The international supervision of the Swedish-speaking character of the Åland Islands – an examination of possible supervisory mechanisms

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Executive summary

The current examination deals with the possible international supervision of the Swedish-speaking character of the Åland Islands as expressed in Chapter 6 of the Åland Act on Autonomy. With the demise of the League of Nations the autonomy arrangement pertaining to the Åland Islands has lost its international guarantor and the possibility to lodge a petition with an international body. The author has been commissioned by the Committee Appointed to Reform the System of Self-Government in Åland to review different types of corresponding contemporary control mechanisms and to draw upon those in order to determine what kind of mechanisms can provide international protection for the Swedish-speaking character of the Åland Islands, under which conditions and to what effect. The mapping includes international non-adjudicative and adjudicative mechanism dealing directly or indirectly with language rights under the institutional roofs of (A) the United Nations (UN), (B) the Council of Europe (CoE), (C) the Organization for Security and Cooperation in Europe (OSCE) and finally (D) the European Union (EU). The mapping exercise allows for two main conclusions: a) there may be little added value in creating a new monitoring mechanism – the Swedish-speaking character of the Åland Islands can be and is indeed scrutinized by existing monitoring mechanisms, which can possibly be made greater use of in the future; b) if quasi-judicial or judicial protection is sought for a standard of protection corresponding to Chapter 6 of the Åland Act on Autonomy, inevitably a new international instrument elevating this piece of domestic legislation into the sphere of international law would have to be adopted. A range of options for the supervision of such an instrument are conceivable. Such arrangements would, however, run counter to the approaches currently dominating international human rights and minority rights law.

I. Introduction

In its Decision of 22 June 2015 the Committee Appointed to Reform the System of Self-Government in Åland (hereinafter the Åland Committee) has commissioned the current author to examine "the question of a new international and collective complaints mechanism and which international institution could be entrusted with such a task".[1]

The Decision specifies that the first part of the examination is to provide for a mapping of different types of corresponding control mechanisms (*kontrollmekanismer*). The second part is then to engage deeper with such international mechanisms that may serve as models for a possible future mechanism relating to Åland. Focus shall be on relevant mechanisms and such institutions/organizations of which Finland is a member. It is further specified that the author is to discuss whether the collective complaints mechanism (*kollektiv klagomålmekanism*) is to be of a political or legal nature. It is explicitly stated that the term 'mechanism' (and not 'instrument') is to be used as this reflects the terminology employed by the Åland Committee in in its preliminary report "Development of the system of self-government in Åland" (hereinafter preliminary report).[2]

The Decision further refers to the principles outlined under paragraph 11.4 of the Åland Committee's preliminary report. Paragraph 11.4 reproduces the relevant part of the Åland Agreement of 1921[3] as well as its implementation into domestic law at the time. It sketches the fate of the supervisory mechanism after the demise of the League of Nations (LoN) and in the course of earlier revisions of legal framework for Åland's autonomy. The question of a renewed implementation of the original guarantee concerning international supervision has remained alive, although unresolved, throughout the previous two revisions of the Act on Autonomy and has acquired force again in the framework of the latest and ongoing revision process. In its preliminary report, the Åland Committee concludes that the measures now sought to be enforced

[1] Justitieministeriet, *Den i Ålandskommitténs delbetänkande avsedda utredningen om en ny internationell och kollektiv klagomålsmekanism för att trygga Ålands svenskspråkiga status enligt språkbestämmelserna i självstyrelselagen och vilken internationell institution som kunde anförtros en sådan uppgift,* Presidiets beslut fattat i skriftligt förfarande, JM 60/08/2013 (22.6.2015).

[2] Justitieministeriet, *Ålands självstyrelse I utveckling*. *Ålandskommittén 2012 delbetänkande*, betänkanden och utlåtanden 6/2015.

[3] The Åland Islands Agreement before the Council of the League of Nations, V. Minutes of the Seventeenth Meeting of the Council, June 27th 1921, League of Nations Official Journal 1921, 701.

internationally are mainly such measures needed to protect Åland's Swedish-speaking status as set out in Chapter 6 of the 1991 Åland Act on Autonomy on language (and thus not the full set of international guarantees of 1921).[4] The three principles guiding future work then read as follows (author's translation):

- Individuals are encompassed by human rights and the individual complaint procedures connected to the human rights conventions.
- The reintroduction of international guarantees would be demanding, as this would require the cooperation of the states that had originally agreed on Åland's international status.
- The Committee is, however, positive to the inclusion of international mechanisms to safeguard Åland's Swedish-speaking status and intends to examine which international institution could be entrusted with such a task.[5]

The task here is to review existing mechanisms and draw upon those in order to determine what kind of mechanisms can provide international protection for the Swedish-speaking character of the Åland Islands, under which conditions and to what effect. This is of course not only a question of law. However, the current analysis is limited to an examination of what international law may have to say about the matter and cannot dwell upon other factors, such as what might be politically wishful and for whom.

Since World War II, international law has witnessed a proliferation of international bodies seized with the enforcement of international treaties in one way or the other. Indeed, the field is dynamic and exposes a high degree of innovation in institutional design. In imagining appropriate mechanisms inspiration can be drawn from a wide array of institutions, tailored to fit specific demands. The Åland Committee has, however, indicated some important limitations which narrow down the relevant frameworks. It has been specified that only those international governmental organizations of which Finland is a member state are ultimately relevant. We are looking primarily at (minority) language as the subject matter *ratione materiae* to be dealt with by the jurisdiction to be engaged and we are looking for a mechanism in

[4] Justitieministeriet, *supra* note 2, 98.
[5] *Ibid*.

which submissions or petitions lodged by a governing body of an autonomy regime (or possibly a group or representative thereof) are admissible *ratione personae*.

It is less certain what type of legal instrument the new supervisory mechanism is to interpret, apply, monitor or promote. The Åland Agreement of 1921 remains in force today, although views may diverge as to who constitute the parties to the Agreement. In his seminal work of 1973, Tore Modeen arrived at the conclusion that what has remained of the original arrangement is the bilateral treaty between Sweden and Finland.[6] Sia Spiliopoulou Åkermark argued in her report submitted to the Åland Committee on 27 October 2014 that Finland's obligations to comply with the Åland Agreement are obligations *erga omnes*, *i.e.* towards the international community as a whole, contracted by virtue of a unilateral declaration.[7] Both authors suggest that the material obligations are directed towards the Åland Islands, which Modeen considers has become a subject of international law with limited capacity upon the establishment of the autonomy regime.[8] However, as such it has been deprived of the original forum where it was to exercise its capacity. In 1950, the United Nations Commission on Human Rights found that "[t]he dissolution of the League of Nations has suspended the obligation contracted towards the League of Nations until such time as the United Nations, by an express decision, takes the place of the League of Nations in this respect."[9] The loss of the guarantor has not affected Finland or Sweden or any sovereign state for that matter (who have access *i.a.* to the principle UN organs and the International Courts of Justice) as much as the Åland Parliament, which has not received a remedy for the loss of its (indirect) right to petition to the Council of the League of Nations.

However, it can be gathered from the work of the Åland Committee thus far that today international supervision is not sought for the 1921 Agreement as such but rather for its contemporary expression as laid out in Chapter 6 of the Åland Act on Autonomy of 1991 (hereinafter Chapter 6).[10] Chapter 6 contains rights and duties pertaining to

[6] Tore Modeen, *De folkrättsliga garantierna för bevarandet av Ålandsöarnas nationella karaktär* (Skrifter utgivna av Ålands kulturstiftelse VII 1973), 171 *et seqq*.
[7] Sia Spiliopoulou Åkermark, *Ålands folkrättsliga ställning. Utredning av folkrättsliga frågeställningar för Ålandskommittén* 2013 (27 October 2014) 6.
[8] Modeen, *supra* note 6, 150; Spiliopoulou Åkermark, *supra* note 7, 12.
[9] United Nations Economic and Social Committee Commission on Human Rights, *Study of the Legal Validity of the Undertakings concerning Minorities*, E/CN.4/367 (7 April 1950) 69.
[10] Självstyrelselag för Åland FFS 1144/1991.

language addressing individuals as well as public bodies. In the latter case it provides *i.a.* for the competence of the Åland Government to determine the language of instruction in Åland schools but it also addresses the language to be used in correspondence between Åland and State authorities, thus not delimiting competences but regulating the way in which they are to be exercised. Notably, Chapter 6 does not address other issues central to the Åland Agreement as well as the current autonomy regime, such as land rights or franchise, which shall thus remain outside the scope of the present examination.

Finland has adopted international human rights obligations pertaining to language, including the use of minority languages in public affairs and in education.[11] However, Chapter 6 cannot be considered to coincide in its entirety with any set of the international obligations binding upon Finland. Many of the corresponding international standards are of a programmatic nature, thus less specific and difficult to enforce in a quasi-judicial or judicial setting. Francesco Palermo has very fittingly described the difficulty with language rights, in stating that "[l]anguage rights are at the same time the most basic and the most articulated rights of persons belonging to national minorities. They are basic, because the use of language is one of the first and most elementary claims of persons belonging to minorities, who to a large extent identify along linguistic lines. But they are also complex, because their implementation poses extraordinary practical and theoretical difficulties – just to mention one: language rights are individual rights (groups do not speak), but with an obvious and dominant group dimension, thus going to the heart of one of the most debated theoretical controversies on the very nature of minority rights. Language rights are also – and increasingly so – a governance issues."[12] The relationship between Finland's existing international legal obligations and Chapter 6 is certainly worth further analysis but exceeds the scope of the present examination, which is not to dwell upon the legal instrument under which

[11] For an overview of relevant international provisions see OSCE HCNM, *Explanatory Note to the Oslo Recommendations Regarding the Linguistic Rights of National Minorities* (1 February 1998); Robert Dunbar, 'Minority Language Rights in International Law' (2001) 50(1) The International and Comparative Law Quarterly 90-120; Fernand de Varennes, 'Linguistic Identity and Language Rights' in Marc Weller (ed.), *Universal Minority Rights. A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford University Press 2007), 253-323.

[12] Francesco Palermo, 'Addressing Contemporary Stalemate in the Advancement of Minority Rights: Commentary on Language Rights of Persons Belonging to National Minorities' in Marc Weller (ed.), *Universal Minority Rights. A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford University Press 2007) 121-140, 121.

a possible future supervisory mechanism is to operate. It should be noted, however, that any mechanism will ultimately be based on a legal instrument and lacking this piece of the equation adds an element of uncertainty to the current examination that cannot be ignored entirely.

II. Mapping

Part I shall rely in part on the work of Professor Cesare P.R. Romano who has devised a comprehensive categorization of what he calls the 'international judiciary' or 'international rule of law institutions'.[13] Romano uses these terms rather broadly. His 'taxonomy of international rule of law institutions' includes courts, monitoring bodies as well as other types of mechanisms. Romano has produced a valuable visualization over his taxonomy, which has been adapted in figure 1 below to highlight the mechanisms of particular relevance here.[14]

What all international rule of law bodies and procedures have in common is that they apply international legal standards, act on the basis of pre-determined rules of procedure and that at least one of the parties to the case they decide, or situation they consider, is a state or an international organization.[15] The most basic distinction Romano then makes is between non-adjudicative and adjudicative means, the main difference being that the former do not produce legally binding outcomes and may be composed of government representatives (although in many cases they are in fact composed entirely of independent experts). Zooming in on the categories displayed in figure 1, human rights mechanisms have been highlighted as particularly relevant mechanisms, both at the UN and at regional levels, as minority rights and minority language rights fall under the scope of their jurisdiction *ratione materiae*. This holds true both for 'treaty-based mechanisms' and for 'charter-based mechanisms', an additional distinction made by Asbjørn Eide and employed here to further distinguish between the different types of non-adjudicative bodies (where applicable).[16] According

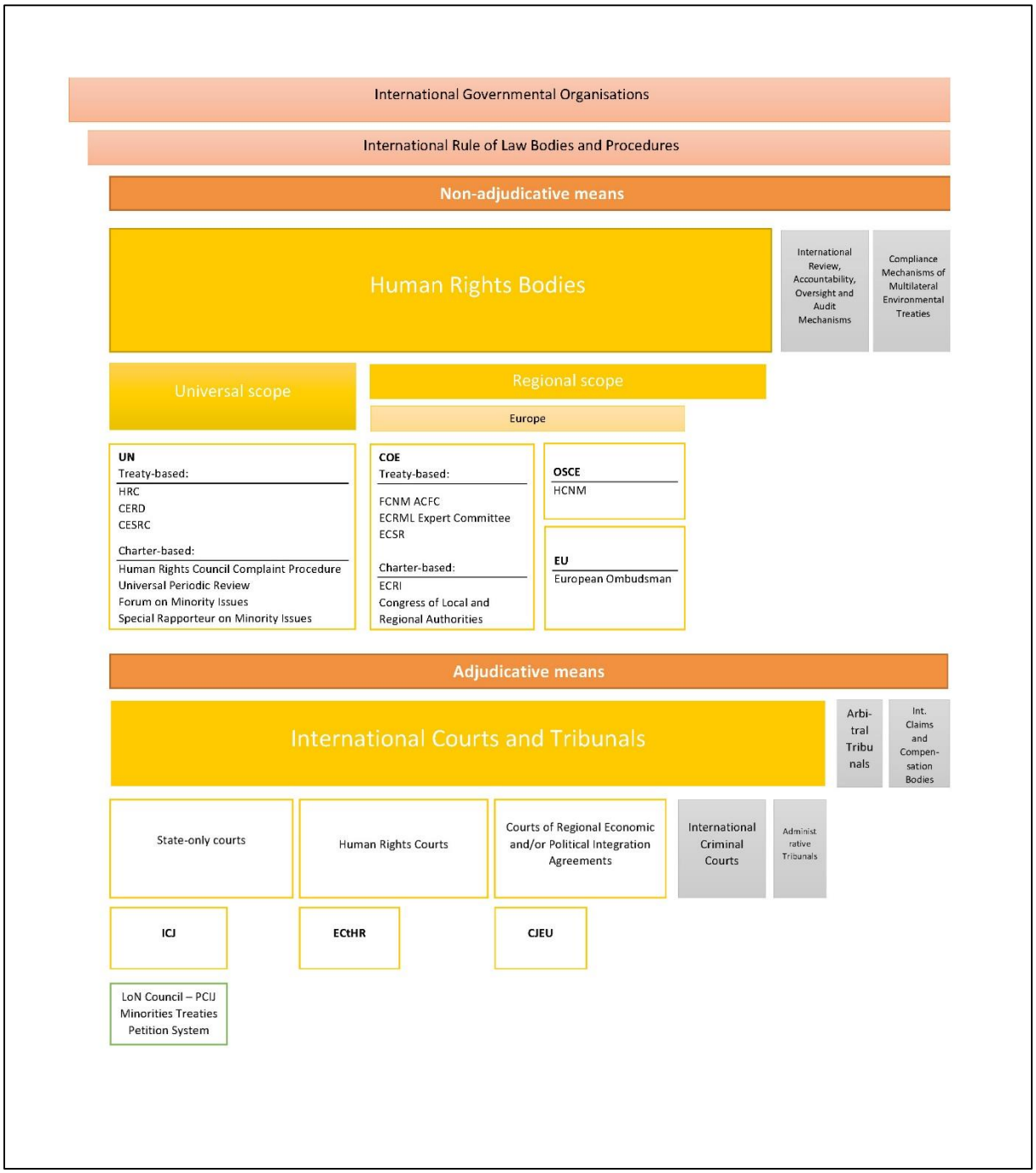
[13] Cesare P.R. Romano, 'A Taxonomy of International Rule of Law Institutions' (2011) 2(1) Journal of International Dispute Settlement 241-277.
[14] *Ibid.* 246 *et seq*.
[15] *Ibid.* 251.
[16] Asbjørn Eide, 'Introduction: Mechanisms for Supervision and Remedial Action' in Marc Weller (ed.), *Universal Minority Rights. A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford University Press 2007) 1-26, 13 *et seq*.

to Eide, “[a] treaty-based mechanism is one which is provided for in a specific treaty, and where the main outlines of its mandate and procedures are set out.”[17] A charter-based mechanism in contrast is “a mechanism established on the basis of what is considered to be the inherent power of the organisation under the UN Charter.”[18] A charter-based mechanism can be established through a resolution by a competent body, adopted a majority vote, and may thus not be backed by the consent of all member states.[19] The distinction between treaty- and charter-based converges largely with the distinction between legal and political, the implications of which shall be discussed further in part III below.[20]

Moving from the abstract to the concrete, in the following the *modus operandi* of the most relevant non-adjudicative and adjudicative mechanisms under the institutional roofs of (A) the United Nations (UN), (B) the Council of Europe (CoE), (C) the Organization for Security and Cooperation in Europe (OSCE) and finally (D) the European Union (EU) shall be presented briefly. Certainly, the Nordic region and the institutional framework for Nordic cooperation, the Nordic Council and the Nordic Council of Ministers, constitute an important regional integration framework for Finland and Åland. However, it is neither equipped with non-adjudicative nor adjudicative mechanisms, which is why it shall remain irrelevant for the purposes of mapping.

[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*

Figure 1. Categorization of international rule of law institutions



A. The United Nations

1. Non-adjudicative mechanisms

a) Treaty-based mechanisms

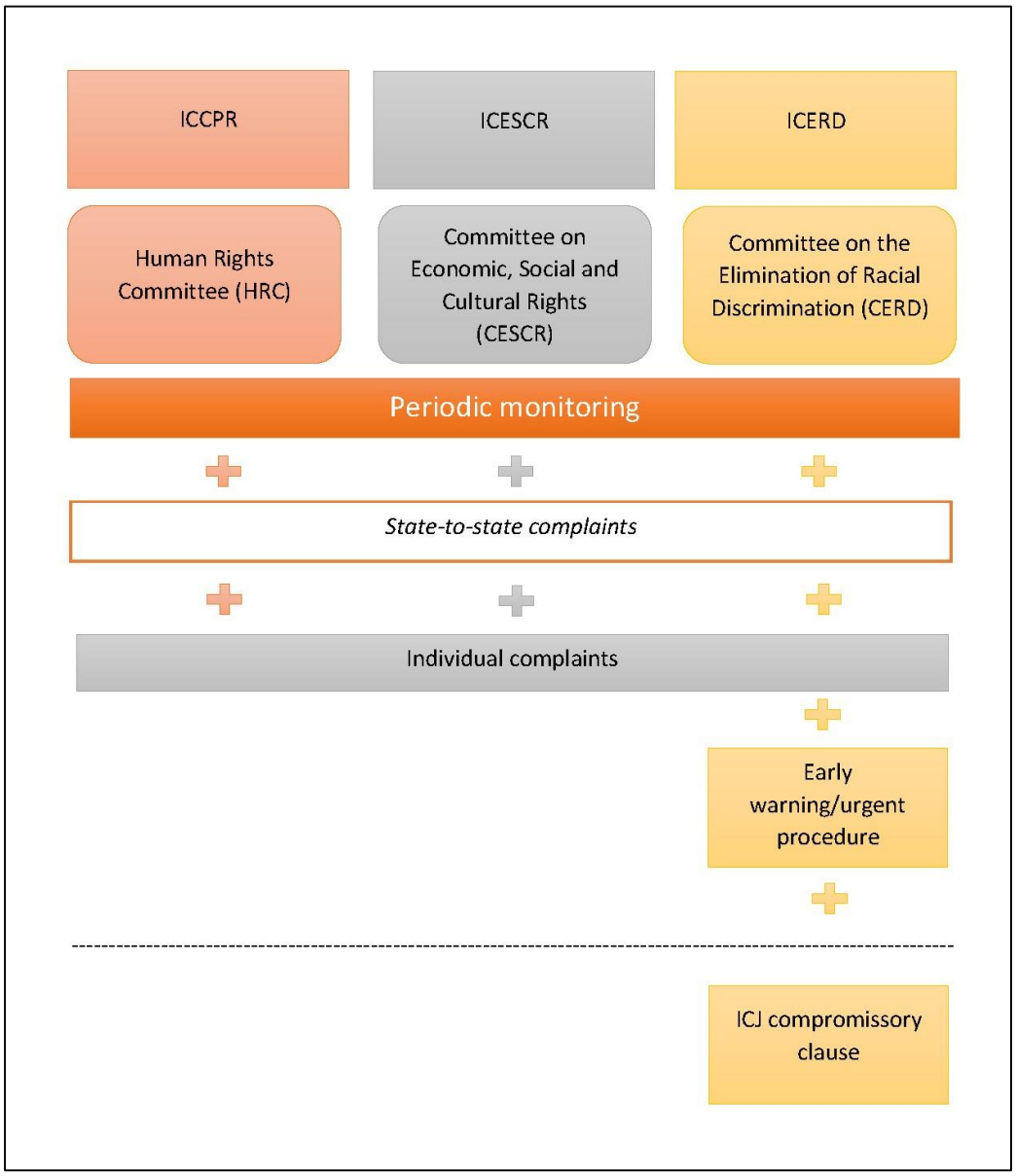
(1) The Human Rights Treaty Bodies

There are nine core human rights treaties at the UN level, each equipped with an expert committee, either by virtue of the treaty itself or by virtue of an optional protocol. Each of the expert committees is seized with monitoring the implementation of the respective treaty by its state parties, which in turn means that all state parties are under the obligation to submit regular reports addressing the measures taken to implement the treaty during the reporting period. Although optional and not yet in force in all cases, all Treaty Bodies can in principle be entrusted with examining individual complaints. Treaty Bodies function largely according to the same procedures when it comes to periodic monitoring and complaint procedures. Some may be equipped with additional competences, *i.e.* to consider inter-state complaints, conduct own-initiative inquiries or to engage in early warning or early action.

In the following, based on the proximity of their subject-matter jurisdiction to the issue at hand, the expert committees established under the International Covenant for Civil and Political Rights (ICCPR),[21] the International Covenant on Economic Social and Cultural Rights (ICESCR)[22] and the International Convention for the Elimination of All forms of Racial Discrimination (ICERD)[23] shall be examined more closely (see figure 2).[24]

[21] International Covenant on Civil and Political Rights, adopted on 16 December 1966, entered into force on 23 March 1976, 999 UNTS 171.
[22] International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3.
[23] International Convention on the Elimination of All Forms of Racial Discrimination, concluded on 7 March 1966, entered into force on 4 January 1969, 660 UNTS 195.
[24] Finland has ratified ICERD in 1970 and the ICCPR and the ICESCR in 1975.

Figure 2. UN Human Rights Treaty Bodies



Monitoring: The Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of Racial Discrimination (CERD) each consist of eighteen experts, who examine periodic reports

to be submitted by state parties at regular intervals.[25] The exact reporting obligations are phrased slightly differently in each treaty but are in essence concerned with the measures adopted by each state party to implement the respective treaty. [26] The expert committees examine state reports in what is called a 'public constructive dialogue' with a delegation of the relevant state party.[27] After the conclusion of the dialogue the committees adopt concluding observations, which are consensus comments on positive and negative aspects of a state party's implementation of the respective treaty.[28] Concluding observations contain suggestions and recommendations, which are non-binding but serve as indicators for the state parties as to how to improve the implementation of the respective treaty. The monitoring procedures also include an either formal or informal follow-up stage.[29] Civil society actors and National Human Rights Institutions play an important role by submitting own reports and providing the monitoring bodies with information not curated by the state parties.[30]

Individual complaints: In addition to their periodic monitoring activities, the HRC, the CESCR and CERD may consider communications submitted by individuals or *groups of individuals* given that the state party in question has accepted the respective complaint procedure.[31] While the relevant provisions differ slightly in their phrasing, all require the complainants to be victims of a violation of a right established under the respective treaty and the prior exhaustion of domestic remedies.[32]

Complaints submitted on behalf of minority groups have proven a contentious issue. Being representative bodies formed by their constituents through democratic

[25] Cf. Art. 8 CERD; Arts. 28 , 32, 38 ICCPR; ECOSOC, *Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Res 1985/17 (28 May 1985).
[26] Art. 40(1) ICCPR, Art. 16(1) ICESCR, Art. 9(1) ICERD; A review of the Treaty Bodies with the aim to strengthen and harmonize the system has been initiated.[26] As of yet, practices vary, as *e.g.* the length of reporting cycles, see UN General Assembly, *Strengthening and enhancing the effective functioning of the human rights treaty body system*, A/RED/68/268 (21 April 2014).
[27] Eide, *supra* note 16, 18 *et seq*.
[28] UN Office of the High Commissioner for Human Rights, *Human Rights. Civil and Political Rights: The Human Rights Committee*, Fact Sheet No. 15 (Rev.1), 19.
[29] UN Office of the High Commissioner for Human Rights, *The United Nations Human Rights Treaty System*, Fact Sheet No. 30 (Rev. 1), 49 *et seq*.
[30] *Ibid*. 43.
[31] Finland has ratified the Optional Protocol to the ICCPR (ICCPR-OP1) in 1975, the Optional Protocol to the ICESCR (ICESCR-OP) in 2003 and has submitted a declaration under Art. 14 ICERD accepting the competence of CERD to receive and consider communications from individuals or groups of individuals within its jurisdiction in 1994.
[32] Art. 2 ICCPR-OPI; Arts. 2 & 3(1) ICESCR-OP; Art. 14(1) & (7)(a) ICERD.

processes, the governing bodies of the Åland autonomy are first and foremost public bodies and thus far no such body has made an attempt to submit a complaint to the HRC, the CESCR or CERD, so that we cannot rely on the committees' jurisprudence in order to establish whether *e.g.* a regional parliament can represent a *group of individuals*. The closest equivalent are complaints submitted to the HRC by representatives for groups, such as leaders of indigenous groups as trustees of their peoples or groups whose autonomy is not necessarily recognized by the state under whose sovereignty they live. There are a range of cases concerning Canadian First Nations, in which a captain or chief has been considered as an authorized representative acting on behalf of his people.[33] Certainly, if a case was brought by a representative for the self-governing bodies of the Åland autonomy, e.g. the Speaker of the Åland Parliament, authorization may not present a major obstacle. It would nonetheless remain for the representative to prove that the group he or she represents is a victim of a violation of the ICCPR.

In *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, the individual complainants represented the Rehoboth Baster Community, a community that had been officially self-governed, a status lost with the independence of Namibia in 1990.[34] The case concerned multiple issues, including the lack of language legislation in Namibia, which the complainants considered had denied them the use of their mother tongue in administration, justice, education and public life.[35] Civil servants had been instructed not to reply to the complainants' written or oral communications with the authorities in Afrikaans, even when perfectly capable of doing so, whether in issuing public documents or in telephone communications.[36] The HRC found this to be a violation of Art. 26 ICCPR (non-discrimination) and provided that under Article 2, paragraph 3(a) ICCPR, Namibia "is under the obligation to provide the authors and the other members of their community an effective remedy by allowing its officials to respond in other languages than the official one in a nondiscriminatory

[33] See e.g. *Lubicon Lake Band v Canada*, Communication No 167/1984, CCPR/C/38/D/167/1984 (26 March 1990); Harriet Ketley, 'Exclusion by Definition: Access to International Tribunals for the Enforcement of the Collective Rights of Indigenous Peoples' (2001) 8 International Journal on Minority and Group Rights, 353 *et seqq*.

[34] *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, Communication No. 760/1997, CCPR/C/69/D/760/1997 (6 September 2000), para. 2.

[35] *Ibid.* paras. 3.4 & 3.5.

[36] *Ibid.* para. 10.10.

manner."[37] It shall be further reflected on the implications of the HRC's case law for the issue at hand in part III below.

Own-initiative inquires: The CESCR may in addition conduct own-initiative inquires by virtue of a state party's declaration to that effect.[38] If the Committee receives reliable information indicating grave or systematic violations by a state party of any of the economic, social and cultural rights set forth in the Covenant, it shall invite that state party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.[39]

Inter-state complaints: The ICCPR, ICERD and the Optional Protocol to the ICESCR entrust the respective committees with competences to consider inter-state complaints.[40] These complaint procedures are optional and have never been used. Under ICERD and the ICCPR the respective provisions foresee the committees to first provide their good offices, after all domestic remedies have been exhausted, and the establishment of an ad hoc Conciliation Commission as a subsequent option.[41] ICERD also contains a compromissory clause granting jurisdiction to the International Court of Justice (see UN adjudicative mechanism below).

Early warning/urgent procedures: CERD may employ early warning measures and urgent procedures directed at preventing existing problems from escalating into conflicts.[42] In essence, these procedures aim at engaging the state party in question through requesting information, expressing specific concerns along with recommendations for action and through offering support.[43]

(2) Others

The UN maintains numerous specialized agencies, which cannot all be made subject of the current analysis. However, it is valuable to take a brief look at the United Nations Organization for Education, Science and Culture (UNESCO) which hosts a number of

[37] *Ibid.* para. 12.
[38] Art. 11 of ICESCR-OP, Finland accepted the inquiry procedure in 2014.
[39] Art. 11(2) ICESCR-OP.
[40] Art. 10 ICESCR-OP (a declaration accepting the CESCR's competence of the committee to receive and consider inter-state communications has been made upon ratification), Arts.11-13 ICERD, Arts. 41-43 ICCPR.
[41] Arts. 41-42 ICCPR; Arts. 11-12 ICERD.
[42] CERD, *Guidelines for the Early Warning and Urgent action Procedures,* Annual report A/62/18, Annexes, Chapter III.
[43] *Ibid.* para 14.

international agreements, including the 1960 Convention against Discrimination in Education.[44] UNESCO exercises similar monitoring functions as the Human Rights Treaty Bodies, however, with some subtle but interesting differences.

Within the framework of UNESCO the Committee on Conventions and Recommendations (CR) is entrusted with the monitoring of state reports under the UNESCO conventions.[45] In its monitoring functions the CR currently covers two conventions and 14 recommendations, including the Convention against Discrimination in Education.[46] The CR may also examine individual complaints relating to cases and questions concerning the exercise of human rights in UNESCO's fields of competence. Complaints must originate from a person or a group of persons who are victims of an alleged violation of any of the human rights falling within UNESCO's competence in the fields of education, science, culture and information. It may also originate from *any person, group of persons or organization having reliable knowledge of those violations*.[47] The communication must indicate whether an attempt has been made to exhaust available domestic remedies.[48] Communications which warrant further consideration shall be acted upon by the CR with a view to helping to bring about a friendly solution designed to advance the promotion of the human rights falling within UNESCO's fields of competence.[49] Of 597 complaints considered between 1978 and 2015, 381 had been settled successfully, with the remaining cases having been inadmissible, suspended or pending.[50] The remedies achieved include *i.a*. the obtainment of previously denied passports, grants or diplomas by minorities.[51] Notably, the complaint procedure does not demand for ratification of states but applies by virtue of the UNESCO Executive Board's decision to all UNESCO member states. The

[44] Convention against Discrimination in Education, entered into force 22 May 1962, 429 UNTS 93; Finland ratified the Convention on 18 October 1971.
[45] A general reporting obligation is contained in Art. XIII UNESCO Constitution.
[46] UNESCO, *Specific multi-stage procedure for the monitoring of the implementation of UNESCO conventions and recommendations for which no specific institutional mechanism is provided*, adopted by the Executive Board at its 177th session (177 EX/Decision 35 I) and amended at its 196th session (196 EX/Decision 20).
[47] UNSCO, *Study of the procedures which should be followed in the examination of cases and questions which might be submitted to UNESCO concerning the exercise of human rights in the spheres of its competence, in order to make its action more effective: Report of the Working Party of the Executive Board* (104 EX/3), para. 14(a)(ii).
[48] *Ibid*. para. 14(a)(iv).
[49] *Ibid.* para 14(k).
[50] UNESCO, *2nd aspect of the terms of reference of CR: examination of the communications relating to cases and questions concerning the exercise of human rights in UNESCO's fields of competence*.
[51] *Ibid.*

UNESCO framework also provides explicitly for conciliation and good offices and for the possibility of the states concerned to further pursue the matter before the ICJ if no amicable solution can be reached. [52]

b) Charter-based mechanism

In addition to treaty bodies, the UN human rights apparatus includes a range of charter-based mechanisms, which are less pre-occupied with monitoring the implementation of specific (and thus rather narrow) treaty obligations. These may be described as political mechanisms. Such mechanisms include the confidential complaints procedure under the Human Rights Council, the Universal Periodic Review, working groups and special procedures.

(1) Human Rights Council complaint procedure

The complaint procedure under the Human Rights Council (not to be confused with the Human Rights Committee) is meant to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances and is thus not linked to one specific treaty.[53] A complaint may be submitted by a person or a group of persons claiming to be the victims of violations of human rights and fundamental freedoms, *or by any person or group of persons*, including non-governmental organizations, after all domestic remedies have been exhausted.[54] The complaint is then examined by the Working Group on Communications and the Working Group on Situations.[55] One of the situations considered in recent years pertained to religious minorities in Iraq, where the Human Rights Council decided to discontinue the consideration of the situation and recommended that the Office of the United Nations High Commissioner for Human

[52] Protocol Instituting a Conciliation and Good Offices Commission to be responsible for seeking the settlement of any dispute which may arise between States parties to the Convention against Discrimination in Education; Finland has not ratified the Protocol but the Commission may nonetheless be engaged if both states in question consent *ad hoc* according to Art. 13.
[53] UN Human Rights Council, *Institution-building of the United Nations Human Rights Council*, A/HRC/RES 5/1 (18 June 2007), para. 85.
[54] *Ibid.* para 87(d) and (g).
[55] *Ibid.* paras. 91 *et seqq*.

Rights provides Iraq with technical cooperation, capacity-building, assistance and advisory services.[56]

(2) The Universal Periodic Review

The Universal Period Review (UPR) is also conducted under the auspices of the UN Human Rights Council. It was established in 2006 and is thus a relatively young mechanism, having become operative only in 2008.[57] The UPR is essentially a peer review process, where a UN member states is reviewed periodically by the other member states as to the fulfilment of its human rights obligations.[58] The states carrying out the review submit recommendations to the state under review, which may respond before the Human Rights Council adopts a final outcome report.[59] The state report submitted for the subsequent cycle will then focus *i.a.* on the implementation of the recommendations received previously.[60] It is a cooperative process which shall complement and not duplicate the work of the Treaty Bodies.[61] Statistics produced by UPR Info reveal that minority rights rank eighth among the most frequent recommendations made thus far during the first two monitoring cycles.[62] Minority issues were also addressed in the recommendations made to Finland in both, the first and second monitoring cycles, none, however, was directly concerned with the Åland Islands or the use of Swedish.[63]

[56] UN Human Rights Council, *Report of the Human Rights Council on its Twentieth Session*, A/HRC/20/2 (3 August 2012), para. 212.
[57] UN General Assembly, *Human Rights Council*, GA/RES/60/251 (3 April 2006), para. 5(e); Elvira Domínguez-Redono, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session' (2008) 7(3) *Chinese Journal of International Law* 722.
[58] UN Human Rights Council, *Institution-building of the United Nations Human Rights Council*, A/HRC/Res/5/1 (18 June 2007), Annex para. 1.
[59] *Ibid.* para. 28.
[60] *Ibid.* para. 34.
[61] *Ibid.* para 5(e).
[62] UPR Info, *Database of UPR Recommendations*, at < http://www.upr-info.org/database/statistics/>.
[63] Cf. UN Human Rights Council, *Universal Periodic Review. Report of the Working Group on the Universal Periodic Review*. *Finland*, A/HRC/8/24 (23 May 2008) & *Report of the Working Group on the Universal Periodic Review. Finland*, A/HRC/21/8 (5 July 2015).

(3) Working Groups

From 1995 to 2006 the UN maintained a Working Group on Minority Issues,[64] which was replaced by the Forum on Minority Issues in 2007.[65] The Forum constitutes a platform for promoting dialogue and cooperation on issues pertaining to persons belonging to national or ethnic, religious and linguistic minorities. It is open to the participation of states, United Nations mechanisms, bodies and specialized agencies, funds and programmes, intergovernmental organizations, regional organizations and mechanisms in the field of human rights, national human rights institutions and other relevant national bodies, academics and experts on minority issues and non-governmental organizations in consultative status with the Economic and Social Council as well as other non-governmental organizations whose aims and purposes are in conformity with the spirit, purposes and principles of the UN Charter.[66] It provides thematic contributions and expertise to the work of the Special Rapporteur on Minority Issues and identifies and analyses best practices, challenges, opportunities and initiatives for the further implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, a non-binding instrument adopted by the General Assembly in 1992.[67] As a result of its annual session, each devoted to a particular theme, the Forum publishes a list of recommendations. The first session of the Forum in 2008 focused on minorities and the right to education.

(4) Special Procedures

The Special Procedures of the UN Human Rights Council comprise special representatives, special rapporteurs and independent experts with mandates to report to and advise the Human Rights Council from a thematic or country-specific perspective. Within their specific mandates many of these procedures deal with minority issues and touch upon language rights. The special rapporteurs and representatives and the independent experts operating as Special Procedures compile

[64] UN ECOSOC, *Rights of persons belonging to national or ethnic, religious and linguistic minorities*, Resolution 1995/31 (25 July 1995).
[65] UN Human Rights Council, *Forum on Minority Issues*, A/HRC/RES/19/23 (10 April 2012).
[66] *Ibid.* para. 6.
[67] *Ibid.* para. 5; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the UN General Assembly on 18 December 1992, GA Res. A/Res/47/135.

joint communication reports that are regularly submitted to the Human Rights Council, where allegations of human rights violations concerning minorities tend to be numerous.

There is no special rapporteur dealing explicitly with autonomy, self-governance or language. Closest to the question at hand are the activities of the Special Rapporteur on Minority Issues (formerly independent expert) and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. Part of the mandate of the Special Rapporteur on Minority Issues is to promote the implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[68] The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities is the most comprehensive minority rights instrument within the UN framework, it is non-binding however. The measures at the Special Rapporteur's disposal are communications to states based on information gathered from a variety of sources, including States, expert bodies, United Nations' agencies, regional and other inter-governmental organizations, NGOs and other civil society organizations; her annual reports to the Human Rights Council, which may include thematic studies; and country visits undertaken at the invitation of governments.[69] The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance employs largely the same measure in order to carry out his mandate,[70] which is constituted of a rather long list of specific issue areas, such as the efficiency of the measures taken by Governments to remedy the situation of victims of racism, racial discrimination, xenophobia and related intolerance.[71]

2. Adjudicative mechanisms

(1) The International Court of Justice

[68] UN Human Rights Council, *Mandate of the Independent Expert on minority issues*, A/HRC/RES/25/5 (11 April 2014.
[69] See webpage of the Special Rapporteur on Minority Issues, at <http://www.ohchr.org/EN/Issues/Minorities/SRMinorities/Pages/SRminorityissuesIndex.aspx>.
[70] Human Rights Council, *Mandate of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, A/HRC/RES/7/34 (28 March 2008), para. 2
[71] *Ibid.* Para. 2(b).

The International Court of Justice (ICJ) is the principle judicial organ of the UN.[72] A distinction is made between the Court's contentious jurisdiction (which results in binding judgements) and its advisory jurisdiction. The ICJ's contentious jurisdiction is open to all state parties to its statute.[73] The Court may deliver an advisory opinion at the request of whatever body may be authorized to do so by or in accordance with the Charter of the United Nations.[74] Such authorization is limited to the General Assembly, the Security Council and the Economic and Social Council as organs of the UN as well as a number of UN agencies [75] While the Security Council and the General Assembly may ask for an advisory opinion on *any legal question*, other organs and agencies may ask legal question arising within the scope of their activities.[76] Unlike judgments in contentious proceedings, advisory opinions have no binding effect.

There are essentially four bases for the Court's contentious jurisdiction. Compromissory clauses have been mentioned above as one such basis. These are clauses in international agreements providing for the jurisdiction of the ICJ. Such clauses can be found in in a multitude of international agreements.[77] ICERD for example stipulates in Art. 22 that "[a]ny dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement." Compromissory clauses such as Art. 22 ICERD can thus require the exhaustion of certain other remedies as a procedural bar to the ICJ's jurisdiction. [78] Sates may further make a declaration recognizing the jurisdiction of the court as compulsory *ipso facto*,

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[72] Art. 92 Charter of the United Nations (hereinafter UN Charter), concluded on 26 June 1945, entered into force on 24 October 1945, 1 UNTS XVI.
[73] Art. 35 Statute of the International Court of Justice, concluded on 24 October 1945.
[74] Art. 69(1) UN Charter.
[75] Webpage of the ICJ, *Jurisdiction. Organs and Agencies of the United Nations Authorized to Request Advisory Opinions* at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2&p3=1>
[76] Art. 96(2) UN Charter.
[77] Webpage of the ICJ, *Jurisdiction. Treaties* at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=4>.
[78] In 2008 Georgia invoked Art. 22 in an application instituting proceedings against the Russian Federation in respect of a dispute concerning Russia's actions in and around the territory of Georgia. While the ICJ was able to agree to the existence of a dispute between the parties on a subject-matter capable of falling under ICERD, the applicant failed to demonstrate an attempt to negotiate these matters as required by Art. 22 ICERD so that the Court did not have jurisdiction to consider the case on the merits, see *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* Preliminary Objections, Judgement of 1 April 2011.

agree to refer a case to the Court by special agreement or accept the jurisdiction after a case is filed against it. [79] Sweden and Finland, for example, have both recognized the ICJ's compulsory jurisdiction and have thus agreed to submit to the jurisdiction of the ICJ should one of them decide to bring a case against the other before the Court.

B. Council of Europe

1. Non-adjudicative mechanisms

Similar to the UN, the Council of Europe hosts a number of treaty- and charter-based non-adjudicative mechanisms which follow rather similar procedures as the corresponding UN bodies when it comes to monitoring.

a) Treaty-based mechanisms

(1) Monitoring under the FCNM and the ECRML

Among the binding treaties concluded under the auspices of the CoE are the Framework Convention on National Minorities (FCNM) and the European Charter for Regional and Minority Languages (ECRML).[80] It is the state parties to the FCNM and the ECRML that decide on the scope of application of the treaties. Finland did not submit a declaration as to the scope of application upon ratification but has consistently applied the FCNM to the Sami, the Roma, the Jews, the Tatars, the Old Russians, the Swedish-speaking Finns and in the last two monitoring cycles also reported on the application of the FCNM with regard to Karelian speakers. The Karelian language was included in the scope of application of the ECRML in 2009, next to Saami, Swedish and Romanes. The ECRML does not apply in whole to all of these languages, however, as the Charter is based on a so-called ratification system. State parties are obliged to apply Part II of the ECRML to all regional and minority languages spoken on its

[79] Art. 36 Statute of International Court of Justice.
[80] Framework Convention for the Protection of National Minorities, adopted on 1 February 1995, entered into force on 1 February 1998, ETS No. 157; European Charter for Regional or Minority Languages, adopted on 5 November 1992, entered into force on 1 March 1998, ETS No. 148; Finland has ratified the FCNM in 1997 and the Convention entered into 1998. The ECRML was ratified by Finland in 1994 and entered into force in 1998.

territories while in respect of each language specified at the time of ratification a party may chose further provisions according to the principles set out in the ECRML.[81]

Monitoring: The implementation of the FCNM and the ECRML by the state parties is monitored by bodies of independent experts, namely the Advisory Committee on the Framework Convention (ACFC) and the Committee of Experts of the European Charter for Regional and Minority Languages. Both monitoring bodies adopt opinions on periodic state reports, whereupon the state parties may in turn submit comments before the CoE Committee of Ministers adopts resolutions/recommendations. Reporting under the FCNM takes place every five years[82] and under the ECRML every three years.[83] Both processes incorporate elements of dialogue with states and other stakeholders, *i.a.* through country visits[84], as well as follow-ups, such as roundtable discussions or follow-up seminars in the respective country.[85]

(2) The European Committee on Social Rights

The European Social Charter (ESC)[86] is the counterpart of the European Convention on Human Rights (ECHR)[87] (which is protected by an adjudicative mechanism) in the sphere of economic and social rights.[88] The ESC resembles the ECRML in that a state party may chose the provisions it is willing to accept under the conditions set out in the ESC.[89] The ESC may not be of immediate relevance *ratione materiae*, however, its monitoring mechanism is equipped with some interesting traits.

Monitoring: The ESC is monitored by the European Committee of Social Rights (ECSR). The reporting intervals under the ESC depend on whether a state party has

[81] Art. 2 ECRML.
[82] CoE Committee of Ministers, *Rules Adopted by the Committee of Ministers on the Monitoring Arrangements under Articles 24 to 26 of the Framework Convention for the Protection of National Minorities,* Resolution (97) 10 (17 September 1997), para. 21.
[83] Art. 15 ECRML.
[84] The ACFC very first country visit was to Finland, which had invited the ACFC to visit in 1999.
[85] Further on dialogue see Antti Korkeakivi, 'The Role of Dialogue in the Monitoring Process of the Framework Convention' in Tove H. Malloy and Ugo Caruso (eds.), *Minorities, their Rights, and the Monitoring of the European Framework Convention for the Protection of National Minorities* (Martinus Nijhoff 2013) 81-89.
[86] European Social Charter, adopted on 18 October 1961, entered into force on 26 February 1965, ETS No. 35.
[87] European Convention on Human Rights and Fundamental Freedoms, dated 4 November 1950, ETS No. 5.
[88] The ESC has been revised in 1996, when new rights where added to the Charter and the collective complaints mechanism originally provided for by an additional protocol was integrated into the Charter. The new revised version is to replace the 1961 ESC gradually as more states ratify the new instrument. Finland ratified the revised ESC in 2001.
[89] Art. 20 ESC.

also ratified the optional protocol providing for a collective complaints mechanism. States which have not done so report every year on one of the four thematic areas of the ESC. States that have accepted the collective complaint procedure submit simplified reports every second year. At the end of each reporting cycle the CoE Committee of Ministers adopts a resolution which may contain recommendations to the state party.[90]

Collective complaints: In addition to the examination of periodic reports, the ECSR monitors compliance also by examining collective complaints in respect of those state parties that have ratified either the 1995 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints or the revised ESC which entered into force in 1999. Complaints may be lodged by the following social partners and other non-governmental organizations: (a) international organizations of employers and trade unions referred to in paragraph 2 of Article 27 of the Charter; (b) other international non-governmental organizations which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee; (c) representative national organizations of employers and trade unions within the jurisdiction of the state party against which they have lodged a complaint.[91] Any contracting state may also declare that it recognises the right of any other representative national non-governmental organization within its jurisdiction which has particular competence in the matters governed by the Charter, to lodge complaints against it.[92] Different from the UN Human Rights Treaty Bodies' complaint procedures, the ECSR may thus consider complaints of collective entities specified in advance. If the ECSR considers that the ESC has not been applied in a satisfactory manner in a specific case, the Committee of Ministers adopts a recommendation addressed to the state party concerned.

[90] See webpage of the CoE, *European Social Charter. The Reporting System: an overview* at < http://www.coe.int/en/web/turin-european-social-charter/reporting-system>,
[91] Art. 1 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.
[92] *Ibid.* Art. 2(1).

b) Charter-based mechanism

(1) The European Commission against Racism and Intolerance

The European Commission against Racism and Intolerance (ECRI) is a body under the CoE charged with reviewing member states' legislation, policies and other measures to combat racism, racial discrimination, xenophobia, antisemitism and intolerance, and their effectiveness, in light of the European Charter of Human Rights, its protocols and related case law.[93] ECRI's statutory activities include country monitoring, work on general themes and relations with civil society.[94] ECRI may organize consultations with interested parties and may be seized directly by non-governmental organizations on any questions covered by its terms of reference. [95] ECRI has granted observer status (without the right to vote) to the Parliamentary Assembly of the Council of Europe, the Congress of Local and Regional Authorities of the Council of Europe and the European Union.[96]

Unlike under the CoE treaty-based mechanisms, periodic reports are not drawn up by states. Instead, ECRI itself draws up periodic reports containing its factual analysis, suggestions and proposals as to how each country may deal with the problems identified. ECRI further conducts contact visits to all CoE member states once within each five year cycle and engages in a confidential dialogue with each member states before it publishes a final report containing the ECRI's recommendations.[97] ECRI regularly draws attention to the situation of minorities as victims of racism and intolerance.[98]

(2) Congress of Local and Regional Authorities

The CoE Congress of Local and Regional Authorities is not a body of independent experts but a pan-European assembly with 648 members representing local and

[93] Art. 1 Statute of the European commission against Racism and Intolerance as annexed to Resolution Res(2002)8 on the statute of the European Commission against Racism and Intolerance, adopted by the Committee of Ministers on 13 June 2002 at the 799th meeting of the Ministers' Deputies (hereinafter ECRI Statute).
[94] Art. 10 ECRI Statute.
[95] Art. 6(2) & (4) ECRI Statute.
[96] See webpage of ECRI at <https://www.coe.int/t/dghl/monitoring/ecri/about/observers_en.asp>.
[97] Art. 11 ECRI Statute.
[98] Cf. CoE ECRI, *Compilation of ECRI's general Policy Recommendations*, CRI(2014)17, Strasbourg, March 2014.

regional authorities from all of the 47 CoE member states. The Congress has drawn up the European Charter of Local Self-Government, which entered into force in 1988.[99] The Charter is a binding treaty recognizing the principle of local self-governance and aimed at guaranteeing the political, administrative and financial independence of local authorities. According to the Charter, local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.[100] The Congress monitors local and regional self-government through regular general country-by-country monitoring missions;[101] the examination of a particular aspect of the Charter; fact-finding missions to look into specific cases of concern; and the observation of local and regional elections.[102] Unlike under the FCNM and ECRML, state parties are not obliged to submit periodic reports. While the Charter does neither address language nor territorial autonomy, the Congress considers the ECRML as one of its reference texts[103] and has adopted recommendations concerning territorial autonomies and national minorities, also addressing the use of regional and minority languages.[104] In its recommendations on Finland the Congress has noted that "for historic reasons and because of their specific situation, the Åland Islands have a special status which complies with the principles laid down in the Council of Europe Reference Framework for Regional Democracy,"[105] a CoE code of rights and duties more particularly geared to regional self-government (as opposed to local). There is no monitoring mechanism linked to the Reference Framework for Regional Democracy.

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[99] European Charter of Local Self-Government, adopted on 15 October 1985, entered into force on 01 September 1988, CETS No.122; Finland ratified the Charter of Local Self-Government on 3 June 1991.
[100] Art. 3(1) European Charter of Local Self-Government.
[101] CoE, Congress of Local and Regional Authorities, *Procedures for monitoring the obligations and commitments entered into by the Council of Europe member states in respect of their ratification of the European Charter of Local Self-Government,* Resolution 307 (2010) Revised (18-20 October 2011).
[102] CoE Congress of Local and Regional Authorities, *Observation of local and regional elections – strategy and rules of the Congress*, Resolution 306 (2010) (18 June 2010), see also webpage of the CoE Congress of Local and Regional Authorities, *Activities. Monitoring* at <http://www.coe.int/t/congress/Activities/Monitoring/default_en.asp?mytabsmenu=3>.
[103] Webpage of the CoE Congress of Local and Regional Authorities, *Texts* <http://www.coe.int/t/congress/texts/conventions/conventions_en.asp?mytabsmenu=6>.
[104] CoE Congress of Local and Regional Authorities, Recommendation 43 (1998) on territorial autonomy and national minorities (27 May 1998) and Resolution 52 (1997) on Federalism, Regionalism, Local Autonomy and Minorities (3 June 1997).
[105] CoE Congress of Local and Regional Authorities, Recommendation 311(2011) Local and regional democracy in Finland (18 October 2011), para. 4(h).

While falling at best marginally under the review of the Congress of Regional and Local authorities, it is interesting to note that minority issues are not entirely left to the 'human rights' tire of the CoE but is appears also under the tire of 'democracy'. Under the CoE's third tire 'rule of law', it is primarily the European Commission for Democracy through Law (Venice Commission) which has occasionally dealt with minority and language rights when providing legal advice to its member states.[106]

2. Adjudicative mechanisms

(1) The European Court of Human Rights

The European Court of Human Rights (ECtHR) is a judicial body under the CoE established by the European Convention for the Protection of Human Rights and Fundamental Freedoms and entrusted with the protection of the individual rights laid out therein.[107] Since the amendment of the ECHR by Protocol 11 in 1998, the Court considers both individual and inter-state complaints, the former of which was previously entrusted in the now abolished European Commission of Human Rights.[108] Although the Commission is now defunct, it is noteworthy that under its original mandate it acted as an intermediary between individuals and the Court. Its task was to examine whether cases submitted were well-founded, and if so it was tasked first and foremost to broker a friendly settlement.[109] If unsuccessful, the Commission was to forward the case to the CoE Committee of Ministers. If the state in question had accepted the compulsory jurisdiction of the ECtHR, the Commission and/or a contacting state could refer the case to the Court.[110] This now historic procedure resembled the petition system under the League of Nations minority treaties, which shall be briefly discussed in part III below.

Today, the ECtHR may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of

[106] The only opinion of the Venice Commission pertaining to Finland was issued in 2008 and concerns the Constitution of Finland, Venice Commission, *Opinion on the Constitution of Finland*, Opinion No. 420 / 2007 CDL-AD(2008)010 (7 April 2008).
[107] Art. 19 ECHR.
[108] William A. Schabas, *The European Convention on Human Rights. A* Commentary (Oxford University Press 2015) 734 et seq.
[109] Art. 28 ECHR of 1950.
[110] Art. 49 ECHR of 1950.

the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.[111] Governmental organizations can thus not submit an application to the court. The ECtHR has clarified that "[t]he term 'governmental organisations', as opposed to 'non-governmental organisations' applies not only to the central organs of the State, but also to decentralised authorities that exercise 'public functions', regardless of their autonomy vis-à-vis the central organs; likewise it applies to local and regional authorities."[112] The Court has further explained that "the idea behind this principle is to prevent a Contracting Party acting as both an applicant and a respondent party before the Court".[113] Submissions of an *actio popularis* character are inadmissible[114] and group applications have been found to necessitate the individual identification of all members.[115] The Court may only deal with a matter after all domestic remedies have been exhausted.[116] The final decisions of the courts are binding.[117]

In the case of *Birk-Levy v. France* the applicant complained that representatives of the Assembly of French Polynesia, a French autonomous oversees entity, "were prohibited from expressing themselves in Tahitian, and contended that the obligation to speak French in the assembly chamber amounted to discrimination both against her and against all Polynesians, who used Tahitian on an everyday basis, relying on Articles 10 (freedom of expression), 11 (freedom of assembly and association) and 14 (prohibition of discrimination)."[118] The ECtHR "reiterated that the European Convention on Human Rights did not guarantee 'linguistic freedom' as such, or the right of elected representatives to use the language of their choice when making statements and voting within an assembly,"[119] thereby confirming its longstanding opinion that the ECHR cannot be invoked to guarantee the language of one's choice in administrative matters.[120]

[111] Art. 34 ECHR.
[112] *Radio France and Others v. France,* application no. 53984/00, admissibility decision (3 September 2009), para 26.
[113] *Islamic Republic of Iran Shipping Lines v. Turkey,* application no. 40998/98, ECHR 2007-V (13 September 2007), para. 81.
[114] Schabas, *supra* note 108, 737 et seq.
[115] Ketley, *supra* note 33, 346.
[116] Art. 35 ECHR.
[117] Art. 46 ECHR.
[118] *Birk-Levy v. France*, application no. 39426/06, Press Release no. 727 (06.10.2010), 1.
[119] *Ibid.* 2.
[120] Cf. *Fryska Nasionale Oartij and Others v. The Netherlands*, application no. 11100/84 (12 December 1985).

The ECtHR also has an advisory jurisdiction, which can be called upon in very limited circumstances. It is thus hardly comparable with the advisory jurisdiction of the ICJ or the yet broader advisory jurisdiction of the Inter-American Court of Human Rights (IACtHR), which can deliver advisory opinions regarding the interpretation of the American Convention on Human Rights *or of other treaties concerning the protection of human rights in the American states*.[121] The CoE Committee of Ministers can request advisory opinions on legal questions concerning the interpretation of the ECHR and its Protocols.[122] Such opinions shall, however, not deal with any question relating to the content or scope of the rights or freedoms defined in in the ECHR or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings, such as questions of admissibility.[123] Thus far, the ECtHR has delivered two advisory opinions, both concerning the election of judges to the Court.[124] In 2013, Protocol No. 16 to the ECHR was adopted, an optional protocol extending the Court's advisory jurisdiction to cover what is reminiscent of requests for a preliminary ruling under the European Court of Justice (ECJ). Protocol No. 16 will allow the highest courts and tribunals of the member states, to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto, in the context of a pending case.[125] At the time of writing six states had ratified the instrument, including Finland. The Protocol will enter into force upon 10 ratifications.[126]

[121] Art. 64 American Convention on Human Rights, concluded on 22 November 1969, entered into force on 18 July 1978, O.A.S.T.S. No. 36, 1114 UNTS 123.
[122] Art. 47(1) ECHR.
[123] Art. 47(2) ECHR; Kanstantsin Dzehtsiarou and Noreen O'Meara, 'Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket control' (2014) 34(3) Legal studies 446.
[124] ECtHR, Advisory Opinion of 12.02.2008 on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights; ECtHR Advisory Opinion (no. 2) of 22.01.2010 on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights; The Court did not consider itself competent under its advisory jurisdiction to consider the coexistence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the ECHR, which had raised the CoE Parliamentary Committee's concern as possibility incompatible legal instruments, see ECtHR, Decision of 02.06.2004 on the competence of the Court to give an advisory opinion.
[125] Art. 1 Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 2 October 2013, CETS. No. 214.
[126] *Ibid.* Art. 8.

C. The OSCE

(1) HCNM

The Office of High Commissioner for National Minorities (HCNM) was established by the Organization for Security and Cooperation in Europe (OSCE) in 1992 to provide early warning and, as appropriate, early action with regard to tensions involving national minority issues.[127] The HCNM acts in confidence and independently of all parties directly involved in the tensions and conducts much of her work by means of quiet diplomacy with little publicity.[128] The HCNM may collect and receive information regarding the situation of national minorities and the role of parties involved therein from any source, including the media and non-governmental organizations.[129] Governments of OSCE participating States, including, if appropriate, regional and local authorities in areas in which national minorities reside are considered parties directly concerned and can thus provide specific reports to the High Commissioner and with whom the High Commissioner will seek to communicate in person during a visit to a participating State.[130] In addition to assistance and structural support, the HCNM has also published a number of thematic recommendations, including the Oslo Recommendations regarding the Linguistic Rights of National Minorities and the Hague Recommendations Regarding the Education Rights of National Minorities, non-binding documents that have proven instructive in advising states on the implementation of core minority rights standards.

D. The European Union

1. Non-adjudicative mechanisms

With the adoption of the Treaty of Lisbon and the European Charter of Fundamental Rights in 2010, the EU has adopted a more coherent framework for the protection of fundamental rights. The EU Charter for Fundamental Rights is addressed to the institutions and bodies of the EU, with due regard for the principle of subsidiarity, and

[127] CSCE Helsinki Document 1992: the Challenges of Change, 1992 Summit, Helsinki, 9 - 10 July 1992, chapter II, para. 3.
[128] *Ibid.* para 4.
[129] *Ibid.* para. 23.
[130] *Ibid.* para. 26(a)

the national authorities only when they are implementing EU law.[131] The Charter protects *i.a.* the right to good administration, including the right to write to the institutions of the Union in one of the languages of the EU Treaties and to receive an answer in the same language.[132] It is important to note that the Charter does not extend or modify the field of application of Union law or any powers or tasks of the EU.[133] It does thus not mitigate the fact that the EU does not yield a well-defined minority rights mandate. According to Article 2 of the Treaty on the European Union (TEU), the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. The Treaty on the Functioning of the European Union (TFEU) and the Charter for Fundamental Rights prohibit discrimination on the grounds of membership of a national minority.[134] However, the framework of the European Union does neither encompass coherent guidelines or indeed legislation nor specific institutions focusing on minority issues as such. The EU's multilingualism policy, while striving to protect linguistic diversity, focusses largely on its second aspect – the promotion of language learning.[135]

The European Fundamental Rights Agency is tasked with collecting and disseminating objective, reliable and comparable data on the situation of fundamental rights in all EU countries within the scope of EU law. However, it does neither carry out systematic monitoring nor does it consider complaints.

The European Parliament Intergroup for Traditional Minorities, National Communities and Languages is to date the only forum within the EU that is explicitly devoted to exchanging ideas and views on the situation and future of traditional minorities, national communities and languages.[136] Intergroups are not parliamentary bodies and do thus not express the EP's official opinions. Nonetheless, they are a way for Members of the European Parliament (MEP) to engage and the Intergroup for Traditional Minorities, National Communities and Languages currently engages more

[131] Art. 51(1) European Charter of Fundamental Rights, OJ C 326 (26.10.2012) 391–407.
[132] *Ibid.* Art. 41(4).
[133] *Ibid.* 51(2).
[134] Rt. 18 TFEU, OJ C 326 (26.10.2012) 47–390 & Art. 21(1) European Charter of Fundamental Rights.
[135] European Commission, *Multilingualism: an asset for Europe and a shared commitment* , communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, /* COM/2008/0566 final */ (18 September 2008).
[136] Kinga Gál, Davyth Hicks & Kata Eplény, *Traditional Minorities, National Communities and Languages. The issues raised by the European Parliament's Intergroup, 2009-2011* (Kinga Gál 2011) 6.

than 60 MEPs.[137] In April 2014 the Intergroup adopted the Strasbourg Manifesto on the protection of national minorities and languages within the framework of the European Union.[138] The 21 points of the Manifesto address some of the major shortcomings of the current EU framework with regard to minority protection. The Manifesto advocates for a more coherent EU policy and calls for the establishment of an effective mechanism to monitor and ensure fundamental and acquired rights of minorities in candidate countries and in states already admitted to the European Union. Another call to improve the protection of persons belonging to national and linguistic minorities and to strengthen cultural and linguistic diversity in the EU has been made by the Minority SafePack Initiative, a European Citizens' Initiative (ECI) submitted to the European Commission by a high profile citizens' committee on 15 July 2013.[139] An ECI is an initiative, signed by one million eligible signatories, inviting the Commission to propose legislation on matters where the EU has competence to legislate. [140] The European Commission rejected the initiative in September 2013 as it considered the proposal to fall manifestly outside the framework of its powers.[141] The Citizens' Committee for the Citizens' Initiative Minority SafePack has brought an action for annulment against the Commission before the Court of Justice of the European Union which has not yet been decided.

The pressure on the EU to step up its commitment to minorities may thus be increasing. However, in light of the EU's current crisis a swift reform of the organization's approach to minority issues cannot be expected.

(1) The European Ombudsman

The only EU body where complaints concerning language can be lodged is the European Ombudsman. Any citizen of the Union and any natural or legal person

[137] See webpage of the European Parliament at <http://www.europarl.europa.eu/pdf/intergroupes/VIII_LEG_23_Traditional_minorities_20150624.pdf
[138] See webpage of the European Free Alliance at <http://www.e-fa.org/fileadmin/user_upload/documents/Studies_on_EFA_and_other_texts/Strasbourg_Manifesto_Intergroup.pdf>
[139] Minority SafePack – one million signatures for diversity in Europe, see webpage of Federal Union of European nationalisities at <https://www.fuen.org/fileadmin/user_upload/main-activities/MSPI/MSPI-Safepack-EN-mit-aufkleber_260215.pdf>.
[140] Article. 11(4) TFEU; Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, OJ 2011 L 65 (11 March 2011).
[141] European Commission, letter of rejection, C (2013)5969 final (13.9.2013).

residing or having its registered office in a member state has the right to refer cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role, to the European Ombudsman.[142] A complaint can be submitted to the Ombudsman directly or through a Member of the European Parliament.[143] City councils, municipalities and regional ombudsmen have qualified as complainants, which has led Paul Craig to argue that "it is reasonable to believe that national governments and state authorities […] are entitled to launch a complaint with the European Ombudsman."[144] *Actio popluaris* are admissible and a complainant does not need to show individual concern.[145] The ombudsman may also conduct own-initiative inquires.[146] The Ombudsman has considered numerous complaints concerning the use of language by institutions, bodies, offices or agencies of the Union.[147] Notably, the Ombudsman is not competent to examine the use of languages in the domestic administrations of the member states.

2. Adjudicative mechanisms

(1) The Court of Justice of the European Union

The Court of Justice of the European Union (CJEU) is made up of the General Court, the Civil Service Tribunal and the Court of Justice (ECJ).[148] The ECJ has jurisdiction in a number of actions, brought by and against different entities. It extends to proceedings against member states for failure to fulfil an obligation under EU law, brought either by another member states[149] or by the Commission (after an attempt to resolve the matter).[150] It further has jurisdiction in proceedings against EU institutions on grounds of lack of competence, infringement of an essential procedural

[142] Art. 228(1) TFEU, Art. 43 European Charter of Fundamental Rights.
[143] Paul Craig, *EU Administrative* Law(Oxford University Press 2012) 744.
[144] *Ibid.* 743.
[145] *Ibid.* 744.
[146] Art. 3 Statute of the European Ombudsman, Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties, adopted by the European Parliament on 9 March 1994, OJ L 113 (4 May 1994) 15 and amended by its decisions of 14 March 2002, OJ L 92 (9 April 2002) 13 and of 18 June 2008, OJ L 189 (17 July 2008) 25.
[147] European Ombudsman, Press release no. 5/2007 (23 May 2007).
[148] Art. 19 TEU, OJ C 326 (26.10.2012) 3-390.
[149] Art. 259 TFEU.
[150] *Ibid.* Art. 258.

requirement, infringement of the EU Treaties or of any rule of law relating to their application, or misuse of powers. Such actions can be brought by a Member State, the European Parliament, the Council or the Commission.[151] Any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them.[152] Similarly, the ECJ has jurisdiction in cases where an EU institution, body, office or agency has failed to act. Such actions can be brought by a Member States and the other institutions of the Union as well as natural or legal persons if the body in question has failed to address to that person any act other than a recommendation or an opinion.[153] Notably, other remedies have to be exhausted first as an action for failure to act shall be admissible only if the body in question has first been called upon to act. [154] Finally, the ECJ can also be called upon by national courts in so called-request for preliminary rulings.[155]

The ECJ has had the opportunity to clarify the question of legal standing of sub-state bodies comparable to the Åland Government and Åland Parliament. In its decision in *Wallonian Region v Commission* the ECJ found that "[…] it is apparent from the general scheme of the Treaties that the term 'Member State', for the purposes of the institutional provisions and, in particular, those relating to proceedings before the courts, refers only to government authorities of the Member States of the European Communities and cannot include the governments of regions or autonomous communities, irrespective of the powers they may have. If the contrary were true, it would undermine the institutional balance provided for by the Treaties, [...]."[156] Regions have been awarded standing as legal persons under limited circumstances only, namely when a treaty infringement or failure to act has been of direct and individual concern, which has thus far been found to apply in cases concerning state aid and structural funds.[157]

[151] *Ibid.* Art. 263(2).
[152] *Ibid.* Art. 263(4).
[153] *Ibid.* Art. 265(1) & (3).
[154] *Ibid.* Art. 265(2).
[155] *Ibid.* Art. 267.
[156] Case C-95/97 *Wallonian Region v Commission* [1997] ECR I-1789, summary.
[157] Piet Van Nuffel, *What's in a Member State? Central and Decetralized Authorities before the Community Courts* (2001) 38 Common Market Law Review 872; See cases T-214/95 *Vlaams Gewest v Commission* [1998] ECR II-717; T-238/97 *Comunidad Autónoma de Cantabria v Council* [1998] ECR II-2271.

III. Discussion

As Romano has aptly put "[b]esides making it possible to discover and describe, scientific classifications crucially enable prediction of new entities and categories."[158] In this regard, the mapping exercise allows for two conclusions that shall be discussed in the following: a) there may be little added value in creating a new monitoring mechanism – the Swedish-speaking character of the Åland Islands can be and is indeed scrutinized by existing monitoring mechanisms, which may be made greater use of in the future; b) if quasi-judicial or judicial protection is sought for a standard of protection corresponding to Chapter 6 of the Åland Act on Autonomy, inevitably a new international instrument elevating this piece of domestic legislation into the sphere of international law would have to be adopted, be it an international agreement or a unilateral declaration placed under the protection of an international organization as guarantor.[159] A range of options for the supervision of such an instrument is conceivable. Such an arrangement would, however, run counter to the approaches currently dominating international human rights and minority rights law.

a) Monitoring mechanisms

For the purpose of discussion the term *monitoring mechanism* shall be used to denote both treaty- (legal) and charter-based (political) mechanisms whenever they conduct either periodic monitoring or engage on a more ad hoc basis. While there certainly are important differences between *e.g.* the periodic monitoring done by UN Human Rights Treaty Bodies and the more ad hoc interventions of the Special Procedures, the major conclusions that can be drawn for the case at hand apply to all mechanisms whose activities are not focused on a judicial review but rather aim to encourage and promote compliance. These mechanisms are not designed to remedy an individual's or any

[158] Romano, supra note 13, 242 *et seq*.

[159] According to Section 58 of the Åland Act on Autonomy, the Åland Government may propose negotiations on a treaty or another international obligation to the appropriate State officials. The Åland Government shall further be informed of negotiations on a treaty or another international obligation if the matter is subject to the competence of Åland or if the negotiations otherwise relate to the matters of special importance to Åland. The Åland Government shall be reserved the opportunity to participate in the negotiations if there is special reason for the same (as for example was the case in EU accession negotiations). Art. 59 provides that the Åland Parliament must consent to any term in an international treaty that concerns a matter within the competence of Åland in order for it to enter into force on Åland. The negotiation of a possible new legal instrument can thus be expected to involve the Åland Government and require the consent of the Åland Parliament in order for it to enter into force.

other entities' grievances but to push for the constant improvement of domestic implementation practices.

It is charter-based mechanisms that are usually characterized as political as opposed to legal. Arguably, charter-based mechanisms are equipped with the least coercive power on the spectrum of mechanisms presented in part II above. This is not to say that such mechanisms do not fulfil valuable roles. As Asbjørn Eide has observed, "[p]olitical mechanisms can be useful in increasing the pressure on states which are reluctant to cooperate in the implementation of human rights and minority rights."[160]

The creation of a new political mechanism, *e.g.* a potential special rapporteur on the status of the Swedish language on Åland under the UN, may be the least demanding avenue. Not because of reluctance to cooperate – clearly what is sought for in the case at hand is a consensual solution. It is least demanding also because questions related to legal standing or individual concern are less defining here. Harriet Ketley has commented that the mandate of the HCNM is "significant in that it relates specifically to groups" and that "the High Commissioner is expressly barred from considering violations of OSCE commitments that concern an individual person belonging to a national minority."[161] The mandates of special rapporteurs and high commissioners tend not to be limited to the supervision of a specific treaty but the human rights standards in the field more broadly and such institutions have on numerous occasions reacted to situations where the domestic protection of the rights of minorities has been circumscribed or where the implementation of existing domestic legislation remains problematic. There is no legal obstacle for existing charter-based mechanisms, such as the UN Special Rapporteur on Minority Issues or the OSCE HCNM, to engage if violations of the linguistic rights of the Swedish-speakers on Åland are brought to their attention, *e.g.* through information communicated by the Åland Government or the Åland Parliament. Nor are these bodies barred from concerning themselves with possible interferences with the autonomy regime as such. In practice they react to specific situations mainly where rights are violated systematically and where the domestic system continuously fails to remedy the situation. Country-specific special rapporteurs or independent experts have usually been created in situations where tensions are prevalent and. Hence, existing charter-based mechanism can be relied

[160] Eide, supra note 16, 25.
[161] Ketley, supra note 33, 349; CSCE Helsinki Document, *supra* note 127, chapter II, para. 5(c).

upon as tools for raising the international communities' awareness and exercising political pressure. The threshold for gaining their attention may be rather high however, and depending on the context they may face considerable political resistance to their work. Nonetheless, even a potential new political mechanism falling within this category can be expected to work on much the same premises, so that there may be very little added value to establishing another political body.

The question of added value is equally relevant with regard to periodic monitoring, carried out mainly by treaty-based monitoring mechanisms, or more rarely by charter-based mechanisms such as ECRI. The UN Human Rights Treaty Bodies, the ACFC, the Committee of Experts on the ECRML and others monitor the implementation of treaty obligations, some of which relate directly or indirectly to the protection of the Swedish-speaking character of the Åland Islands as laid out in Chapter 6 of the Åland Act on Autonomy. In terms of mere monitoring, the fact that rights are constructed and protected as individual rights does in effect not prevent the governing body of an autonomy regime from submitting information, nor has it prevented monitoring bodies to raise issues concerning the collective aspects of rights.

In the past three monitoring cycles the ACFC has not failed to raise concern about the "ongoing controversy between the authorities of Åland and the central authorities with regard to the availability of relevant legal and other documentation in Swedish, particularly in the EU context" as it had been informed that "the Åland authorities often receive belated requests to comment on draft EU legislation in Finnish which prevents them from indicating their concerns within the time limit allotted."[162] The ACFC has thereupon encouraged "the authorities at central level as well as the authorities in the province of Åland to enter into a constructive dialogue and find pragmatic solutions to meet the requirements of Swedish language documentation as provided for in the Autonomy Act of Åland."[163] It is questionable whether the language of correspondence as provided for in Chapter 6 of the Åland Act on Autonomy could be enforced by means of complaints lodged with a treaty body or a court, as to date corresponding international norms remain of a programmatic nature and due to admissibility impediments. Monitoring bodies, however, can go beyond minimum standards in their

[162] CoE ACFC, *Third Opinion on Finland adopted on 14 October 2010,* ACFC/OP/III(2010)007 (13 April 2011), para. 114.
[163] *Ibid.* para. 117.

comments and recommendations as they seek to improve the standard of protection. They can take communications submitted by concerned stakeholders, such as an autonomy body, into account. In its first opinion of Finland, the ACFC has actively encouraged the Government of Finland to consult the Åland Government in drafting its periodic state reports.[164] As Antti Korkeakivi has noted, "[t]hrough dialogue and corresponding comments in its Opinions, the Advisory Committee repeatedly proposes changes, not for the sake of changes, but where this would contribute to better implementation of minority rights, even if the present situation is not necessarily in direct contradiction with treaty norms."[165] Korkeakivi has further remarked that the flexibility of the FCNM has often been "a blessing rather than a burden" as it has enabled the ACFC to encourage improvements of the FCNM's implementation "without having to take a rigid position on the legal interpretation of a specific provision."[166] What is more, over time the work of treaty bodies may contribute to the strengthening of international legal standards. It should thus be in the interest of all relevant stakeholders to engage to the extent possible in the monitoring procedures by contributing to state reports and communicating independently with monitoring bodies. It may be worthwhile to consider whether Finland can increase the participation of the Åland Government in drafting its state reports under the various universal and regional instruments and whether Åland could increase its direct engagement with the related monitoring bodies.

It is of course not impossible to create an entirely new legal framework to be monitored by either a new or an existing mechanism. It can be assumed, however, that the above examined organizations would be reluctant to host such an arrangement as they all aim for coherence and unity preventing them from extending their mandates *ratione materiae* or *ratione loci* beyond certain parameters. Generally, treaties concluded under the auspices of an international organization are open for signature by all member states or even non-members. However, none of the monitoring mechanisms identified above is concerned with bilateral agreements, agreements that relate to only few of their member states or indeed unilateral declarations. Considering that existing monitoring mechanisms already cover the issues at hand, the idea of potentially overlapping monitoring engagements can also be expected to lead to a certain

[164] CoE ACFC, *Opinion on Finland*, ACFC/INF/OP/I(2001)002 (22 September 2000), para. 7.
[165] Antti Korkeakivi, *supra* note 85, 90.
[166] *Ibid*.

reluctance on the side of international organizations to accommodate such proposals. Arguably, the CoE and the OSCE have demonstrated the greatest understanding of the benefits of autonomy as a tool for the protection of minorities.[167] These organizations may thus be more amenable to finding special solutions for an autonomy regime within their wider institutional frameworks.

As has been mentioned in the introduction, the Nordic Council and Nordic Council of Ministers, the inter-parliamentary and intergovernmental tires of Nordic cooperation, are not entrusted with any monitoring (or adjudicative) functions. However, it can be argued that within the framework for Nordic cooperation autonomy arrangements experience one of the most far-reaching degrees of international accommodation.[168] While the implications of autonomy may be well understood within Norden, it is a system that is not concerned with supervising compliance at all. It can further be gathered from the preparatory works of the institutional reforms that have allowed for the representation and participation of the Faroe Islands, Greenland and Åland, that there has been little inclination to devise forms of accommodation that would require Norden to occupy itself with questions pertaining to the delimitation of competences between the autonomies and their metropolitan states in any way.[169] Just as the EU, Norden is a general-purpose regional integration framework and both organizations' portfolios lag behind the more task-specific mandates of the CoE, the OSCE and the UN when it comes to the protection of minorities.

b) Quasi-judicial and judicial mechanisms

Following Romano's categorization, the above mapping depicts complaint procedures as non-adjudicative mechanism. According to Eide "monitoring/dialogue under reporting procedures and complaint procedures have different functions, each of which

[167] Neither the CoE nor the OSCE recognize autonomy as a right, forms of self-government are however more actively promoted as possible solutions to the challenges of diversity management than in other institutional frameworks. Within the UN framework, autonomy is recognizes as a right of indigenous peoples only, cf. Art. 4 UN Declaration on the Rights of Indigenous Peoples.

[168] Nordiska ministerrådet, *De självstyrda områdena och det nordiska samarbetet. Generalsekreterarens kartläggning*, ANP 2006:743, 25

[169] Nordiska rådet, *PM om tänkbara former för de självstyrda områdenas representation i Nordiska rådet* (sammanställd av huvudsekreteraren i Nordiska kommittén för utredning av formerna för de självstyrda områdenas representation i Nordiska rådet), B 4/j, Bilaga 2, Bihang 2, 16:e sessionen 1968, 1377 *et seqq*.

is useful on its own rights. The role of the court is to determine whether a violation has taken place in a concrete and specific context."[170] One may in fact want to place complaint procedures closer to adjudicative mechanisms as ultimately they also determine whether violations have taken place in concrete and specific contexts. Complaint procedures shall thus be discussed here as 'quasi-judicial' mechanism together with judicial mechanisms. Both remain largely inaccessible for the governing bodies of an autonomy regime.

Romano considers the binding force of judicial decision as the dividing line between non-adjudicative and adjudicative mechanisms. Formally this of course is an accurate distinction to make. However, ultimately a binding court decision may not provide any form of substantive remedy that a monitoring mechanism may not also achieve. Both, recommendations made by a monitoring body as well as a court decision, can have merely declaratory value or may compel a state to change course. An international judgement, if not implemented, may bear first and foremost political consequences considering that international law lacks an enforcement machinery comparable to domestic systems. It should of course be presumed that a state acts in good faith when accepting the jurisdiction of a quasi-judicial or judicial mechanism. Nonetheless, the question of substantive remedies should be kept in mind and guide further deliberation. Are the desired remedies for violations of Chapter 6 of a coercive nature, do they entail remedies or are declaratory remedies what is sought for?[171] This is ultimately a political questions.

The UN Human Rights Treaty Bodies may consider complaints submitted by individuals or groups of individuals who are victims of a violation of a right established under the respective treaties. The notion of collective rights has proven problematic in this context. Joshua Castellino has pinpointed why: "While under the modern regime minority rights can be accessed individually as accepted in the jurisprudence of the HRC, there is much greater reluctance to legitimise collective utilisation of this right. The main fear with collective utilisation is that systems need to be created to ensure that the individual who 'opts out' is protected."[172] Many minorities do not benefit from representation by recognized representative bodies which is why as groups they are

[170] Eide, supra note 16, 25.
[171] Capone, *supra* note **Fel! Bokmärket är inte definierat.**, para. 1.
[172] Joshua Castellino, 'The Protection of Minorities and Indigenous Peoples in International Law: A Comparative Temporal Analysis' (2010) 17 International Journal on Minority and Group Rights 418.

faced with the 'individual *versus* collective rights' dilemma. Autonomy or self-governance mitigates this problem through institutionalization. However, even where an autonomy regime is protected under international law, as in the case of the Åland Islands, the international community has often proven incapable of accommodating such entities in its institutional structures.

The case law of the HRC suggests that *e.g.* the head of an autonomy government or the speaker of a regional parliament may be able to bring a case as a representative for the constituents of an autonomy regime.[173] The case concerning the Rehoboth Baster Community confirms that under the ICCPR a claim can be made as to the use of a minority language as the language of communication between members of a minority community and state authorities. While complaints concerning language use submitted by representative of an autonomies' governing body on behalf of their constituents may be admissible, it would be a rather big leap to argue that the body as such can claim a right to receive communications from state authorities in a specific language under the ICCPR. The HRC is unlikely to bridge this gap between individual and collective rights. Ultimately direct concern will need to be attributed to individuals. It is of course worth pursuing the existing procedures more strategically in order to push for ultimately clarifying jurisprudence. At this stage, the complaint procedures under the Human Rights Treaty Bodies do certainly not depict as accessible avenues.

Complaint procedures that explicitly provide legal standing to collective entities or individuals not directly concerned, such as within UNESCO or under the ECSR, include entities fundamentally different from the governing bodies of autonomy regimes. Under these procedures legal standing is awarded to predetermined private law entities. Only the European Ombudsman may receive and consider complaints lodged by public bodies. Paul Craig has argued that "[i]nternational experience shows that the institution of Ombudsman has been successfully employed as a vehicle for providing a speedy, free of charge, and informal alternative to administrative litigation."[174] While this holds true, it is important to keep in mind that the European Ombudsman operates within the system of the EU and does not consider cases where the maladministration in question

[173] Ketley, *supra* note 33.
[174] Craig, *supra* note 143, 757.

can be attributed to a national body. It does thus not provide for a remedy vis-à-vis the member state.

Moving from quasi-judicial to judicial procedures, none of the European courts, neither the ECJ nor the ECtHR provide for judicial remedies for grievances related to Chapter 6 of the Åland Act on Autonomy. The ECJ may consider actions brought by regions, including self-governing bodies of autonomies. However, regions have been considered to fulfill he requirement id direct concern only under limited circumstances (state aid and structural funds), which are rather far removed from the question at stake here – language rights – for which the EU's competences are limited. The very distinct institution of preliminary ruling may be of interest as it links domestic courts to an international court. However, an adaptation of such a system to the case at hand is hard to imagine, not only materially but also technically, as it would first of all require the domestic justiciability of the rights in question. However, not all the rights protected under Chapter 6 are justiciable. Complaints concerning violations of Section 38 of the Åland Act on Autonomy on the language of correspondence cannot be submitted to a domestic court (but to the Parliamentary Ombudsman). Where there is no domestic court involved to begin with, preliminary ruling procedures remain out of reach, even if the international court was competent materially. [175]

Although marginal phenomena, it may briefly be mentioned here that other example of courts operating with special and particular links to domestic systems are hybrid criminal tribunals, such as the Extraordinary Chambers in the Courts of Cambodia, as well as the unique case of the Caribbean Court of Justice which replaced the Judicial Committee of the Privy Council of the United Kingdom as the appellate jurisdiction for criminal and civil cases in Barbados, Belize, Dominica and Guyana.[176] If of any value at all here, these example serve to illustrate the array of possibilities in institutional design.

The ECtHR has been rather adamant in its reluctance to consider applications by public bodies and applications concerning the language used in public administration and it is unlikely that this approach will change in the near future. Neither does the

[175] The prime remedy in this case is a complaint to the Parliamentary Ombudsman, cf. Arts. 2 & 11 Lag om riksdagens justitieombudsman, FFS 197/2002; Other remedies might include procedures based on professional misconduct.
[176] Romano, *supra* note 13, 245 & 274.

Court's advisory jurisdiction allow for a consideration of the content or scope of the rights or freedoms defined in in the ECHR. Upon entry into force of Protocol no. 16 to the ECHR, the advisory jurisdiction of the Court can be triggered by the Supreme Court of Finland. Once again, Chapter 6 is not in its entirety enforceable domestically by means of judicial remedies. In fact, this issue arising in the context of preliminary-ruling type of procedures serves well to highlight the intricate relationship between domestic and international remedies. This relationship is also emphasized by the principle of the exhaustion of domestic remedies, a central admissibility criterion of most international quasi-judicial and judicial mechanisms. It may be advisable to review the whole breadth of remedies available for violations of Chapter 6, including domestic remedies as well as potential international remedies, in order to establish what types of satisfaction are sought and where these can best be obtained.

Finally, the ICJ's contentious jurisdiction can be triggered by states alone. The General Assembly, the Security Council, the Economic and Social Council as organs of the UN as well as a number of UN agencies can avail themselves of the advisory jurisdiction of the Court. It was under the advisory jurisdiction of the ICJ's predecessor, the Permanent Court of International Justice (PCIJ), that the Council of the League of Nations could request the Court's opinion on undertakings relating to the protection of minorities placed under the guarantee of the League of Nations. Such undertakings were entered into by the states in question through various types of legal instruments, including treaties (as part of wider peace agreements between the state in question and the principle allied and associated powers after WWI) and declarations (essentially made to satisfy accession requirements). While many of the provisions of the minorities treaties, declarations and agreements contained identical or similar wording, instead of a universally applicable system for the protection of minorities, the League regime was tailored to the realities of each country and the minorities concerned.

In the Max Planck Encyclopedia of International Law's entry on the Minority Protection System between World War I and World War II it can be read that "[a]fter World War II, the League of Nations minority system was not continued and formally no traces were left."[177] In fact, traces have been left domestically, as the case at hand illustrates. The League of Nations system is the context in which the autonomy of the Åland

[177] Anna Meijknecht, *Minority Protection System between World War I and World War II*, Max Planck Encyclopedia of Public International Law (October 2010), para. 31.

Islands has been conceived and designed. The autonomy regime has persisted since, at the same time as the system of protection under international law has been remodeled entirely, away from an individualized towards a universal system. The current minority rights framework does simply not provide for a petition system where a minority as such could lodge a complaint concerning violations collective rights. The LoN system certainly had many shortcomings and did not entitle a minority to have a matter examined by the Council of the League or the PCIJ. Many petitions did not get over the initial threshold of raising a Council member's attention.[178] The Åland Agreement stipulates that the Council shall, in any case where the question is of a juridical character, consult the PCIJ. This could possibly be interpreted to constitute a limitation of the discretionary powers which the LoN Council otherwise exercised, so that it may have been under the obligation to first of all consider and then to refer the case if it was of a judicial nature. No petition concerning the Åland Island has ever reached the Council.[179] The Åland Agreement did not foresee a direct right of petition, as any complaint would have to be forwarded by the Government of Finland. However, in practice anyone could have made an attempt at raising the Council's attention with petitions concerning a minority and there is no reason to believe that an individual constituent of the Åland autonomy or a governing body could not have done so as well.[180]

The creation of an equivalent contemporary system would require 1) the adoption of an agreement or unilateral declaration recognizing the rights of the autonomy regime as such, 2) placed under the protection of an international organization as guarantor, 3) who would be obliged to act upon the complaint of an autonomy regime represented by one its governing bodies and 4) to facilitate a solution, in the last instance by referring the issue to the advisory jurisdiction of an international court.

Technically, this is not an unthinkable legal construct but it would constitute a solution at odds with the overall approach to the protection of minorities adopted by the UN and the Council of Europe, which are the two organizations currently equipped with the necessary institutional apparatus. In fact, when the United Nations Commission on Human Rights studied the legal validity of the LoN's undertakings concerning the Åland

[178] Modeen, *supra* note 6, 153; Mejknecht, *supra* note 177, para 22.
[179] Modeen, *supra* note 6, 166.
[180] *Ibid.* 152; Mejknecht, *supra* note 177, para 20

Islands in 1950 it was found that the two circumstances liable to affect all obligations were i) the dissolution of the League of Nations and ii) the recognition of Human Rights and of the principle of non-discrimination by the UN Charter.[181] Hence, the system of universal protection is considered to have rendered individual solutions obsolete. Any attempt to create special solutions can thus be expected to face considerable opposition.

Of course autonomy is a wide-spread phenomenon, particularly in Europe, and a possible mechanism providing a governing body of a self-government regime accessto quasi-judicial or judicial remedies, whether directly or indirectly, may be welcomed by many such entities. However, such proposals may not necessarily be met with applause by the respective metropolitan states. On the one hand a broader demand may thus serve to overcome opposition on the side of international organization, on the other hand the formation of a more concerted effort is likely to prove difficult.

IV. Conclusions

In terms of institutional design international law seems to provide for endless possibilities, which in practice remain circumscribed by one unsurprising factor – state consent. The international law discourse is preoccupied with questions arising precisely because of the lack of state consent. When state consent is present, the challenges tend to be less of a legal but rather of an institutional nature, as in the present case, where the Åland Committee has taken a positive stance towards international supervision and a consensual solution is sought. None of the mechanisms examined above provide for a precedence or an ideal model for the case at hand.

What will most certainly prove problematic is to engage an international organization and possibly an existing complaint procedure or court within this system. The governing bodies of a self-government regime do not fit in neatly with the traditional subjects of international law and neither with those recognized more recently, i.e. individuals, transnational corporations and non-governmental organizations. Any international legal instruments and related mechanism designed to provide a sub-state entity with standing in a quasi-judicial or judicial procedure against its own metropolitan state would not only constitute somewhat of an oddity among existing quasi-judicial or

[181] UN ECOSOC, *supra* note 9, 69.

judicial mechanisms operating in the field of human rights law or minority rights law. It would also be counter to the underlying rationale of contemporary systems of protection, which emphasize equality and universality. The same holds true with regard to a petition system. This should not in any way inhibit legal imagination but it needs to be underlined that there is not one obvious institutional roof that could be called upon.

Departing from the observation that the existing rights of minorities under international law today remain either non-justiciable or non-accessible to minorities, Joshua Castellino has gone so far as to argue that "minority rights were arguably better protected under the old regimes with all their failings, before the onset of the human rights era, but are less protected under the more sophisticated so-called rights-based system of today."[182] This statement can certainly be qualified. Many minorities around the world did not experience any form of international protection at all at many points in time, including under the LoN system. Thus, the fact that multiple monitoring mechanisms operate with a universal scope to promote the implementation of minority rights, in consultation with minorities, has to be considered an achievement. Universal and regional monitoring mechanisms should be exploited to the extent possible, through engagement in the national reporting and the submission of independent communications where deemed appropriate. Special Procedures can be called upon and ultimately an attempt to push for a recognition of the rights of autonomy bodies as a *sui generis* type of entity in quasi-judicial procedures could be made. If, in defiance of all obstacles, a fully-fledged judicial mechanism emerges as the preferred option a number of issues should be taken into consideration in future deliberations – the type of satisfaction that is sought, the relationship between domestic and international remedies and the scope of the underlying instrument, as possibly inclusive of other comparable situations in Europe or beyond.

[182] Castellino, *supra* note 172, 422.

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