, the doctors determined that a third pregnancy could have ended in the death of both the mother and the future child, therefore, they asked the woman if she wanted to be sterilised. According to the hospital, after they had explained to her the situation and the risks inherent in a possible third pregnancy, the applicant, who was fully aware of what was happening, signed the sterilization request[458]. However, the applicant said that when she signed the document, she did not understand the meaning of the term "sterilization", and that she signed the form out of fear that otherwise there would be fatal consequences. Moreover, the high level of pain that she was experiencing affected her recognition and cognitive abilities. As a result, also the signature on the document where V.C. demanded to be sterilized is visibly shaken and her surname is split in two words. The applicant complained that this procedure was in violation of Articles 3 and 8 ECHR. Moreover, she also declared a violation of Article 14. This last point was also exemplified by the fact that after the delivery, the applicant was put in a bedroom with other Roma women and was forbidden to use the same bathrooms of non-Roma patients. The hospital held that Roma women were not segregated, but put in a room with other Roma women at their request, since they preferred staying together. The Court also emphasized that in the patient's medical file, under the field "Social and working conditions, especially during the pregnancy" the sentence "the patience is of Roma origin" was added. As further proof of the fact that her sterilization was part of a wider problem of forced sterilization of Roma women, the applicant referred to numerous publications citing cases of forced sterilization of Roma women in Czechoslovakia, and, to prove this point, V.C. showed that the 60% of sterilization practices carried out between 1986 and 1987 in the Prešov District, where the applicant lived, were related to this minority. Moreover, Amnesty International had received reports about an unusually high rate of sterilization practices carried out on Roma asylum seekers in the same hospital where the applicant was hospitalized[459].
As a consequence of the sterilization procedure, the applicant was left by her husband and ostracized by the Roma community. She also needed to visit a psychiatric because she experienced the symptoms of a false pregnancy, and according to the doctor, she still suffers from the consequences of this forced procedure[460].

3.2.3.1 The achievements- The evolutionary approach of the Court

[458] Judgement of the European Court of Human Rights, 8 February 2012, 18968/07, *V.C v. Slovakia, para* 22.
[459] Judgement of the European Court of Human Rights, 8 February 2012, 18968/07, *V.C v. Slovakia, para* 47.
[460] Judgement of the European Court of Human Rights, 8 February 2012, 18968/07, *V.C v. Slovakia, para* 19.

In this judgement, the Court for the first time ruled that what had been carried out in the Prešov hospital amounted to a violation of the ECHR, and therefore, was not in compliance with human rights standards. This was a huge step toward the protection of reproductive rights in Europe, especially for the Roma minority. In particular, the Court ruled that the sterilization procedure was carried out without the free, prior and informed consent of the applicant and therefore this treatment amounted to a violation of Articles 3 and 8 of the ECHR. In this way, the Court aligned its jurisprudence to that of the Committee of the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'), which had ruled on a similar matter in 2006.
In next paragraphs, the reasons why the Court found a violation of the previously mentioned articles will be analysed, as well as drawing a comparison between this sentence and the one of the CEDAW Committee. Lastly, a criticism will be made about the interpretation of the Court, namely the fact that it did not recognize a violation of Article 14.

3.2.3.1.1 The recognition of a violation of rights

After analysing the applicant's, the hospital's and the government's statements the Court found that a violation of Articles 3 and 8 had occurred. Particularly, the ECtHR held that the forced sterilization "constituted a major interference with a person's reproductive health status"[461] and therefore had to be carried out with the free, prior and informed consent of the patient, a circumstance that was not met in *V.C. v Slovakia*. Moreover, the Court recognized that such measure was not adopted to avoid an imminent threat to the life of the patient, since generally sterilization is not a life-saving procedure. In this specific case, the risk concerned a possible future third pregnancy and not an imminent emergency, therefore could not be regarded as an exception to the rule of obtaining the patient's consensus. For what concerns Article 8, the Court held that, having already established that "the sterilization was in breach of the applicant's rights under Article 3 of the Convention" it was not necessary to examine this complaint separately under Article 8[462]. However, the Court decided to establish if Slovakia "complied with its positive obligation under Article 8 to secure through its legal system the rights guaranteed by that Article, by putting in place effective legal safeguards to protect the reproductive health" of Roma women[463]. The Court held that national laws, namely the 1972 Sterilization Regulation and the Health Care Act 1994, in view also of their interpretation and implementation in the applicant's case, did not provide appropriate safeguards. In particular, they allowed the occurrence of a situation in which an intervention of a particularly serious nature was carried out without the applicant's informed consent[464]. Moreover, the Court noted that the situation of Roma women in Slovakia was particularly worrisome, especially for what concern their right to health, and other international bodies, like the CEDAW Committee, had already encouraged the State to update its policy on the access to reproductive rights.

[461] Judgement of the European Court of Human Rights, 8 February 2012, 18968/07, *V.C v. Slovakia, para* 106.
[462] Judgement of the European Court of Human Rights, 8 February 2012, 18968/07, *V.C v. Slovakia, para* 144.
[463] Judgement of the European Court of Human Rights, 8 February 2012, 18968/07, *V.C v. Slovakia, para* 145.
[464] Judgement of the European Court of Human Rights, 8 February 2012, 18968/07, *V.C v. Slovakia, para* 152.

Therefore, the Court concluded that a violation of Article 8 had occurred. This line of reasoning was echoed in other ECtHR's judgements dealing with reproductive rights and Roma women. *V.C. v Slovakia* is thus considered as a ground-breaking case, being the one in which the Court recognized the injustice of the treatment to which many women had been subjected.

3.2.3.1.2 The adaptation to the jurisprudence of the CEDAW Committee

Moreover, the case was particularly important since, with this sentence, the ECtHR aligned its jurisprudence with the most advanced one of the CEDAW Committee. This international body created to monitor the correct implementation of the CEDAW had ruled on a similar matter in 2006, in the case *A.S. v Hungary*[465]. In this case, a Roma woman was sterilised while giving birth to her fourth child. The doctors made her sign a form where she agreed to having performed a Caesarean section, with a small, almost unreadable hand written clause in which she agreed to be sterilized. In the form, the word "sterilisation" was in Latin, and therefore not comprehensible to the woman. Moreover, the latter was also in a state of severe pain due to the labour, therefore her cognitive abilities were reduced as well. As it can be seen, the circumstances of the case are very similar to those of *V.C. v Slovakia.* The applicant here claimed that this procedure had violated Articles 10 (h), 12 and 16, paragraph 1 (e) of the CEDAW[466]. These articles respectively protect the right to have adequate information on health matters, the elimination of discrimination against women in the access to healthcare services and the right to freely decide how many children to have.
The CEDAW found that these articles had been violated, since the medical staff did not provide adequate information to A.S. regarding the sterilization procedure and that she did not give her prior, free and informed consent. The CEDAW Committee decision was praised by many, among which the Centre for Reproductive Rights, which celebrated the fact that for the first time an international human right body had held a government accountable for failing to provide the information necessary for a woman to freely decide to carry out a sterilization procedure[467]. Moreover, it "affirmed that the right to health includes the right to information about health, and that health-related information is critical to the enjoyment of the rights to life, autonomy in decision making, and all other reproductive rights of women and girls"[468]. This extends beyond the sphere of sterilization to all other medical practices which can affect the well-being of a patient. Moreover, the judgement was delivered when the practices of forced sterilization against Roma women in central Europe began to be exposed, thus condemning these deeds.
By aligning its jurisprudence with this landmark decision, the ECtHR took a step forward in relation to the protection of Roma women's health rights in Europe, paving the way for a stricter States' compliance with the ECHR in health-related issues.

3.2.3.2 The problem: The non-recognition of a violation of Article 14

[465] Communication of the CEDAW Committee, 29 August 2006, C/36/D/4/2004, *A.S. v. Hungary.*
[466] Convention on the Elimination of all forms of Discrimination against Women, New York, 18 December 1979.
[467] Factsheet of the Centre for Reproductive Rights, December 2008, no. 12, *A.S. v Hungary - Informed Consent: A Signature is Not Enough.*
[468] Factsheet of the Centre for Reproductive Rights, December 2008, no. 12, *A.S. v Hungary - Informed Consent: A Signature is Not Enough,* p. 2.

Notwithstanding the aspects analysed above, the decision of the ECtHR was also criticised because it failed to acknowledge the existence of a violation of Article 14 ECHR, the prohibition of discrimination. The Court indeed, did not find that, as the applicant claimed, she had been discriminated against on the grounds of her race and sex, in the enjoyment of her rights under Articles 3 and 8 of the Convention. Instead, the Court found that "the information available [was] not sufficient to demonstrate in a convincing manner" that the doctors acted in bad faith and that the hospital was carrying out a sterilization policy targeting Roma women[469]. However, the Court failed to take into account that statistical data regarding the Prešov Hospital showed a higher number of sterilized Roma women compared to non-Roma ones, as reported by Amnesty International and acknowledged by the Court itself [470]. Moreover, the Centre for Reproductive Rights recognized that "widespread violations of Romani women's human rights, specifically reproductive rights [had taken place] in eastern Slovakia[471]. The published report explicitly stated that "Slovak health-care providers throughout eastern Slovakia are complicit in the illegal and unethical practice of sterilizing Romani women without obtaining their informed consent"[472]. As proof of the existence of this discriminatory practice it was also recalled that the sentence "the patient is of Roma origin" was specifically stated in the medical file of the applicant. The doctors justified this fact affirming that this specification was necessary, allowing doctors to understand that the woman needed special attention, since often Roma people neglect health care. However, as the Court itself recognized[473]:

> "Even assuming this to have been the reason for the entry, the reference in the record to the applicant's ethnic origin without further details being given indicates, in the view of the Court, a certain mindset on the part of the medical staff as to the manner in which the medical situation of a Roma woman should be managed".

Therefore, here the ECtHR seemed to recognize a certain prejudice against Roma patients. However, when ruling over the violation of Article 14, the Court did not indicate this prejudice as a symptom of a racist behaviour. Unfortunately, this fact does not change even in the following judgements of the Court concerning similar cases, like *N.B. v. Slovakia* and *I.G. and Others v. Slovakia.* Faced with a number of complaints against forced sterilization carried out on Roma women in the same State, the Court could have acknowledged the existence of a racist mindset behind this behaviour. The fact that it did not manage to do so is certainly a setback for the Roma community, since these procedures are not considered as part of a systematic attack against this minority, but rather as isolated cases not depending on the ethnicity of the applicants. Consequently, also the measures that Slovakia is asked to take will most likely not be able to address the root causes of the issue. This is very concerning especially if one considers the unfair treatment that Slovakian Roma have to face still today. They meet great difficulty in the access to healthcare services and this situation has rapidly worsened with the outburst of the ongoing pandemic, where under the pretence of enforcing

[469] Judgement of the European Court of Human Rights, 8 February 2012, 18968/07, *V.C v. Slovakia, para* 177.
[470] Judgement of the European Court of Human Rights, 8 February 2012, 18968/07, *V.C v. Slovakia, para* 47.
[471] Report of the Centre for Reproductive Rights, 2003, *Body and Soul: Forced Sterilization and Other Assaults on Roma Reproductive Freedom in Slovakia*, p. 13.
[472] Report of the Centre for Reproductive Rights, 2003, *Body and Soul: Forced Sterilization and Other Assaults on Roma Reproductive Freedom in Slovakia*, p. 14.
[473] Judgement of the European Court of Human Rights, 8 February 2012, 18968/07, *V.C v. Slovakia, para* 151.

lockdown, Roma people are under a strict and unjustified police surveillance[474].
In conclusion, the lack of recognition of Article 14 seems to dampen the achievements of the Court, which should have recognized the racist motive behind the sterilization procedure, thus granting a fairer compensation to the victim.

3.3 Education rights

Leaving behind the topic of health rights, it will now be analysed what the right to education is and how it applies to the Roma minority. At the international level, the right to education was recognized in the Universal Declaration of Human Rights[475] which at Article 26 states that education is a right for everyone, and it should be free and compulsory. Moreover, it affirms that education should be aimed at "the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms" and that parents have a right to choose the education they think best for their children. This last provision is particularly important for minorities, since it allows them to choose an education which is responsive to their cultural needs. This formulation of the right to education is echoed in the UN Convention on the Rights of the Child[476] at Articles 28 and 29, where the UN reaffirms the importance of the matter and adds that higher education should be available to everyone on the basis of their capability. Moreover, at the international level, the right to education is recognized at Articles 13 and 14 of the ICESCR[477]. At the European level, the right to education is protected by the Charter of Fundamental Rights of the European Union at Article 14, which ensures to everyone the right to a free education, carried out in respect with the "democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions"[478]. Moreover, at the Council of Europe's level, the European Social Charter protects education in various provisions, among which Article 17 named "The right of children and young persons to social, legal and economic protection", where it is recognized that the Parties should ensure free primary and secondary education for all children. The ECHR protects education at Article 2 of the 1952 Protocol to the Convention[479]. Moreover, the FCPNM protects education in relation to minority rights: for example, it establishes that all the members of a minority have the same right to education as the other people[480]. Finally, the ECRML protects minority languages and, at Article 8, binds the Parties to provide an education in said languages[481].
However, notwithstanding the efforts of the international community to ensure that every child enjoy his right to education, official statistics confirm that this right is often denied. According to the World Bank, in 2019, the

[474] See *supra,* note 429.
[475] Declaration of the UN General Assembly, 10 December 1948, 217A(III), *Universal Declaration of Human Rights.*
[476] UN Convention on the Rights of the Child, New York, 20 November 1989.
[477] International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966.
[478] Charter of the Fundamental Rights of the European Union, Brussels, 2 October 2000.
[479] The text of Article 2 reads: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".
[480] Framework Convention on the Protection of National Minorities, Strasbourg, 1 February 1995, Article 12 (3).
[481] European Charter on Regional or Minority Languages, Strasbourg, 5 November 1992.

number of out-of-school children of primary school age of both sexes was more than 58 billion, of which 24 billion only in the least developed countries (according to UN classification)[482]. Moreover, the great majority of out-of-school children are girls, more than 31 billion[483]. It must also be noted that some countries, like Afghanistan and Syria have not provided any data regarding this indicator: therefore, it can be concluded than an even higher number of girls and children in general do not have access to primary school. These numbers worsen if secondary and upper education are taken into account. Moreover, it should also be remembered that minority children are at disadvantage in this field, often being discriminated and not allowed to attend mandatory schools. This is why the most important international documents for the protection of minorities, among which the already mentioned FCPNM, also include the right to education among their provisions.
In the next paragraph, the particular situation of Roma people will be analysed, in order to point out the particularly high level of discrimination that they face in this field.

3.3.1 The discrimination faced by Roma in access to education

In the past years, many activists and Romani organisations have advocated for the end of discrimination in the access to education, with the help of supporters like the European Roma Rights Centre and Amnesty international. However, the situation of Roma children is still very harsh. According to a survey of the EU Fundamental Rights Agency ('FRA'), at least 10 % of Roma children aged 7 to 15 in Romania, Bulgaria, France and Italy are not attending school, while the percentage rises at 35% in Greece. Moreover, fewer than one out of 10 Roma is reported to have completed upper-secondary education in eleven States[484]. As a consequence of the low rate of education, Romani are less likely to find a job: according to the FRA's survey, in France, Italy and Portugal, only about one out of 10 Roma aged 20 to 64 is reported as being in paid employment[485].
However, even when Roma people manage to attend school, they have to face a further problem: a *de facto* segregation, since they are often placed in specific schools or classes attended only by Roma students. Specifically, three types of segregation have been pointed out by a report of the European Roma Rights Centre[486]: Roma children can either be put in special schools for children with mental disabilities; or in special classes for children with the same problems, or non-Roma parents can remove their children from a school attended by many Roma students. In the first case, the segregation happens because Roma children receive wrong diagnoses labelling them as mentally impaired: these misdiagnoses can be the results of culturally-biased diagnostic tests. Moreover, sometimes parents are encouraged to enrol their children in these schools. In the second case, the dynamic is very similar, the only difference is that the segregation happens at the class level. In the third case, the non-Roma parents refuse to have their children attend the same classes of

[482] Statistics of the World Bank, 2019, *Education indicators: Out-of-school children of primary school age, both sexes (number).*
[483] Statistics of the World Bank, 2019, *Education indicators: Out-of-school children of primary school age, both sexes (number).*
[484] Survey of the EU Fundamental Rights Agency, 2012, TK-31-12-551-EN-C, *The situation of Roma in 11 EU Member States Survey results at a glance*, p.15. The states are Greece, Romania, Bulgaria, France, Spain, Portugal, Slovakia, Poland, Romania, Hungary, and Italy.
[485] Survey of the EU Fundamental Rights Agency, 2012, *The situation of Roma in 11 EU Member States Survey results at a glance*, p.16.
[486] Report of the European Roma Rights Centre, 2004, *Stigmata: Segregated Schooling of Roma in Central and Eastern Europe.*

Roma people, giving rise to the phenomenon of "white flights"[487]. School segregation is a great concern for the respect of human rights: it affects the education and dignity of Roma children, who cannot interact with their pairs and are forced to receive substandard education[488]. For this reason, it is a matter of extreme concern. In the next paragraphs, the efforts carried out by the ECtHR in this field will be analysed, in order to point out the achievements of the Court and the points that could be improved in order to ensure a better education to Roma children.

3.3.2 The protection offered by the ECtHR

The ECHR started to address the issues concerning the relation between minorities and education in the 1960s[489]. The first case in this regard was the 1968 *Belgian Linguistics Case*[490] which today is still considered as an important precedent for what concerns the relation between discrimination and education. In this sentence, a group of parents living in the Dutch speaking part of Belgium complained that their children could not receive an education in French. They found this treatment unlawful and challenged various national laws and especially Section 4 of the Act of 30th July 1963 which provided that the language of education should be Dutch in the Dutch-speaking region, French in the French-speaking region and German in the German-speaking region of Belgium. The Court held that the claim of the applicants was legitimate and that Belgium had violated Article 2 Protocol 1 of the ECHR. This is still considered a landmark judgement, since the Court applied for the first time Article 2, specifically in the part which recalls the right of parents to ensure to their children an education and teaching in conformity with their own convictions.
Since this sentence, the cases concerning the right to education complained over a violation of the same Article taken in conjunction with Article 14, the prohibition of discrimination. The Court's jurisprudence concerning Roma people and education is no exception to this trend. As mentioned above, the main problem of this minority is that Roma children live in a situation of *de facto* segregation, and the cases brought before the attention of the Court reflect this current issue. Starting from *D.H. and Others v. The Czech Republic*[491], the Court has ruled that keeping Roma pupils separated from their peers was not in accordance with the principles of the ECHR, even if in some cases Roma students may have linguistic issues or diagnoses of mental disabilities which would require that they receive an education more tailored to their needs.

3.3.2.1 Art 2 Protocol 1 ECHR

Contrary to the right to health and the right to housing, education is explicitly protected in the ECHR, at Article 2 Protocol 1, as mentioned above. This means that, rather than deriving a protection through the interpretation of other articles, the Court has a direct provision to apply in order to protect this right. However, as for the other cases, the process was not always straightforward and not always the Court managed to grant protection to the victims of a

[487] ARABADJIEVA (2016: 34).
[488] ARABADJIEVA (2016: 35).
[489] PELEG (2018: 118).
[490] Judgement of the European Court of Human Rights, 23 July 1968, 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, *Belgian Linguistics Case.*
[491] Judgement of the European Court of Human Rights, 13 November 2007, 57325/00, *D.H. and Others v. The Czech Republic.*

violation of Article 2. For example, in the already mentioned judgement *D.H. and Others v. The Czech Republic*, the Grand Chamber was the one that recognized a violation of Article 2 during the appeal, while the Chamber had previously ruled that no discrimination had occurred. Indeed, it claimed, children were put in special classes in order to receive an education more attuned with their needs, and not separated from the other students due to their ethnicity. When the Grand Chamber overturned the decision, it recognized that such behaviour could not be justified by the need to ensure a proper education, taking also into account the sheer number of Roma Czech pupils who were enrolled in special schools. Therefore, for the first time the Court also took into account statistical data to prove the existence of discrimination[492]. After that decision, the Court continued to uphold the protection of Article 2, also enhancing its scope of protection, as will be exemplified in the next paragraphs where the case of *Horvath and Kiss v. Hungary* will be taken into account.

3.3.3 Case study: *Horvath and Kiss v. Hungary*

In *Horvath and Kiss v. Hungary*[493] the applicants were two young Roma men who were diagnosed with mental disabilities and had therefore to attend a special school for students with particular educational needs. As a result, they were not able to pursue the career they wanted to have, because their curricula were insufficient to attend an upper education institution who could have given them the certification necessary to get their job of choice. The applicants claimed that the tests that labelled them as "mentally disabled" were both culturally and socially biased and that the scores they achieved were not low enough to consider them as "mild disabled". Moreover, the applicants recalled that a high number of Roma children in Hungary were attending a special school due to receiving a similar diagnosis. Finally, they complained that they were not given a proper explanation on the consequences of scoring few points on these psychological tests and that they were not even aware of the possibility of appealing the decision which put them into a special school.
The Government, on the other hand, stated that the tests administered to these students were standardized and not likely to be influenced by the ethnicity or the culture of the applicants. Moreover, it claimed that using "tests and standards tailored to the Roma population would have no sensible meaning from the point of view of assessing a child's ability to cope with the mainstream education system"[494]. Therefore, the resulting diagnoses were unbiased and the two children rightly attended a special school. However, the Government recognized the validity of the applicant's claim that the parents had not been well informed about the consequences of the diagnoses, as also acknowledged by the Hungarian Supreme Court.
The Court started by taking into account the disproportionate number of Roma pupils attending special schools or classes. Particularly, the ECtHR referred to some statistical data which reported that the number of Hungarian non-Roma students who attended special schools was around 2%, while this percentage raised to 17.5% among Roma pupils[495]. Therefore, the Court concluded that this trend was enough to consider the existence of a *prima face* indirect discrimination and that the State had a duty to undo the mistakes of

[492] O'NIONS (2010: 478).
[493] Judgement of the European Court of Human Rights, 29 January 2013, 11146/11, *Horvath and Kiss v. Hungary*.
[494] Judgement of the European Court of Human Rights, 29 January 2013, 11146/11, *Horvath and Kiss v. Hungary, para* 95.
[495] Judgement of the European Court of Human Rights, 29 January 2013, 11146/11, *Horvath and Kiss v. Hungary, para* 10.

the past. Moreover, this body reviewed the way in which the tests' results were interpreted: it found that the borderline value of mental disability at IQ 86 set by Hungary was significantly higher than the WHO guideline of IQ 70. Moreover, the Court took into account the fact that, when evaluated by a panel of independent experts, the two children scored a higher point in all the different tests they carried out. Lastly, the Court recalled that various experts found that some of these tools were obsolete and one of them was officially recognized as culturally biased[496]. These findings led the Court to believe that there was the possibility that also the other tests were culturally biased. The issue was therefore to ascertain to what extent special safeguards were applied that would have allowed the authorities to take into consideration the particularities and special characteristics of the Roma applicants, in view of the high risk of discriminatory misdiagnosis and misplacement[497]. The Court found that these safeguards were not in place since, back then, the Hungarian legislation was not clear regarding the possibilities of children with mental disabilities attending normal schools. Therefore, Hungary "failed to prove that it had provided the guarantees needed to avoid the misdiagnosis and misplacement of the Roma applicants, and the Court considered that the applicants necessarily suffered from the discriminatory treatment"[498].

3.3.3.1 The achievements- the evolutionary approach of the Court

As it can be gathered from the previous analysis, two important points were recognised by the Court in this judgement: the first is that statistical evidence can be used to determine the existence of discrimination, and the second is that the State has a positive obligation to undo past discrimination in the field of education. These points are fundamental steps forward in the jurisprudence of the ECHR and show once again how the Court takes an evolutionary approach in its sentences concerning Roma rights. Indeed, taking into account the broader social context when delivering a sentence is not usually the path followed by the Court, neither is recognizing the existence of positive obligations to undo past discrimination. Therefore, this judgement can be considered as representing the evolution of the Court's reasoning in the field of education and given its importance, it will now be better analysed. As for the previous cases, also the Court's shortcomings will be taken into account, in order to get a clear understanding of the scope of the protection offered by the ECtHR to Roma students.

3.3.3.1.1 The acceptance of statistical data as *prima facie* evidence of discrimination

The fact that, as stated above, the Court took into account the social context of Hungarian Roma when delivering its judgement should not be taken for granted. Indeed, when analysing how this body protects the Roma right to health, we found that it failed to take into due account the overproportioned number of Roma women who underwent sterilization procedures, affirming that there was not enough evidence for declaring the existence of a policy aimed at targeting this minority[499]. This was affirmed notwithstanding the fact that, in Slovakia, the number of Roma women who underwent a sterilization

[496] Judgement of the European Court of Human Rights, 29 January 2013, 11146/11, *Horvath and Kiss v. Hungary, para* 120.
[497] Judgement of the European Court of Human Rights, 29 January 2013, 11146/11, *Horvath and Kiss v. Hungary, para* 121.
[498] Judgement of the European Court of Human Rights, 29 January 2013, 11146/11, *Horvath and Kiss v. Hungary, para* 128.
[499] See *supra, para* 3.2.3.2.

procedure was much higher than that of their non-Roma counterparts and notwithstanding the reports and the opinions of different NGOs which advocated that sterilising Roma without their consent was common practice[500]. Not taking into account statistical evidence is the conclusion generally reached by the ECtHR, but in the field of education the Court decided to abandon this cautionary approach[501].

The first time that such a step was taken was not in *Horvath and Kiss v. Hungary*, but in a previous judgement, *D.H. and Others v. The Czech Republic*, where the Court held that the sheer number of Roma students attending special schools or classes could be taken as *prima facie* evidence of the existence of a discriminatory treatment against Roma pupils. This evolution is particularly important because in some circumstances, it would be difficult to prove the existence of discrimination without taking into account the existence of statistical data, as in *D.H. and Others v. The Czech Republic*[502]. Instead, the Court has now shifted the burden of proof to the State, which consequently must demonstrate that, notwithstanding what the numbers suggest, there is no differential treatment accorded to the Roma minority. This makes easier for applicants to prove their claim since, in cases involving discriminatory treatment, a broader approach is best suited to prove their points[503]. With *D.H. and Others v. The Czech Republic* the Court aligned its jurisprudence concerning the education field with the jurisprudence of other judicial bodies, like the European Court of Justice[504].

While *D.H. and Others* was a landmark case for the reasons just mentioned, with *Horvath and Kiss v. Hungary,* the Court showed that this evolutionary reasoning was there to stay and was now part of the approach of the Court when dealing with Roma people and access to education. The Court thus managed to ensure a greater protection to Roma minority, making also easier for the pupils belonging to this group to attend regular schools, and hopefully, this criterion will be considered also in its judgments relating to other fields, like health.

3.3.3.1.2 The recognition of a positive obligation of the State to undo past discrimination

A second achievement in this sentence is the recognition of a positive obligation of the States to undo past discrimination. This is the first time that the Court recognised this duty, not even in the landmark case of *D.H. and Others v. The Czech Republic* had it gone so far. Instead, in *Horvath and Kiss v. Hungary*, the Court stated that "the State has specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests"[505] and, most importantly, that the behaviour of Hungary was in breach of Article 14 because it allowed Roma pupils to "receive an education which did not offer the necessary guarantees stemming from the positive obligations of the State to undo a history of racial segregation in special schools"[506]. Therefore, the State's positive obligations are twofold: on the one hand, the State has to prevent the discrimination from being carried out in the present, which is the meaning most easily inferred by

[500] *Ibidem.*
[501] O'NIONS (2010: 478).
[502] O'NIONS (2010: 478).
[503] *Ibidem.*
[504] *Ibidem.*
[505] Judgement of the European Court of Human Rights, 29 January 2013, 11146/11, *Horvath and Kiss v. Hungary, para* 116.
[506] Judgement of the European Court of Human Rights, 29 January 2013, 11146/11, *Horvath and Kiss v. Hungary, para* 127.

the analysis of Article 14, but on the other hand, it has also to undo the discrimination carried out in the past. Although the scope of these last obligations is not very clear and the aspects that they cover beside the special schools' context is not specified, the case is still relevant in ensuring a higher commitment of States in the fight against discrimination[507]. Indeed, it ensures that States do not lose sight of the episodes of past discrimination and commit themselves to improve their legislations in order to solve the issue. This is particularly relevant for the Roma minority, which is a historically vulnerable community that has been facing discrimination for many years and whose integration is strictly linked to addressing the past wrongdoings they have been subjected to.

3.3.3.2 The problems

Notwithstanding the positive developments analysed above, the Court's reasoning can be further improved in order to ensure a better protection against discrimination in education. For example, even if the Court recognized a violation of Article 14, it did not consider that the treatment to which the Roma students were subjected to amounted to segregation. Furthermore, even if the Court's judgment made very important points, like recognising the existence of a positive obligation of the State to undo past discrimination and accepting statistical data as *prima facie* evidence of discrimination, the implementation of this decision is defective, since, as explained above[508], some States tend not to apply or apply with great delays the ECtHR's judgements. In the next paragraphs, these points will be analysed in detail, in order to provide an insight of the shortcomings of the ECtHR's jurisprudence.

3.3.3.2.1 The non-recognition of segregation

While in the decision the Court pointed out that Hungary has a "history of racial segregation in special schools"[509], segregation is not recognized *per se* as a serious issue[510]. Indeed, the Court put more emphasis on the fact that discrimination had occurred, while not specifically qualifying as "segregation" what happened to the applicants. While this approach has been praised because it recognized the link between ethnicity and the placement in special schools, it still leaves room for improvement. In particular if the Court were to specifically address the issue of separation as segregation, stricter provisions could be required from States in order to fulfil their obligations. In particular, as pointed out by Arabadjeva, the Court could decide to state that "school segregation is inherently discriminatory towards Roma children and constitutes a violation of Art. 14 together with Art. 2 of Protocol 1 in itself, unless there are some particularly weighty reasons to justify separation"[511]. This might be justified because special schools deprive children of the possibility of receiving high level education and because it is a deprivation of human dignity.
Having already established that States have positive obligations to undo past discrimination the Court has put itself one step closer to achieving this objective: indeed, the recognition of positive obligations is necessary to correctly address the issue of segregation, which cannot be counteracted only

[507] ARABADJIEVA (2016: 42).
[508] See *supra, para* 2.1.1.2.3.
[509] Judgement of the European Court of Human Rights, 29 January 2013, 11146/11, *Horvath and Kiss v. Hungary, para* 127.
[510] ARABADJIEVA (2016: 43).
[511] ARABADJIEVA (2016: 41).

using negative actions. The evolutionary approach of the Court, that with each decision adds a piece which further strengthens the protection granted to Roma people, bodes well for the recognition of segregation *per se* as a serious issue and for a future reinforced protection of Roma students and a more integrated education environment. This is even more necessary in the context of the COVID19, to counteract the dangerous effects caused by the pandemic which has forced many students to not attend school, and which has adversely impacted Roma pupils who had more difficulty in finding electronic devices to attend online classes and who sometimes did not have a reliable internet connection.

3.3.3.2.2 The difficulty in the implementation of the judgement

Aside from the issue just analysed, another important point which reduces the effectiveness of the Court's judgement is the way in which Hungary is implementing it. After 9 years, this State has still not completely realised the objectives prescribed by the Court. This is particularly true for what concerns general measures, since there were not relevant individual measures to be applied in this case, being that the applicants had not requested a further pecuniary compensation aside from the one already awarded by the national court and since they were adults and not attending school anymore. On the contrary, for what concerns general measures[512], in the latest exam of the Committee of Ministers, the latter complained that "the authorities have not provided any concrete examples demonstrating the effectiveness of the administrative and judicial remedies […], such as relevant decisions of the administrative authorities and the domestic courts"[513]. Moreover, the Committee was concerned over the lack of statistical disaggregated data regarding the number of Roma students attending special schools or classes. However, the Court noted also some positive developments, like the significant upgrade of testing methods which have been standardized and are less likely to be influenced by the pupil's socio-cultural context and ethnicity. Moreover, the Committee took into account the fact that two recent academic papers confirm an overall improvement in respect of the specific issue of misdiagnosing and misplacing Roma children in Hungary[514]. However, in one of these papers, it is acknowledged that, while the practice of segregating Roma pupils in special schools or classes is becoming less popular, new methods of segregation in education have been adopted[515]. Moreover, in another recent report, it is stated that school segregation is still a very relevant issue not prioritized by the State[516]. The same report notes that, according to a study published by the Hungarian Academy of Sciences in 2018, school segregation increased by almost 10 per cent between 2008 and 2016[517]. This

[512] As stated by the Court itself, the State's main obligations arising from this judgement are: "the provision and accomplishment of state-of-the-art non-discriminatory testing (when used) that prevents misdiagnosis and misplacement of Roma children […]; […] to provide adequate and sufficient safeguards against misdiagnosis and misplacement; as a result, the appropriate diminution of the statistical overrepresentation of Roma in the special school population". Communication of the Hungarian Government to the Council of Europe's Committee of Ministers, 25 June 2021, DH-DD 653, *Communication from Hungary concerning the case Horvath and Kiss.*

[513] Communication of the Hungarian Government to the Council of Europe's Committee of Ministers, 25 June 2021, DH-DD 653, *Communication from Hungary concerning the case Horvath and Kiss.*

[514] *Ibidem.*

[515] Working Paper of the Center for Policy Studies CEU, 2021, *Comparative Overview of the Capacity of the Education Systems of the CEE Countries to Provide Inclusive Education for Roma Pupils.*

[516] KIRÁLY, BERNÁTH, SETÉT (2021: 9).

[517] KIRÁLY, BERNÁTH, SETÉT (2021: 5).

fact, combined with the lack of official data transmitted by the authorities, casts some shadows on the effective reduction of the percentage of Roma students who are discriminated. Moreover, as already mentioned, in other aspects, Hungary still needs to step up its efforts.
In conclusion, after 9 years, Roma students are still not adequately protected and Hungary has mostly failed to fulfil its obligations as described the Court, reducing the overall evolutionary stance of *Horvath and Kiss v. Hungary* and partially undermining the Court's effort.

3.4 Roma cultural identity and cultural rights

Our analysis ends by taking into account a group of rights which has started to be considered more often than in the past[518] and whose importance is particularly heightened for members of a minority. Indeed, cultural rights are assisted by provisions aimed at protecting and preserving the culture of each specific community. They are particularly relevant especially for those small groups whose customs and traditions are threatened by globalization and at risk of disappearing. Due to their nature, they have been considered both a group rights and individual rights[519]. Indeed, they concern a whole group of people who have same cultural traits but, at the same time, each individual belonging to that community has a specific and personal entitlement to practice his own culture and to enjoy all the other aspects included in the term "cultural rights". Indeed, the latter includes a various range of situations: from the right to enjoy one's own culture and to participate in one's own cultural life, to the parents' right to educate their children according to their own religious and moral convictions, to the preservation of cultural heritage. A link between cultural rights and the one to self-determination has also been highlighted: the UN Special Rapporteur Cristescu affirmed that the right to self-determination also applies to the cultural sphere, and, in this case, it can be described as the right of peoples to choose their cultural system and freely pursue their cultural development[520].
Cultural rights are protected at the international level at Articles 22 and 27 of the Universal Declaration of Human Rights; at Articles 1 (1), 2, 15 (1-2) of the ICESCR; and at Article 1 and 27 of the ICCPR. All these articles protect different specifications of cultural rights[521]. Moreover, many instruments of soft law have been developed by UNESCO, like the 2003 Convention for the

[518] As proof of this, it can be considered the development, in 2007, of the Fribourg Declaration, a document with no legal stats aimed at gathering in a single document all the cultural rights already recognized under international human rights law. This Declaration was carried out with the aim of fostering the debate about cultural rights and it also managed to influence further discussions on the topic. FERRI (2018:4).
[519] FRANCIONI (2008: 4).
[520] VRDOLJAK (2008: 47).
[521] Namely, Articles 22 and 27 of the Universal Declaration of Human Rights state that: "Everyone […] has the right to […] social and cultural rights indispensable for his dignity and the free development of his personality", and that "Everyone has the right freely to participate in the cultural life of the community". Articles 1 and 27 of the ICCPR affirm that: "All peoples have the right of self-determination. By virtue of that right they freely […] pursue their economic, social and cultural development" and "Minorities have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language". Lastly, Articles 1 (1), 2, 15 (1-2) of the ICESCR state that: "All peoples have the right [… to] freely pursue their economic, social and cultural development"; "The States Parties undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights" and "The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life […]"; "The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture".

Safeguarding of the Intangible Cultural Heritage[522] or the 1966 Declaration of the Principles of International Cooperation[523]. Moving on to the European level, the European Union included two provisions concerning culture in the EU CFR, Articles 13 and 22[524]. Moreover, at the level of the Council of Europe, the European Social Charter recognizes the importance of cultural rights in its preamble but does not include a specific provision entirely dedicated to cultural rights. Not even the ECHR directly protects cultural rights, as will be better explained below. However, Article 5 of the FCPNM protects minorities' culture by stating that "the Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage" and prohibits any attempt at assimilation[525]. In sum, cultural rights are strictly intertwined with other types of rights, like education or health, and are an instrument to preserve the specificities of each cultural groups.

Strictly linked to the concept of cultural rights, there is the one of cultural identity: each individual is indeed defined also by the cultural group he belongs to, and he has the right to freely express this belonging. Once again, this is particularly relevant for minorities, indigenous peoples and, more generally, for all those groups which are different from the majoritarian society. In the case of Roma people, this protection becomes extremely important. Their cultural identity is indeed perceived as very distinct from the one of other European peoples, with two main consequences that follow: the first is that this cultural diversity must be preserved; the second is that a compromise between the Roma and non-Roma identities must be found, in order to realize a proper integration. However, in order to properly reach both of these goals, a clear understanding of what Roma's identity means should first be reached. Indeed, Roma cultural rights and identity cannot be protected properly if judges, policy makers and NGOs ignore which are the aspects that need to be safeguarded. At the same time, false misconceptions about Roma hinder their integration and threaten to further spread racism against this group. In order to understand the relevance of this topic, it can be considered that James and Southern have argued that the false claims concerning Roma's identity are to blame for the failure of the numerous efforts of integration carried out through the years[526]. In order to overcome this issue, a proper definition of Roma cultural identity should be pointed out. This is particularly relevant for our analysis because the ECtHR has often referred to this concept, trying to defend Roma culture and identity by extending the protection of the ECHR to these aspects. However, the efforts of the Court can be undermined without a proper understanding of the subject or, even worse, the ECtHR can spread wrong conceptions about Roma people, conceptions that are likely to be used also by the States, thus adversely influencing the perception or this community among the general public.

3.4.1 The problem of identity as a complex and evolving concept

Indeed, identity is a very complex concept which evolves through time, as culture does. In the minds of many Europeans, Roma identity is confined to their different lifestyle, *i.e.*, their nomadism, phenomenon in stark contrast

[522] Convention for the Safeguarding of the Intangible Cultural Heritage, Paris, 17 October 2003.
[523] Declaration of the Principles of International Cooperation, Paris, 4 November 1966.
[524] Article 13 states that the arts and scientific research shall be free of constraint. Article 22 of the same Charter requests that "the EU shall respect cultural, religious and linguistic diversity".
[525] Framework Convention on the Protection of National Minorities, Strasbourg, 1 February 1995, Article 5 (1) (2).
[526] JAMES and SOUTHERN (2019: 324).

with the sedentary European way of life[527]. However, during their stay in Europe, Roma and their cultural identity have evolved as well. Consequently, nowadays, the binarism between sedentarism and nomadism does not describe anymore the differences between this minority and the mainstream society, as many Roma live a more hybrid lifestyle, which includes some elements of sedentarism. Moreover, it should be remembered that the term "Roma" has to be intended as an umbrella term, as specifically stated by the Council of Europe as well[528], and therefore includes many different groups, each one with its own characteristics and cultural identity[529]. The evolving nature of the concept of cultural identity has to be taken into account in order to better protect Roma cultural rights. In the next paragraphs, the way in which the ECtHR faces this challenge will be analysed, in order to understand how this body protects Roma cultural rights and which steps can be taken to strengthen the respect of these provisions.

3.4.2 The protection offered by the ECtHR

In line with what stated above, it can be affirmed that the ECtHR has to face a double challenge for what concerns Roma and cultural rights. On the one hand, it has to ensure that the Roma cultural identity is protected against a possible discrimination and, on the other hand, it has to correctly interpret a concept which, for its inherent fluidity and complexity, is hardly to point out. Nonetheless, this effort is vital to ensure that Roma people are free to express themselves and to live in accordance with their cultural requirements. As already pointed out, if the ECtHR judges were to fail in correctly classifying Roma cultural traits, not only their cultural rights could not be protected at the highest level possible, but this erroneous interpretation could affect the way in which Roma are perceived by society. These two challenges are made even more difficult by the fact that the ECtHR does not directly protect cultural rights. Therefore, as for education and health rights, the existence of States' obligations had to be derived from other articles. Moreover, it should be recalled that cultural rights are strictly intertwined with other types of rights, like in the case of the right to receive an education in accordance with one's cultural requirements, or to have a house which is culturally adequate[530]. Therefore, the fact that the Court tried to stretch the interpretation of the Convention so to protect also these rights does not seem implausible. To date, the majority of cases brought before the Court, which included Roma people and cultural aspects, has mainly dealt with housing rights. This is not surprising, since one aspect which constitutes a striking cultural difference is the way in which some Roma people live. As already analysed above, the ECtHR has widely dealt with cases concerning Roma and the right to house. We have also explained how the Court has adopted an evolutionary approach in these judgments. In the next paragraphs, we will take into account another important part of the Court's reasoning, the fact that cultural traditions, also those concerning the way of life and the housing arrangements, are protected under the Convention.

3.4.2.1 The recognition of art 8 ECHR as protecting cultural rights

[527] See *supra, para* 1.3.
[528] Glossary of the Council of Europe, 18 May 2012, *Descriptive Glossary of terms relating to Roma issues*. See, *supra* note 128; HRUSTIČ (2018: 452).
[529] KAPRALSKI (2018: 467).
[530] Factsheet of the United Nations High Commissioner for Human Rights, 2009, no.1, *The Right to Adequate Housing.*

Indeed, the Court started to interpret the right to respect for private and family life, enshrined in Article 8, as giving rise to a positive obligation of States to facilitate the Gypsy way of life[531]. In one of the first cases concerning Roma lifestyle and their housing rights, the Court (then the Commission) recognized that "as submitted by the applicant, […] living in a caravan home is an integral and deeply-felt part of […] gypsy life-style. The Commission's case-law indicates that the traditional lifestyle of a minority may attract the guarantees of Article 8 as concerning their private life, family life and home"[532]. Notwithstanding this interpretation, in the first cases brought before its attention, like *Buckely v. the United Kingdom* and *Chapman v. the United Kingdom*, the ECtHR did not find any violation of Article 8. This situation changed with *Connors v. The United Kingdom*[533], as will be analysed in the next paragraphs. However, even if at the beginning the applicant's claims were rejected, the topic of cultural identity immediately started to be considered. It remains to be seen if the cultural identity described by the Court actually reflects a correct picture of what being Roma means, or if it is a definition based on misconceptions and prejudices. In order to understand this point, in the next paragraphs the case *Connors v. The United Kingdom* will be analysed and, subsequently, the achievements of the Court and the shortcoming in its reasoning will be pointed out.

3.4.3 Case study: *Connors v. The United Kingdom*

In this case, the applicant was a Roma and a British citizen who, after having lived a "traditional travelling lifestyle"[534] had decided to live on a Roma site and stayed there with his family for 13 years. Mr Connors was lawfully occupying the Roma site, since the city Council had granted the applicant and his wife a contractual licence to occupy plot no. 35 at Cottingley Springs caravan site in 1998. Then, in 1999, one of the applicant's daughters was granted another license to occupy a plot next to the one of her family. However, both these licenses were subjected to the conditions of not producing any nuisance which may have disturbed the neighbours. Notwithstanding this prohibition, the City Council received various complaints accusing the applicant's children and his soon-to-be son-in-law to misbehave. In view of this, the Council decided to proceed with an eviction which occurred rather violently and on the basis of a written notice but not containing any justification. The two caravans the family possessed were seized, as well as their personal belongings that were later dumped in the street. The applicant's 13-year-old son was taken in police custody for five hours and the applicant was not immediately brought to the hospital even if he had chest pain. As a consequence of the eviction procedure, the applicant's wife and their baby son, who was severely ill, decided to live in a house, while the applicant continued having an itinerant lifestyle, and, lastly, the two separated in 2001. Moreover, the applicant's 10-year-old son dropped out of school and never returned, while the applicant's health conditions progressively worsened.
For these reasons, Mr. Connors claimed a violation of Article 8 taken in conjunction of Article 14. The Court recognised that a violation of Article 8

[531] Judgement of the European Court of Human Rights, 18 January 2001, 27238/95, *Chapman v. the United Kingdom*.
[532] Judgement of the European Commission on Human Rights, 11 January 1995, 20348/9, *Buckley v. the United Kingdom, para* 64.
[533] Judgement of the European Court of Human Rights, 27 May 2004, 66746/01, *Connors v. the United Kingdom.*
[534] Judgement of the European Court of Human Rights, 27 May 2004, 66746/01, *Connors v. the United Kingdom, para* 9.

had indeed occurred, since the eviction procedure was disproportionate and not necessary in a democratic society. In particular, it found that the required procedural safeguards were not put in place, rejecting the Government's justification that a swift eviction procedure was necessary to cater for the special needs of gypsies who live a nomadic lifestyle and therefore force the authorities to flexibility in the management of local authority sites. The Court affirmed that there was no evidence which proved that Roma people were nomadic, but actually, reports showed that they now tended to be sedentary. Therefore, the argument of the Government could not be accepted as a justification for a swift eviction procedure and Article 8 was thus breached[535].

3.4.3.1 The achievements- The evolutionary approach of the Court

As it can be noted, in *Connors v. the United Kingdom* the Court found a violation of Article 8 and, for the first time, it took into account the fact that Roma's cultural identity could not always coincide with nomadism, overcoming its previous idea which necessarily saw Roma as a travelling community. In this decision therefore, the Court seems able, to a certain extent, to win the double challenge presented above, namely ensuring the protection of Roma's lifestyle, while not constructing a wrong image of their cultural traditions. Therefore, the decision can be considered a landmark judgement, notwithstanding other issues which will be addressed further below. To understand the relevance of the Court's reasoning in this judgment, a comparison between the previous cases can be drawn. The next paragraphs indeed, will be dedicated to point out the achievements and the pitfalls of the Court' reasoning in *Connors v. the United Kingdom,* always taking in mind the importance of agents like judges who can shape the legal definition of Roma's identity[536].

3.4.3.1.1 The achievements: The recognition of protection of Roma's lifestyle

The first achievement that will be analysed is the fact that the Court managed to successfully recognise that Article 8 protects the Roma right to house, which also includes cultural adequacy. In this judgement the Court stated that: "The vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases"[537]. In *Buckley v. The United Kingdom,* the Court had reached a similar conclusion, stressing the concept that "Roma traditional lifestyle" thus, nomadism, came with special needs that had to be respected and taken into account by the respondent State. Not dwelling on the fact that the Court equates nomadism to Roma lifestyle, a point which will be analysed below, it is worth noting that in this previous case, like in *Connors,* the Court is ready to acknowledge this minority's cultural requirements. Moreover, the Commission which judged the admissibility of the case, "accepted as submitted by the applicant, that living in a caravan home is an integral and deeply-felt part of her gypsy life-style. The Commission's case-law indicates that the traditional lifestyle of a minority may attract the guarantees of Article

[535] Judgement of the European Court of Human Rights, 27 May 2004, 66746/01, *Connors v. the United Kingdom*, *para* 74.
[536] FARGET (2012: 305).
[537] Judgement of the European Court of Human Rights, 27 May 2004, 66746/01, *Connors v. the United Kingdom*, *para* 84.

8"[538]. However, in *Buckley*, the Court did not find a violation of this provision, even if the applicants were refused a planning permission which would allow them to live in a caravan, thus respecting their traditional lifestyle. On the contrary, in *Connors*, the ECtHR granted a greater protection to what it considered as the Roma lifestyle, recognising the eviction in breach of Article 8.

3.4.3.1.2 The recognition of non-homogeneity of Roma lifestyle

While the recognition that Roma lifestyle is worth of protection is certainly positive, it remains to be seen whether the meaning given to it is actually in line with reality. In the first cases brought before the ECtHR, this does not seem to be the case. In these judgements indeed, the Court always associated the peculiarity of Roma lifestyle with nomadism. In *Chapman*, this biased view is particularly evident when the Court stated that: "It would appear that the applicant does not in fact wish to pursue an itinerant lifestyle. She was resident on the site from 1986 to 1990, and between 1992 and these proceedings. Thus, the present case is not concerned as such with the traditional itinerant Gypsy lifestyle"[539]. In *Buckley*, the Court kept referring to the "traditional Gypsy lifestyle" as necessarily including nomadism. Moreover, in his dissenting opinion Judge Repik stated that the applicant "wishes to retain the possibility of travelling during school holidays - a legitimate objective given the traditional way of life and culture of the Gypsy minority"[540] confirming once again the view that Roma's identity is linked to nomadism. However, "studies of Gypsies, Travellers and Roma have long-recognized the nuanced and variable nature of cultural nomadism that includes a range of approaches to living that are bound up with notions of freedom and autonomy"[541] and which can include living in moving caravan as well as living on the same piece of land. This is particularly evident if one looks at the cases brought before the Court, where the applicants also own the land they reside on, a stark contrast with the idea of Roma as only being a nomad people.
However, in *Connors v. the United Kingdom*, the Court abandoned this idea in favour of a new conception, exemplified by the following sentences[542]:

> "As regards the nomadism argument, the Court notes that it no longer appears to be the case that local authority gypsy sites cater for a transient population. The October 2002 report indicates, as has been apparent from the series of cases brought to Strasbourg over the last two decades, that a substantial majority of gypsies no longer travel for any material period. Most local authority sites are residential in character. […] The Court is not persuaded therefore that the claimed flexibility is related in any substantial way to catering for an unspecified minority of gypsies who remain nomadic […]".

Therefore, the Court is starting to develop a legal conception of Roma identity which is more similar to the real image of this people. In this way, the Court will help shape a legal definition of this minority's identity which will include the multifaceted aspects of this concept, so that all various lifestyle led by the different communities grouped under the umbrella term "Roma" can be protected under international and national laws too. Indeed, the conception developed by the Court is likely to influence the State's view of the topic,

[538] Judgement of the European Commission on Human Rights, 11 January 1995, 20348/9, *Buckley v. the United Kingdom, para.* 64.
[539] Judgement of the European Court of Human Rights, 18 January 2001, 27238/95, *Chapman v. the United Kingdom, para.* 105.
[540] FARGET (2012: 305).
[541] JAMES and SOUTHERN (2019: 324).
[542] Judgement of the European Court of Human Rights, 27 May 2004, 66746/01, *Connors v. the United Kingdom, para* 74.

therefore ensuring a greater acknowledgement of the intragroup and intergroup differences, with the result of a heightened protection of the different lifestyles led by this minority.

3.4.3.2 The problem: The presence of stereotyped concepts about Roma lifestyle

Notwithstanding these achievements, some stereotyped views of the Roma minority are still present in this judgement. One example, is the fact that Roma are usually portrayed as a group of people seeking exemption[543]. In *Connors*, to point out the difference between this case and the *Chapman*'s one, the ECtHR stated that in *Connors* "it was undisputed that the applicant […] claimed, in effect, special exemption from the rules applying to everyone else"[544]. However, as Farget highlighted, it is not always easy to point out the line between the desire to not respect the rules and the desire to find a place in a society which does not wish for the integration of this community[545].
Moreover, one last point concerns considering Roma like a homogenous group from the point of view of their vulnerability. In particular, the Court seems to consider this trait as part of the Roma's identity. While it is true that this minority is particularly at risk, seeing how anti-Gypsyism is a wide spread phenomenon, nonetheless, some Roma people are more vulnerable than others, like for example women. Moreover, for what concern their traditional way of life, some lifestyles can be considered as more at risk than others, for example those which require a higher level of nomadism, deserving thus a different consideration even from the Court. This reflection seems to be missing in the ECtHR's reasoning, thus not encouraging States to concentrate their efforts on specific subgroups of Roma people.

[543] FARGET (2012: 305).
[544] Judgement of the European Court of Human Rights, 27 May 2004, 66746/01, *Connors v. the United Kingdom*, *para* 95.
[545] FARGET (2012: 300).

Conclusion

This dissertation aimed at understanding to what extent the Council of Europe protects minority's rights, with a focus on how this protection is ensured by the European Court of Human Rights to the Roma minority. The topic of minority's protection is particularly relevant nowadays, since the current pandemic has exacerbated the already dire living conditions of minorities[546] and the Roma were no exception to this trend. In order to answer our initial question, this dissertation started with a recollection of how the term "minority" is interpreted in international law. This was done to understand what groups can be included in our analysis and which are excluded from the regime of protection developed by the Council of Europe. The analysis has shown that there is no common consensus in international law over a binding definition for the term "minority", notwithstanding the fact that one of the first classificatory efforts took place many years ago, in 1930, with a sentence of the Permanent Court of International Justice[547]. From there, different UN bodies have tried to come up with a proper definition, which however did not meet universal consensus. However, some common elements can be identified, like the presence of unique ethnic, religious and linguistic characteristics. Given the difficulty in finding a compromise, the solution normally adopted is to use a practical approach and decide case by case which groups can be considered a minority. Moreover, this term is often coupled with other adjectives, like historical, new, territorial and non-territorial. We saw that, generally, new minorities do not enjoy the rights set forth in national and international law, contrary to historical ones. Moreover, the different ways in which territorial and non-territorial minorities are administered was detailed. This analysis showed that the solutions traditionally adopted for minorities and also their different categorizations do not precisely apply to Roma people, which, while being an historical minority, share some traits with the new ones, like the fact that, generally, they do not have citizenship. Building on these findings, we then moved to analyse the peculiarity of this minority and its history of discrimination and exclusion. We saw indeed, that Roma people arrived many centuries ago in the European continent, but they are still treated as foreigners and not accepted in the mainstream society. States have tried to address this issue by granting Roma people different status: from ethnic to national minority, to indigenous people and also others. However, they were mainly unsuccessful in their attempts, seeing how anti-Gypsyism is still a widespread phenomenon.

Having emphasized the limitations of the national regimes of minorities' protection, we then moved to the European level, taking into account the Council of Europe's instruments to protect minority's rights, in order to understand if they were best suited to protect minorities or if they had some limitations as well. In particular, we highlighted the main criticisms moved to the most important documents developed by the Council of Europe in this regard, as well as taking into account a program developed specifically to favour the integration of the Roma minority. What emerges from the analysis of these main instruments is that, while all the documents produced by the Council contain important provisions to protect minorities, there are still some limitations which may hinder their effectiveness.

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[546] DORN, HANCOCK, SARAKATSANNIS, VIRULEG (2020).

[547] Advisory opinion of the Permanent Court of International Justice, 31 July 1930, Series B, N.17, *Greco-Bulgarian Communities Case*.

In the case of the European Convention on Human Rights, the main drawback is that it does not directly address minority's rights, therefore reducing the overall protection offered. Also, other limitations are present, which concern the fact that States are sometimes allowed a too wide margin of appreciation and therefore they can decide to not apply, or apply partially, some of the obligations included in the Convention. This, coupled with the fact that few member States have ratified the additional Protocol on the prohibition of general discrimination may end up reducing the level of protection granted to minorities. Moreover, the effectiveness of the Convention has to be examined together with the ECtHR, the body which oversees its implementation. The Court appears to be overburdened with a heavy workload of cases, and therefore unable to judge over the controversies brought before it. This means that many problems remain without a solution and possible violations of rights may continue. Moreover, even in those circumstances in which a judgement is delivered, its implementation must not be taken for granted, since States may be unwillingly to implement the judgements and generally, more than five years can be necessary to comply with one. These problems, together with the growing scepticism towards international and European institutions, led the legitimacy of the Court to be doubted. However, the system composed by the Convention and the Court has been praised as the most successful system of transnational justice for the protection of human rights[548]. The FCPNM, the next document taken in analysis, has equally been praised for its importance, being the first multilateral treaty that details the right of minorities and States' obligations in this regard, while also being the first multilateral treaty on the protection of national minorities in Europe. However, unlike the ECHR, it does not contain specific rights but provisions which are programmatic in nature, progressive standards that States can realise through time. Moreover, some articles contain a weak wording, thus reducing the extent of States' obligations. Then, we analysed the ECRML, which has the merit of being the first and only international binding treaty concerning minority language protection. Even in this case though, some issues aroused: specifically, as for the FCPNM, the ECRML does not entitle groups nor individuals not any specific right, since its aim is that of protecting languages, not speakers. Moreover, only the languages chosen by the States can be included under the protection of the most substantive part of the Charter, further reducing its scope. Lastly, the analysis of the ROMED program showed the limits of an initiative of intercultural mediation which does not specifically address the topic of socio-spatial segregation. Therefore, what emerges from this analysis is the idea of an organisation which is trying to uphold the respect and the protection of minority's rights through the adoption of relevant and innovative documents, which have the potential of reaching their goals if some improvements are made.

Following this reflection, we then decided to dedicate a Chapter to the analysis of the protection granted by the ECtHR to the Roma minority, in order to understand more in depth which are the problems concerning this praised system of international justice. In this way, it was easier to understand which were the steps to take to improve the Court's approach toward Roma rights. While many rights may have been taken into analysis, we decided to focus on housing, education, health and cultural ones, since they are those fields in which Roma people are often discriminated. This analysis has shown that the Court faces a first important difficulty when dealing with these rights: aside from education, which is protected under Protocol I to the Convention, the other rights are not specifically mentioned in the text of the ECHR. However, the Court was not deterred by this fact, and tried to overcome this issue, so to

[548] GREER (2018: 126).

ensure greater protection to Roma people. Indeed, it derived the protection for housing, health and cultural rights from Article 8 ECHR, which enshrines the respect for private and family life. It did so through persistent litigation and extending the meaning of Article 8. In this way, it was able to affirm that forced evictions in *Yordanova and Others v. Bulgaria* and in *Connors v. The United Kingdom* were violating the respect of private and family life, and that forced sterilisation was against the same right in *V.C v. Slovakia*. Moreover, it tried to stop eviction procedures with the application of interim measures in Italy, a country where Roma camps are often evacuated without granting other accommodations to their settlers.

In the cases concerning Roma education rights, it found that Article 2 Protocol I was violated. What is interesting to observe and common to all the rights analysed, is that the Court did not start from the beginning to recognise such violations. For example, for what concerns the right to housing, we can see that in the first string of cases brought before it, the Court respected what was already recognised by national courts, and agreed that no right was violated. This is the same for cases concerning health, education and culture. The Court therefore seems to have modified its stance to enlarge the scope of protection granted to the Roma minority. This assumption is confirmed if other aspects are taken into account. All the specific decisions analysed in this dissertation indeed, include the use of a new instrument, or the presence of a new development which increased the protection of Roma minority. In the case taken in analysis for housing rights, we saw the inclusion of interim measures to suspend the applicants' eviction; in *Horvath and Kiss v. Hungary* the Court recognised the States' obligation to undo past discrimination and in *Connors v. The United Kingdom* it included a definition of Roma cultural identity more respectful of the diversity characterising this group. The only field in which fewer innovations were included is health rights, in which the Court has nonetheless found a violation of Articles 3 and 8, conforming its jurisprudence to those of other international bodies. Therefore, the Court seems to be on a steady path towards increasing protection of the Roma minority, not only finding a violation of Article 8, but also adopting other measures to better realise this aim. This behaviour bodes well for a future improvement of the protection granted by the ECtHR, notwithstanding all the difficulty and the issues pointed out.

In sum, this dissertation showed that, notwithstanding the impossibility of finding a commonly agreed definition of the term "minority", the Council of Europe developed a series of innovative and relevant documents to protect these groups. These measures are particularly important for the Roma minority, a community heavily discriminated. The instruments developed have been criticised as too weak and not apt to guarantee the protection of these groups. While it is true that some improvements could be made to foster their effectiveness, they often represent the first international legislative attempt to regulate the issue of minority's protection and have also been praised for their importance and the results that they have achieved. Analysing more in detail the regime of protection developed by the ECtHR in regard to the Roma minority, it clearly emerges an evolutionary attitude of this body, which is ready to adopt new measures supporting this community. The Court and the Council therefore, seem to be on a steady path to improve Roma rights and foster their inclusion in the mainstream society. If the Court were to maintain its evolutionary attitude ad address the issues underlined in this dissertation, Roma people may have more chances of finally being accepted in the European society.

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Summary

The current pandemic has exacerbated the already dire living conditions of minorities throughout Europe. Indeed, while COVID19 violently hit every country, some groups were particularly affected by it[549]. This is because minorities, among other groups, generally live in overcrowded settlements and may experience more difficulty in accessing healthcare services, all conditions which made the spread of COVID19 easier and more dangerous. At the same time, digital learning has been more challenging for those groups, and it seems that, compared to the other non-minority students, these communities have already loss more school hours, a lost which will have an effect on their future paths and careers[550]. Aside from these developments, episodes of racism against minorities have increased. At the beginning of the pandemic, it was the Asian community to be particularly targeted, being accused of spreading the virus. Then, throughout Europe, the general anti-minorities sentiment was reinforced and other groups were targeted, like Roma[551].

Seeing the critical situation in which minorities are, it is important to understand what measures can be implemented in order to strengthen the respect of their rights. In order to do so, it is necessary to understand what measures are in place. This dissertation aims at fulfilling this task, looking at minority protection in Europe. In order to do, we will start by analysing what exactly the term "minority" means, so that our analysis can be more precise. After a reflection on this term, it will be detailed how the Council of Europe protects this minority and lastly, the specific case of the European Court of Human Rights and the Roma minority will be analysed, to have a clearer understanding of how minority protection is granted in this case. Therefore, this dissertation will be able to show to what extent minority's rights are protected in Europe by the Council of Europe, with a specific focus on the European Court of Human Rights and the Roma minority. The idea of analysing the regime of protection developed by the Council is motivated by the fact that this organisation was created with the aim of protecting human rights in Europe, and, therefore, also minorities' ones. Being that minorities protection is a field which transcends the border of a single State, the approach developed by an international organisation was deemed more appropriate to analyse. The idea of selecting the Roma minority can be understood if we consider that this community is one of the most vulnerable, with many episodes of racism displayed against them notwithstanding the fact that they came to Europe many years ago and, by now, should be more integrated into the mainstream society. By analysing what has just been discussed, this dissertation will show what are the next steps to take in order to strengthen minorities' protection, an action even more necessary now that the pandemic has worsened their living conditions.

As anticipated, this dissertation starts with an analysis of what the term "minority" means. Notwithstanding the fact that minorities have been an issue in international law for a long time, no commonly agreed definition has been provided yet. However, many attempts have been made throughout the years. One of the first ones was that of the Permanent Court of International Justice[552], which already pointed out some elements found in later definitions of the term, namely the presence of different religious, linguistic or ethic characteristics that the group wishes to preserve. Subsequently, new

[549] DORN, HANCOCK, SARAKATSANNIS, VIRULEG (2020).
[550] *Ibidem.*
[551] Report of the Open Society Foundation, 2021, *Roma in the Covid-19 Crisis: An Early Warning from Six EU Member States*, p. 4.
[552] Advisory opinion of the Permanent Court of International Justice, 31 July 1930, Series B, N.17, *Greco-Bulgarian Communities Case*.

definitions were put forward, like the one proposed by the Subcommission on Prevention of Discrimination and Protection of Minorities. Then, after the publication of the International Covenant on Civil and Political Rights, a new study was commissioned to the Special Rapporteur Capotorti, who managed to write down the most widely accepted definition of minority to date, although not legally binding. This definition states:

> "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"[553].

As it can be seen, the definition both includes subjective and objective criteria. The latter include the presence of ethnic, religious or linguistic characteristics, which the subjective criterion is the desire to maintain these specific characteristics. In Capotorti's and the Sub-Commission's definition, a reference to the "non-dominant" position can also be found (objective criterion). By "non-dominant", it is not strictly intended a numerical inferiority, which, in Capotorti's definition is also explicitly mentioned, but being in a subordinated position for what concerns political power, social, cultural and economic status[554]. Another important element to underline is the specification "nationals of the State", which implies that only citizens can be recognised as part of the minority groups. However, the Human Rights Committee when addressing this issue has specifically recognised that also non-citizens can be recognised as part of a minority and granted the correspondent rights[555]. However, following international attempts to find a definition of the term maintained the criterion of citizenship, as in the Deschenes' definition, which is very similar to the Capotorti's one also in all its other elements. At the European level then, Worms, Rapporteur of the Council of Europe's Committee on Legal Affairs and Human Rights, proposed a definition of the term "national minority" which included all the main elements described above, as well as the criterion of citizenship[556]. Therefore, it seems unlikely that any further possible definition of minority may be very different from what already suggested by Capotorti, even though many criticisms have been moved to this attempt. For example, it has been underlined that the presence of ethnic religious or linguistic characteristics may be underinclusive, leaving out other categories in need of protection like people with disability[557]. However, to date, it seems that the quest for a binding definition has come to a halt. In its place, a pragmatic approach is being used, which allows to judge if a group can be considered a minority on a case-by-case basis. This is the approach followed in the Framework Convention on the Protection of National Minorities, where "it was decided to adopt a pragmatic approach, based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States"[558].

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[553] Study of the Special Rapporteur of the UN Subcommission on Prevention of Discrimination and Protection of Minorities, 1979, E/CN.4/Sub.2/384/Rev.1, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities.*

[554] PEJIC (1997: 671).

[555] General Comment of the UN Human Rights Committee, 8 April 1994, CCPR/C/21/Rev.1/Add.5, *General Comment N. 23: Article 27 (Rights of Minorities).*

[556] Report of the Special Rapporteur of the Parliamentary Assembly of the Council of Europe, 19 January 1993, Doc. 6742, 1403-15/1/93-2-E, *Report on an additional protocol on the rights of minorities to the European Convention on Human Rights.*

[557] SIMON (1997: 513).

[558] Framework Convention for the Protection of National Minorities, Strasbourg, 1 February 1995.

Although a common agreement over the meaning of this term seemed impossible to reach, it is easier to identify different types of minorities. Specifically, international law has identified four main categories: historical and new, territorial and non-territorial. Historical minorities are those that originated even centuries ago as a consequence of the redrawing of international borders: people with different ethnic characteristics could become citizens of a new State whose majority population did not match their own. These minorities have always been perceived as a threat by States' rulers, because of their differences. However, after the Peace of Westphalia, the problem intensified since the souverains feared that these elements could hinder the strengthening of their power over the newly born nation States. This was because minority's members could be considered part of the State, (that is of a political entity that exercises control over a territory whose boundaries are strictly identified) but not of the nation, i.e., of the community of people sharing common values and culture and/or religious, linguistic and ethnic characteristics[559]. The way in which minorities were treated also depended on how the concepts of nation and state had developed: in those countries in which the "State" was born before the idea of nation, minorities were more accepted, since the "nation" had to be more tolerant toward diversity, being that it had to include all the different groups of people living in the territory of the State[560]. However, in those States where the concept of nation was born before that of State, this idea had to be constructed not around the belonging to a certain well-defined and organized territory, which was missing, but on other elements common to all the population, namely culture and language. Therefore, it was more difficult to consider people with did not meet this requirement as part of the nation and, consequently, of the State[561]. In all cases though, a way to deal with the "minority issue" had to be found. In the end, three different approaches towards minorities could be identified. The first was granting protection to each member of these groups, recognizing, among others, also the right to express their own culture. The other two approaches took into account the link minority-territory and provided a territorial autonomy to those territorial historical minority who lived in a concentrated area and other forms of non-territorial autonomy which were deemed more useful for non-territorial minorities, which lived more sparsely. Indeed, another important classification of minorities revolves around them living in a single part of State, thus earning the name "territorial minorities", or living sparsely throughout this territory, thus labelled "non-territorial minorities". However, all the solutions created to deal with historical minorities, territorial or not, had some weaknesses. This situation further complicated when to historical minorities, new ones were added. New minorities, originated from the recent migration flows, may be different in their claims from historical ones, they may, for example, be more prone to integrate in the mainstream community and the relationship between the two minorities can be strained[562]. Furthermore, when they arrive in a new country there is also the issue of their protection: many States tend to not consider these new migrants as minorities, thus restricting the level of protection that they can claim.

While all these classifications are useful to understand the different problems concerning each minority and therefore, which are the best solutions to address them, it is also true that not all minorities neatly fit into these categories. This is especially true for Roma people, a minority which counts 10-12 million of people in Europe and that arrived in the continent around the

[559] MEMO (2012:15).
[560] MEMO (2012:16).
[561] *Ibidem.*
[562] KYMLICHA (2003: 278).

XV century[563]. Indeed, they are generally regarded as a non-territorial minority, due to their nomadic nature, and an historical one, since they have been living for a long time in the territories of many European States. However, they also share traits typical of the new minorities, since they are migrants who move throughout different countries[564], or at least some of them do, since others have abandoned the nomadic tradition. Some people have argued that this difficult categorisation is at the origin of the failure of States and international policies aimed at the integration of this minority into the mainstream society[565]. Indeed, this group, although part of the European society for a long time, has always struggled to integrate, and heavy distrust and reluctance towards them seem to be the predominant sentiments, so much so, that there is also a word to describe this phenomenon, "*anti-Gypsyism*". The anti-Roma attitude has strong historical roots and, today, racism against them is still widely accepted and does not carry the usual moral stigma associated with other forms of racism. Many attempts at their integration have been made throughout the years, but with little results. It has been pointed out that this may be due to the lack of citizenship, a condition common to many Roma. Indeed, citizens tend to enjoy a high protection under the law, notwithstanding the fact that also minorities can enjoy a specific regime of protection. However, although living in Europe for centuries, many Roma have not taken a permanent residence, rather moving around different countries, in line with their nomadic tradition. In Europe, only some States recognize Roma as their citizens, like Germany, where Roma people are granted the same rights of the other German citizens, Netherlands in which almost all Gypsies are of Dutch nationality, Greece, in which Greek citizens and Roma have equal status, and Hungary in which they are granted Hungarian citizenship[566]. Moreover, even possessing a citizenship does not protect this minority from episodes of discrimination and violence, that they still usually face. Aside from this issue, Roma have been awarded different legal status across the European States. They are either recognized as a national or an ethnic minority, in which the difference between these categorization blurs. In one case, they are recognized as a constitutional minority and in another one, as an indigenous people. Different types of legal status translate into different types of legal protection, some more enhanced than others. All of them though, do not seem to have put a stop to the episodes of violence and distrust against this community, nor seem to have improved their living conditions. Moreover, protection in law should also be compared to protection in fact. The implementation of the legislation has also to be carried out and not only remain on paper, as sometimes happens. It has also been argued that a regime of non-territorial autonomy would produce better results. This has been implemented in Hungary. However, as highlighted by a recent report, the situation of Roma has not improved, with this minority facing heavy difficulty in everyday life: actually, in some aspects, the situation has also worsened, like in the reduction of the barriers against justice[567].
Therefore, the different solutions adopted at the States level and the different regimes of legal protection implemented present some weaknesses.

[563] MCGARRY (2010: 12).
[564] MEMO (2012: 31).
[565] *Ibidem.*
[566] Report of the Committee on Legal Affairs and Human Rights, 19 April 2002, Doc. 9397 revised, *Legal situation of the Roma in Europe.*
[567] KIRÁLY, BERNÁTH, SETÉT (2021: 2). The report also underlines how women and children pay the highest toll of discrimination, with a highly percentage of children subjected to school segregation and with women discriminated also in the access to healthcare, a problem exacerbated by the current pandemic. Also, legal awareness among Roma people is very low, which means that most of the time they do not even know which are their rights.

Consequently, this analysis will now shift its focus to the international level, specifically, to the level of the Council of Europe, to see how this organisation deals with ensuring the protection of minorities' rights and more specifically, the Roma one. In order to do so, the mail legal instruments developed by this organisation will be analysed and their main weaknesses pointed out, so to understand where improvements can be made. Particularly, the documents taken into analysis will be the European Convention on Human Rights and the body responsible for its oversight, the European Court of Human Rights; the Framework Convention on the Protection of National Minorities; the European Charter for Regional and Minority Languages and the ROMED program, focused on the integration of the Roma minority.

One of the first criticisms moved to the European Convention on Human Rights is the fact that its text is largely protecting civil and political rights, leaving out economic, social and cultural ones, thus reflecting an outdated and limited vision of what human rights protection might significate. Other limitations that have been highlighted concern as well the scope of the rights included in the text. This is particularly true for what concerns minority rights, which are not protected by the European Convention on Human Rights ('ECHR') although they are a necessary piece of the puzzle of human rights protection. Other complaints refer to the way in which the Convention has been interpreted by the Court, namely how the doctrine of the margin of appreciation (which implies that States have some discretion in the application of the rights put forward by the Convention, so that they can decide not to apply, or apply partially, some of them) has been applied in a too wide way, or as the minimum standards are seen as the greatest effort that State should make, and not as the starting point they actually are[568]. Finally, criticisms have been moved to the Protocols to the Convention, particularly to Protocol 12, which includes a general prohibition of discrimination, but unfortunately has been ratified by few member States. Strictly linked to the criticisms moved to the ECHR, there are those moved to the Court. It is impossible indeed to analyse the first without the second, seeing how they are part of unique system which has also been praised as the most successful system of transnational justice for the protection of human rights[569]. Notwithstanding these facts, some limitations are still present. Specifically, in recent years, the criticisms moved to the ECtHR have been many, but they revolve around the same main issues: the high workload of cases, the implementation of the judgements mainly relying on States and the legitimacy of the Court itself. The first point refers to the fact that, each year, many complaints are lodged with the Court, so many that it would be impossible to deal with all of them. By way of example, in 2017, the number of cases that were still pending amounted to approximately 80000[570]. The second criticism refers to the period after the delivery of a judgement: the implementation of the sentences mainly relies on the same States that have been found guilty of a violation, with the Committee of Ministers simply monitoring their compliance, a system that has shown to not work perfectly: indeed, to date, many judgements are still to be implemented, even more than five years after their delivery[571]. This heavy workload and the long time required to implement a decision have been addressed by the Court itself, by developing a priority policy and with the creation of the *Interlaken* process, which consisted in a series of reforms aimed at speeding up the work of the ECtHR. Together with Protocol 14 to the Convention, which allowed cases to be assigned to smaller judicial

[568] ANDREADAKIS (2013: 1189).
[569] GREER (2018: 126).
[570] LEMMENS (2017: 23).
[571] STAFFORD (2019A: 1).

formations, these measures were thought to reduce the workload of the Court[572]. Notwithstanding these efforts though, it should be considered that this body is still overburdened with cases and it seems to have already slowed down its productivity. Moreover, another point of criticism concerns the legitimacy of the Court, which in recent years has been severely questioned, both because of the impossibility to deal with the main cases brought before it and because of the spread of neo-nationalist, neo-sovereigntist and anti-European movements. All the latter have in common the distrust toward an international organisation which they perceive as illegitimately imposing its authority to the detriment of national independence and sovereignty.

Moving one from this analysis, the next document taken into account will be the Framework Convention on the Protection of National Minorities ('FCPNM'). It is the first multilateral convention which spells in detail minority rights and the corresponding States' obligations, while also being the first multilateral treaty on the protection of national minorities in Europe. Moreover, it has been praised for its role in the development and codification of legally binding minority standards[573]. Notwithstanding these facts, the FCPNM still has limitations which various scholars have pointed out. Indeed, the text of this document has been accused of containing many judgements formulated with a too weak wording. Some of these are: at Article 9 the use of the term "*as far as possible*", in relation to the duty of States to ensure that minorities can create and use their own media; at Article 12, the wording "*where appropriate*" in relation to the measures States should establish in the field of education to ensure that minorities can have knowledge of their history and of the majority's one; and at Article 18, the wording "*where necessary*" in relation to the duty of the Parties to encourage other States to respect minority rights[574]. Moreover, the rights included are not immediate obligations to carry out, like in the case of the ECHR, but they are progressive standards, to be realised at a pace mostly set out by States themselves. In addition, they are not even justiciable, meaning that there is not a court like the ECtHR responsible for ensuring that States are meeting their obligations, thus depriving citizens of a way to actively gain respect for their human rights. The absence of an international judge is then coupled with the impossibility of relying on the rights protected by the Framework Convention in domestic courts. Indeed, the legal standards included in the document are not addressed specifically to minority groups but, rather, to States[575]. This is not necessarily a weakness, since there are other ways in which States' compliance can be assured, for example through an effective monitoring system. However, the one put in place by the FCPNM has its own problems, like the lack of transparency. Finally, another criticism moved to the FCPNM is that of not including a proper definition of the term minority, thus not clearly identifying who the Framework Convention is protecting. The Advisory Committee and the States have reached an agreement over this issue, leaving States to decide which groups fall under the scope of the Convention, while the Advisory Committee remains in charge of monitoring the entire implementation

[572] Report of the Council of Europe, November 2020, PREMS 049220, *The Interlaken Process*, p. 22.

[573] EIDE (2009: 120).

[574] Report of the Parliamentary Assembly of the Council of Europe, 8 November 2011, AJDOC46, *An additional protocol to the European Convention on Human Rights on national minorities,* p.8.*;* Framework Convention for the Protection of National Minorities, Strasbourg, 1 February 1995.

[575] Report of the Parliamentary Assembly of the Council of Europe, 8 November 2011, AJDOC46, *An additional protocol to the European Convention on Human Rights on national minorities,* p.8.

process[576]. Seeing the difficulty in finding a commonly accepted definition of the term minority, this solution appears to be a solid compromise. However, inevitably, some groups will be left out, especially new minorities.
After having analysed the issues relating to the FCPNM, the analysis will move to the European Charter for Regional or Minority Languages ('ECRML'). The ECRML is the first and only international binding treaty concerning minority language protection. It establishes a common legal framework for States to develop their language policies. One of the first criticisms moved to this Charter refers to the fact that, contrary to the ECHR, the ECRML does not entitle individuals nor groups to any specific right. This may seem a contradiction, but, actually, the protection of regional and minority languages cannot be achieved by only granting rights to the speakers of these linguistic communities. Indeed, the Charter manages to protect minority languages adopting a different solution, *i.e.*, setting out standards, which States are expected to reach. Consequently, the primary goal of protection is not minorities as groups or individual members belonging to them, but "*languages*" as a cultural phenomenon[577]. Therefore, speakers are not protected nor granted any additional rights. However, it remains a good instrument for the development of language policies. Aside from this, further criticisms have been moved. One of them refers to the ambiguities concerning the identification of minority or regional languages. This is particularly relevant for the general provisions contained in Part II of the Charter, which are always binding in their entirety for a State Party. However, drawing a line between a language and a dialect can be challenging. There are indeed, certain dialects that greatly differ from the language spoken at the national level and that may be considered as a language as well. At the same time, it is not always easy to determine what a "new migrant" is. Finally, the last criticism revolves around the fact that Part III of the Charter, the one including the most substantive provisions, can be applied only to those minority languages specifically chosen by each State. The articles mentioned in this Part are particularly relevant since they deal with topics like, education, cultural activities and facilities, judicial authorities, administrative authorities and public services, media, economic and social life[578]. Not only States can decide which languages include under Part III but they also have to pick only few obligations, not all those included in this Part, thus reducing the ECRML's scope of protection.
The last part of this analysis of the instruments used to protect minorities includes a reflection on the ROMED program, an intercultural mediation program developed to foster the integration of Roma communities. It is a non-binding instrument which however brought some positive results[579]. Among them, it is worth noticing the development of a training curriculum for mediators as well as a code of ethics to establish core principles to enhance service quality and practical tools for mediators[580]. Moreover, the ROMED program also helped member States improve their policies concerning Roma and Roma integration. Lastly, mediators gained some benefit in terms of training[581], but also in terms of recognition by public bodies of the worthiness of their work. However, there also some serious drawbacks. Some have criticised the idea of a program based entirely on *intercultural* mediation, arguing that "this framework occludes the broader socio-economic, political, and historical contexts which have contributed to the marginalization of the

[576] HOFFMAN (2006: 7-8).
[577] OETER (2018:72).
[578] European Charter for Regional or Minority Languages, 5 November 1992, Strasbourg.
[579] CLARK (2017: 2).
[580] CLARK (2017: 6).
[581] *Ibidem.*

Roma"[582]. Others, as the Roman sociologist Kyuchukov[583], pointed out that, while the program led to great results, one must consider the conditions in which mediators had to operate, which were precarious and characterized by low wages. Moreover, they were often used as a "buffer" by local institutions to avoid a direct contact with the Roma community[584]. This also translated in the fact that the Roma community and the majoritarian one continued to be detached from one another. The mediators were the only one bridging the gap, thus, in reality, in this way, the socio-spatial segregation of Roma continued. In sum, all the instruments developed by the Council of the Europe present some limitations that should be addressed. As a case study, this analysis will now move on to study more specifically which are the limitations that affect the way in which the ECtHR protects Roma rights. The ECtHR has been chosen for this analysis because it probably is the most important body of the Council. As for what concerns the choice of the Roma minority, it has already been highlighted how their vulnerability calls for a strong legal protection. The rights which will be analysed have been chosen because they represent those fields in which Roma face the higher discrimination, namely, housing, health, education and culture[585]. Starting from housing rights, we will analyse what is the topic taken into account, how Roma people are discriminated in this field and how the ECHR protects these rights. Then, a specific judgement will be chosen, highlighting the strengths and the weaknesses of the Court's reasoning.

By right to housing, we mean the right to have adequate standards of living, which include more than four walls and a roof. Indeed, we include living in houses which are safe, not overcrowded or substandard[586]. Moreover, they have to be cultural adequate, in the sense that houses must respect the expressions of cultural identity[587]. Unfortunately, Roma people are often discriminated in this field[588]. This is also because of the peculiar lifestyle which is often seen as characteristic of this minority, that is, nomadism, practiced living in caravans. The Convention does not expressly protect the right to housing, notwithstanding its importance. However, through the years, the Court managed to extend the meaning of Article 8, devoted to the protection of private and family life, to include also the right to housing. This was not done immediately, but through persistent litigation. The first cases concerning Roma and housing rights brought before the Court found no violation of any articles of the Convention. However, starting from *Connors v. The United Kingdom*, the judges started to find forced evictions of Roma people in breach of Article 8. In *Yordanova and Others v. Bulgaria*, the case taken in analysis, the Court found that the measure of forced eviction was too extreme and not "necessary in a democratic society"[589]. Furthermore, the Court noted that "the authorities have refused to consider approaches specially tailored to the needs of the Roma community", while they were supposed to

[582] KÓCZÉ (2019: 197).
[583] KYUCHUKOV (2012: 375).
[584] CLARK (2017: 7).
[585] PERIĆ (2012: 23); Report of the Centre for Reproductive Rights, 2003, *Body and Soul: Forced Sterilization and Other Assaults on Roma Reproductive Freedom in Slovakia*.
[586] Issue Paper of the Council of Europe, April 2008, Comm/HDIssuePaper 1, *Housing Rights: The Duty to Ensure Housing for All*.
[587] Factsheet of the United Nations High Commissioner for Human Rights, 2009, no.1, *The Right to Adequate Housing.*
[588] KELLEY and EDWARDS (2017: 183); Complaint to the European Committee of Social Rights, 18 March 2019, No. 178, *Amnesty International v. Italy*.
[589] Judgement of the European Court of Human Rights, 24 September 2012, 25446/06, *Yordanova and Others v. Bulgaria.*

take into account the vulnerability of this minority and act accordingly[590]. Moreover, for the first time, the Court applied Rule 39, delivering interim measures which stopped the eviction to be carried out while the judgement was pending, so to better protect the applicants. These important achievements highlight how the Court is adopting an evolutionary approach, implementing increasingly more measures to better protect Roma people and their housing rights. However, this decision still presents some drawbacks: particularly, notwithstanding the clear judgement of the Court, Bulgarian authorities continued to carry out forced evictions against Roma settlers. This led to another case been brought before the Court, *Aydarov and Others v. Bulgaria*, which, once again, concerned the forced eviction of Roma applicants. Moreover, as reported in the EOIA survey, between 2012 (the year in which the *Yordanova* case was judged) and 2016, Bulgarian authorities carried out 399 demolition orders related to houses owned by Roma families- 90% of all demolition orders issued in this period[591]. Therefore, the effectiveness of the judgements seems hindered by the State's authorities. Another important circumstance to take into account when discussing housing rights is the situation of Roma camps in Italy. Roma camps are spread throughout the country and they do not meet sanitary standards. In 2015 they were ruled illegal by the Civil Court of Rome, nonetheless they still exist and many Roma consider them their houses. Unfortunately, like in Bulgaria, very often evictions are carried out without granting the Roma with other accommodations. Recently, the Court applied in two forced eviction procedures interim measures, in one case to stop the eviction procedure, and in another to force the State to provide alternative settlements. Only in the second circumstance did the Italian authorities followed the Court's request. Moreover, wide ant-Roma sentiment is spread throughout the country and in 2008 what has been labelled as an anti-Roma law was approved. Therefore, both in Italy and Bulgaria the evolutionary approach of the Court seems hindered by national authorities. However, small improvements have been made and, by reiterating its evolutionary approach, the Court may further influence the authorities' behaviour.

After having analysed housing rights, we will now take into account health rights. The right to health contains various specifications and does not merely refer to having access to healthcare services and hospitals. It is an inclusive right, which also contains freedoms, like the right to be free from non-consensual medical treatment, such as medical experiments and research or forced sterilisation[592]. Since before the outbreak of the pandemic, Roma access to healthcare services was challenging: particularly, the lack of financial resources for high price medicines, treatment and transport constitutes significant obstacles for Roma who seek care. Moreover, very often, these people do not possess a birth certificate or other relevant documents, therefore they cannot access public services, including healthcare[593]. As a consequence, mortality rates are particularly high, as well as life expectancy at birth and infant mortality[594]. The Convention does not specifically protect health rights, but once again, the Court was able to identify Article 8 as covering this matter as well. The cases concerning health and

[590] Judgement of the European Court of Human Rights, 24 September 2012, 25446/06, *Yordanova and Others v. Bulgaria, para* 128.

[591] Memorandum of the European Society Foundation, February 2017, *Violations of EU Law and Fundamental Rights by Bulgaria's Discriminatory Treatment of Roma in the Area of Housing*, p. 10.

[592] Factsheet of the World Health Organization, 2008, no.31, *The Right to Health*.

[593] ALEXIADOU (2018: 264).

[594] Study of the European Public Health Alliance, December 2018, *Closing the Life Expectancy Gap of Roma in Europe*, p.5.

Roma people brought before the Court mainly rely on forced sterilisations of women. At the beginning, the Court could not find a violation of the Convention in this regard but with *V.C v. Slovakia*[595], the Court ruled that the sterilisation procedure was carried out without the free, prior and informed consent of the applicant and therefore this treatment amounted to a violation of Articles 3 and 8 of the ECHR. In this way, the Court aligned its jurisprudence to that of the Committee of the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'), which had ruled on a similar matter in 2006[596]. However, the Court still failed to consider a violation of Article 14 and, consequently, of the racist motive behind the sterilization procedure. The racist connotation was also confirmed by various reports which pointed out how Roma women were often subjected to this involuntary procedure in Slovakia[597].

After having analysed health rights, education rights will be taken into account. The right to education is widely recognised in many international documents but, notwithstanding the efforts of the international community to ensure that every child enjoys it, official statistics confirm that this right is often denied[598]. This is especially true for Roma children who, even when they manage to attend school, are faced with a further problem: a *de facto* segregation, since they are often placed in specific schools or classes attended only by Roma students[599]. The Court has tried to overcome this situation with a series of decisions that recognised as racist the separation of Roma children from non-Roma one. It did so by founding a violation of Article 2 Protocol I to the Convention, which specifically protects the right to education. In the analysed judgement, *Horvath and Kiss v. Hungary*[600], two important points were highlighted: the first is that statistical evidence can be used to determine the existence of discrimination, and the second is that the State has a positive obligation to undo past discrimination in the field of education. These points are fundamental steps forward in the jurisprudence of the ECHR and show once again how the Court takes an evolutionary approach in its judgments concerning Roma rights. However, the Court failed to recognise that what happened to Roma pupils was not only racist but amounted to segregation[601]. Therefore, even in this case, some steps forward need to be taken. Moreover, some problems with the implementation of this judgment have arisen: after 9 years, Roma students are still not adequately protected and Hungary has mostly failed to fulfil its obligations as prescribed by the Court[602], reducing the overall evolutionary stance of *Horvath and Kiss v. Hungary* and partially undermining the Court's effort.

Moving on from this subject, we will now analyse cultural rights and Roma cultural identity. Cultural rights are assisted by provisions aimed at protecting and preserving the culture of each specific community. Strictly linked to this

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[595] Judgement of the European Court of Human Rights, 8 February 2012, 18968/07, *V.C v. Slovakia.*

[596] Communication of the CEDAW Committee, 29 August 2006, C/36/D/4/2004, *A.S. v. Hungary.*

[597] Report of the Centre for Reproductive Rights, 2003, *Body and Soul: Forced Sterilization and Other Assaults on Roma Reproductive Freedom in Slovakia.*

[598] Statistics of the World Bank, 2019, *Education indicators: Out-of-school children of primary school age, both sexes (number).*

[599] Report of the European Roma Rights Centre, 2004, *Stigmata: Segregated Schooling of Roma in Central and Eastern Europe.*

[600] Judgement of the European Court of Human Rights, 29 January 2013, 11146/11, *Horvath and Kiss v. Hungary.*

[601] ARABADJIEVA (2016: 43).

[602] Communication of the Hungarian Government to the Council of Europe's Committee of Ministers, 25 June 2021, DH-DD 653, *Communication from Hungary concerning the case Horvath and Kiss.*

concept, there is the one of cultural identity: each individual is indeed defined also by the cultural group he belongs to, and he has the right to freely express this belonging. In the case of Roma people, this protection becomes extremely important. Their cultural identity is indeed perceived as very distinct from the one of other European peoples, leading to two main consequences: the first is that this cultural diversity must be preserved; the second is that a compromise between the Roma and non-Roma identities must be found, in order to realize a proper integration. However, in order to properly reach both of these goals, a clear understanding of what Roma's identity means should first be reached. The Court therefore, in order to protect Roma identity, has first to understand exactly what this term means and ensure that no harm is caused in this regard. Once again, the Convention does not specifically protect cultural rights, however, through different judgements, the Court started to interpret the right to respect for private and family life, enshrined in Article 8, as giving rise to a positive obligation of States to facilitate the Gypsy way of life[603]. In *Connors v. the United Kingdom*, the analysed case, the Court found a violation of Article 8 and, for the first time, it took into account the fact that Roma's cultural identity could also not coincide with nomadism, overcoming its previous idea which necessarily saw Roma as a travelling community[604]. In this judgment therefore, the Court seems able, to a certain extent, to win the double challenge presented above, namely ensuring the protection of Roma's lifestyle, while not constructing a wrong image of their cultural traditions. This judgement was the first to actually recognise the different lifestyle of the Roma community, thus showing once again the evolutionary approach of the Court which manages to strengthen the protection of Roma rights. However, the Court still holds some prejudices in this decision, for example considering *all* Roma as "weak" while not differentiating between the categories who need help the most, like children.

In sum, this dissertation showed that, notwithstanding the impossibility of finding a commonly agreed definition of the term "minority", the Council of Europe developed a series of innovative and relevant documents to protect these groups. These measures are particularly important for the Roma minority, a community heavily discriminated. The instruments developed have been criticised as too weak and not apt to guarantee the protection of these groups. While it is true that some improvements could be made to foster their effectiveness, they often represent the first and only international legislative attempt to regulate the issue of minority's protection and have also been praised for their importance and the results that they have achieved. Analysing more in detail the regime of protection developed by the ECtHR toward the Roma minority, it clearly emerges an evolutionary attitude of this body, that is ready to adopt new measures supporting this minority. Therefore, the Council, and the Court more specifically, seem to be on stable path toward better ensuring judicial protection to Roma people, while some aspects still need to be corrected and improved.

[603] Judgement of the European Court of Human Rights, 18 January 2001, 27238/95, *Chapman v. the United Kingdom*.

[604] Judgement of the European Court of Human Rights, 27 May 2004, 66746/01, *Connors v. the United Kingdom.*