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"Unstable orders in the minority regimes and norms, increasing divergence between UN, ECtHR, and EU approaches, and resulting implications" **to be presented by Alexandra Xanthaki**

(which orders have become unsettled?
In which way? And why?
How does it intercept with minority rights)

Migrants and refugees as minorities

Although migration is considered one of the biggest challenges in Europe at the moment, the legal framework of the protection of migrants is surprisingly still quite unclear. Mostly, states have been relying on general human rights law. In addition, the Convention on the Rights of Migrants is quite weak, whereas the Global Compact for Safe, Orderly and Regular Migration - albeit all the furore- is still very much a non-binding agreement. In an attempt to clarify migrants' protection, this chapter revisits the distinction between migrants and minorities. It argues that migrants -and refugees- are more often than not already members of minorities in the host countries and as such their rights go beyond non-discrimination. Positive measures to protect rights to religion, culture and education are needed.

Fragmentation in minority regimes

The popular belief among States and scholars is that the regime recognising rights to minorities is rather settled, for better or for worse. It is weak, it has many imperfections, but it is rather self-contained and focused. International lawyers have been pushing hard for the clarification of international standards on minorities, but usually focusing on the general human rights instruments and the additional minority rights norms, mainly the UN Declaration on the Rights of Minorities, and the Framework Convention on National Minorities.

Yet, this perceived self-contained category of minorities seems these days to be more incomplete than ever. When the world is seriously concerned with migration, voluntary or non-voluntary; when new instruments on the rights of migrants and the rights of refugees have been introduced to the international human rights norms; when discussions on all international for a and domestic space have been dominated by the migration and refugee so called crisis; keeping the minority norms separate from these debates seems illogical and out of date.

Certainly, one can see the excellent work that several scholars have been doing on pushing for 'new minorities' to be included in the minority protection. And the UN Special Rapporteur has recently affirmed the relevance of minority protection to 'stateless persons'. But first, states seem to continue to be reluctant to accept these categories within the minority protection. Yet, there is a need to go far beyond this. My involvement with the Brunel Refugee project revealed that European states apply only general human rights protection to asylum seekers; only refugee protection to refugees; and only the non-discrimination regime to migrants. There is a need to review the recently accepted norms on migration and refugee law, insist on the many convergences and also recognise the divergencies. This paper argues that one cannot ignore the links that exist among refugees, migrants and minorities; and that

the regimes running through their rights should be seen as complimentary, not distinct. This compartmentalization and specialization is very obvious in the study of indigenous cultural heritage with detrimental effects to a coherent development of the law.

Two are the theoretical underpinnings of this research: First, **fragmentation in international human rights law**. Fragmentation in international law has been defined as 'the profound systemic rupture in the structure of international law, reflected in the lack of well-developed and established hierarchies or other techniques to deal with normative conflicts and tensions between general international law norms and its specialized regimes, as well as between those regimes *inter se*.'[1] It has been widely argued that the expansion of international law 'has created problems of harmony between its different branches, institutions and norm-systems'.[2] Such developments have led to a lack of coherence of the various regulatory contexts in international law, which prevent the formation and application of shared principles and interpretations across international law.[3] I argue that one can clearly see the downsides of such fragmentation in the regimes of migrants, minorities and refugees: responses of international law to the challenges posed currently cannot be comprehensive unless they consider the common characteristics of these categories, accept the blurring of these categories in most situations, and re-examine the scope of minority rights norms to include such categories. Of course, at the same time, one has to recognise the tensions and the divergencies in these categories and norms. International lawyers can only reach an accurate interpretation of the existing law and suggest helpful ways forward, if they take into account the possible downsides of every such suggestion.

The second theoretical underpinning is the **commitment of international human rights law to celebrating cultural diversity**. 'Integration' has also become a buzzword in international fora: European states pride themselves on the integration policies they have which, they proclaim, form part of their wider anti-discrimination policies. At the same time, more and more international bodies encourage the 'integration' of new and old migrants. 'integration' is currently used in international fora as a ground to restrict the precise human rights as well as minority rights standards that European states have promised to respect. Repeated references to this fuzzy concept shift the debate from the obligation of states to recognise and accommodate cultural diversity to the obligation of migrants to 'conform' to existing and perceived 'national values'. As I have argued elsewhere, integration is used as a smokescreen to weaken human rights obligations in Europe.

I will first discuss how the concept of a minority is linked to the concept of the migrant, both voluntary and unvoluntary. I will use the well-read literature on new minorities for the voluntary migrant groups, widely called 'new minorities'. Then I will look at the minority that have to be recognised as relevant to these other regimes.

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[1] A Jakubowski and K Wierczy**n**´ska (eds), *Fragmentation vs the Constitutionalisation of International Law* (London: Routledge, 2016), p. 1.

[2] Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report Finalized by M Koskenniemi, UN Doc. A/CN.4/L.682.

[3] Jakubowski and Wierczy**n**´ska, as above, p. 2, also citing MA Young (ed), *Regime Interaction in International Law Facing Fragmentation* (CUP 2012); N Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (OUP 2010).

The scope of minority protection- Definitional issues

Several attempts have been made to define 'a minority' in international human rights law, most recent one by the UN Special Rapporteur on Minorities. The definition of a minority has not been

Migration

Migration is considered one of the main challenges for international law. In the last decade, it has widely been perceived as a 'problem' to be solved; and one that has been failed by current international human rights law. This does not seem to be fully unjustified. The 'migration debate' focused on the end to curb migration, on national security, on integration and social cohesion. In this framework, the rights of migrants seem to be either set aside or served only by general human rights instruments, or at the very best served by the very weak Convention on the rights of the migrants. **In addition, the rights of migrants only appear to be a distinct category to the rights of refugees, and the rights of minorities; all three categories separate and distinct.**

This paper argues for the opposite. It claims that the rights of migrants, forced or non-forced, are also to be considered in the framework of minority rights. Migration rights, both forced and non-forced, are not to be seen as exclusive of minority rights; but prima facie as additional to minority rights.

In this debate, very little discussion has been had in united nations for a by the very weak Convention, or at the best of narrative, migrant rights have been Norms on the rights of migrants of are weak, they are not taken seriously into account, and has not yet been It has raised issues regarding the credibility of international law norms

There have been many attempts to define minorities.

There is no universal definition of who is a migrant and different sources use different criteria to define the term. However, for the purposes of statistics, the UN defines the 'long-term international migrant', the subject of integration policies, as 'a person who moves to a country other than that of his or her usual residence for a period of at least a year [… .] so that the country of destination effectively becomes his or her new country of usual residence'.[18] This definition is used by the International Data Survey and in turn by several national statistics.[19] What complicates the issue further is that international law does not require the same state protection for all international migrants. Old migrants clearly fall within the protection of minorities. Even if they have not acquired the citizenship of the host state, they are still recognised by international law as members of minorities. Contrary to the widely used Capotorti definition of the 1970s,[20] lack of citizenship of the host state is not considered anymore as an important criterion for minority protection: the Commentary of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities maintains that citizenship 'should not be a distinguishing criterion'.[21] In 2005, the UN Working Group on Minorities recommended that governments protect the rights of all minority persons within their territory 'irrespective of citizenship'.[22] Indeed, states should not be allowed to withhold protection to minority groups by denying them citizenship.[23]

Contrary to well-established groups, recently arrived migrants may not fall within the protection of a 'minority'. Support from state practice on recognising recently arrived migrants as minorities entitled to the full range of 'minority rights' is indeed very thin. If the group is well-established but the individuals recently arrived, then this is not a problem: **the Human Rights Committee (HRC) has noted in its General Comment 23 that 'Just as they need not be nationals or citizens, [members of minorities] need not be permanent residents. Thus, migrant workers or even visitors in the State party constituting such minorities are entitled not to be denied the exercise of [minority] rights'.**[24] However, if the group has arrived in the last 30–40 years, it is not always accepted that they form a minority. **The dichotomy between 'new' and 'old' minorities and the different treatment of the two categories has attracted criticism. The Commentary on Minorities favours abandoning such an approach,**[25] **while the ACFCNM has on several occasions discussed within the context of article 6 of the FCNM rights of 'new minorities'.**[26] **Yet, in its 2016 report, Sweden said:**

> In many international contexts these measures would be seen as types of 'positive discrimination'. They include general initiatives aimed at the entire population but of particular benefit to people from under-represented groups, and targeted action based on particular individual needs or requirements. There are also measures that target newly arrived immigrants ***or*** national minorities. [4]

Academic opinion also warns against such a differentiation: **Packer has noted that the distinction would be discriminatory**[27]**; and Nowak has stressed that members of so-called 'new minorities' also must have the right 'not to be assimilated into a melting pot type of newly created "European citizens" but to enjoy their traditional culture, practice their own religion and speak their mother tongue'.**[28]**Medda-Windischer has noted that the differences between migrants and traditional minorities are mainly down to their respective formal legal status and the state's perceptions of them, rather than objective differences.**[29] **Berry has gone a step further and has argued that even most recently arrived migrants fall in the definition of 'new minorities'.**[30] **Henrard has noted that 'there seems to be an emerging consensus that "(…) 'new' minorities should be considered 'minorities' for the purposes of minority protection"'.**[31] Even more complicated is the issue of groups arrived in Europe during the last decade. State practice recognising them as minorities is almost non-existent. They are given the protection of migrants, but not that of minorities.

Fortunately, the debate on whether all international migrants or only most of them will be considered minorities for the purposes of international law is not that important after all. First, most migrant groups have been living in European states for a long time, even if individuals belonging to these groups have arrived recently. Second, and most importantly, the *level of protection* may differ, but the *actual rights* that all these individuals must enjoy are the same. Even the most recently arrived migrants are subject to the rights recognised to every individual in legally binding human rights treaties, including the prohibition of discrimination, cultural rights and participation in the life of the state. The specific measures that need to be taken will differ depending on whether the group to which the individual

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[4] Sweden's 2016 report to the Advisory Committee of the FCNM, ACFC/SR/IV(2016)004 .

belongs is newly arrived or not, but also depending on other issues such as the numbers of migrants and the resources of the state; but the rights that all migrants must enjoy are the same.

States are also very reluctant to accept migrants, refugees and asylum seekers in the discussion of minority rights. In its 5th report to the Advisory Commitee of the FCNM, Germany states that ‘

> **Germany finds unacceptable the Council of Europe’s press release accompanying the Fourth Opinion of the Advisory Committee entitled "Anti-immigrant sentiment was rising in Germany before refugee influx: Council of Europe committee on national minorities", which makes no reference to national minorities not only in the title, but also in the first two paragraphs and therefore almost completely misses the actual aim of the Framework Convention**.
>
> The Advisory Committee’s assumption that the Framework Convention is a flexible instrument which is supposed to apply in highly diverse social, cultural and economic contexts and in evolving situations is incorrect. This is true not only of the overly broad interpretation of Article 6 of the Framework Convention, but also of the Advisory Committee’s request that individual articles of the agreement be applied to specific groups of migrants, which, given the clear definition of national minorities in Germany, is legally unfounded. [5]

Links of international instruments

- Forced migration- current developments
- The current focus on migrants:
- Convention on the Rights of Migrants
- Global Compact for safe, Orderly and Regular Migration
- ECtHR case-law on migration

- Are migrants members of minorities? Revisiting the definition
- Revisiting their rights- when destinctions do not really matter (regular, irregular/ refugees, migrants etc)
- Intersectionality?

Many attempts to define. The most recent one has been de Varennes.

- Traditionally there are people

[5] 5th report submitted by Germany to the Advisory Committee of the FCNM, ACFC/SR/V(2019)001, p 9.

- Multicultural Europe- so many people have come in the previous years. New and old migrants.
- Refugee status is additional protection, not instead of minority protection

Integration
The recent appointment of one of the Vice-Presidents of the European Commission responsible for protecting the European 'way of life' and the polemics that it has triggered coupled with tensions followed by the refugee crisis and the lack of solidarity of EU states especially the so called group of Visegrad on the redistribution of migrants, have put on the forefront of the publica debate the issue of common values among EU citizens, 'new citizens' and MS themselves. Such debate couples with the fact that civic integration has become in recent years fashionable.
Common threats

It has been rightly argued that negative representations of the 'others' are «the main engine of current efforts to introduce neo-assimilationist policies».[39] As Spivak notes, the white men saving brown women from brown men's narrative was important for the operation of British colonialism.[40] Ahmed has discussed how the British colonial authorities in Egypt relied on the rhetoric of women's emancipation for their colonial missions.[41] Western feminism became a 'hand- maiden to colonialism' in this process.[42] This leads to the common portrayal of non-Western women as victims of 'their culture'. It is for their interest that they should 'adopt western values'.[43] And if they do not, the liberal cast doubt as to why is the case. In her mission to Sweden, the Special Rapporteur on Violence against Women Yakin Ertürk found that «some circles have also tried to reframe the issue of gender inequality (...) as a problem re-imported into equal Sweden through immigration from developing countries».[44] And although women's rights seem to have an important place in the Swedish society, the effects of structural racial discrimination and the effects of colonial remains are not seen as relevant in today's society.[45] More generally, several sociological studies support that there is today a widespread denial that race and colonialism continue to be present and relevant in Europe.[46]

Divergence issues among the systems of minority protection

- ***DEFINITIONAL ISSUES***
  - **Introduction**
    - Minorities
    - Migrants or new minorities?
    - Asylum seekers and refugees?

  - **Similarities:**
    - transnational element (both migrants and refugees);
    - vulnerability (both refugees and migrants);
    - ethnic, linguistic, cultural distinctiveness
    - want to continue their characteristics
    - current emphasis on integration

  - **Divergences:**

        - Refugees are more vulnerable than other sections
        - Claims are different short term:
            - Global Compact on Refugees: equitable sharing of burden
            -

    - FCNM
    - ECtHR- emphasis on integration
    - CERD opening the debate to intersectionality too much
    - Refugees?

- ***RIGHTS***

The fragmentation in the concepts of minorities, asylum seekers, refugees and migrants has also been reflected in the recent instruments.

The New York Declaration for Refugees and Migrants, adopted by the United Nations (UN) General Assembly on 19 September 2016, called for the adoption of two compacts by the end of 2018, one on refugees and the other on migrants. The Refugee Compact was presented to the UN as an annex to the UN High Commissioner for Refugees' annual report in September 2018. The Global Compact on Migration (Migration Compact) was adopted in Marrakesh, Morocco, in December 2018. The New York Declaration contained over 30 references to human rights. The Migration Compact has 45 references. Its preamble refers to the main human rights instruments, including the two Covenants but also refers to other international law instruments. The framing of the Compact stems from the UN development arena.

MIGRATION COMPACT

REFUGEE COMPACT

The Global Compact on Refugees notes in paragraph 9: the global compact complements ongoing United Nations endeavours in the areas of prevention, peace, security, sustainable development, migration and peacebuilding. All States and relevant stakeholders are called on to tackle the root causes of large refugee situations, including through heightened international efforts to prevent and resolve conflict; to uphold the Charter of the United Nations, international law, including international humanitarian law, as well as the rule of law at the national and international levels; to promote, respect, protect and fulfil human rights and fundamental freedoms for all; and to end exploitation and abuse, as well as discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, age, or other status. The international community as a whole is also called on to support efforts to alleviate poverty, reduce disaster risks, and

> provide development assistance to countries of origin, in line with the 2030 Agenda for Sustainable Development and other relevant frameworks'.[6]

[6] Report of the United Nations High Commissioner for Refugees, Part II, Global compact on refugees, UN Doc A/73/12 (Part II) (2018), para 9.

Also, the Global Refugee Forum has no part in the programme about human rights of refugees in a way that reflects their different ethnic, religious or linguistic identity.[7]

- **Negative or positive protection/**

States' justification for differential treatment between citizens and foreigners (migrants) is always that the prohibition on discrimination contained in all human rights treaties, such as in article 26 of the ICCPR,[1] does not expressly prevent it, although this interpretation has been challenged before the UN human rights bodies.[2] Article 1(2) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) specifically excludes differential treatment on the basis of citizenship in providing that the treaty 'shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party … between citizens and non-citizens'. General Recommendation XXX of the CERD Committee deals with discrimination against non-citizens. It reiterates that human rights are, in principle, to be enjoyed by all persons. However, it focuses on those areas where discrimination is the most egregious for migrants. It calls on States to avoid discrimination between different classes of non-citizens and, importantly, against any particular nationality. It establishes that differential treatment based on citizenship or immigration status will constitute discrimination where it does not pursue a legitimate aim or is not proportionate to achieve that aim.

The Migration Compact notes that:

> The Global Compact is based on international human rights law and upholds the principles of non-regression and non-discrimination. By implementing the Global Compact, we ensure effective respect, protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle. We also reaffirm the commitment to eliminate all forms of discrimination, including racism, xenophobia and intolerance against migrants and their families.

There are other references to non-discrimination through out the text. However, the text has no reference to positive protection. The references to non-discimination have to be interpreted in line with CERD article 1.2 and ICERD General Recommendation No 35.

In any case, the limits of discrimination in States' border and migration practices are currently before the International Court of Justice (ICJ) in a case brought by Qatar against the United Arab Emirates (UAE), concerning ICERD. Qatar has challenged the UAE's decision to expel all Qatari nationals from its territory based on discrimination contrary to ICERD, in that only Qatari nationals are subject to the collective expulsion measure. In a decision on provisional measures to protect Qatari nationals living in the UAE, the ICJ granted relief, ordering both parties to refrain from taking action which could aggravate the dispute

[7] https://www.unhcr.org/5df69ca07.

(including expelling Qatari nationals). The full hearing will revisit the correct interpretation of article 1(2) of ICERD.[8]

The Migration Compact provides a new undertaking by States to uphold the human rights of migrants. However, this needs to be strengthened by an enhanced commitment to eliminating discrimination between citizens and migrants, and between different categories of migrants. In doing so, the ICJ may assist States with a comprehensive interpretation of ICERD in the context of migration measures.

In any case, the Migration Compact makes no reference to

- Right to religion
- Education
- Respect for identity/ non-racism/ police brutality
- Socio-economic life
- ECHR- emphasis on

- **Non-refoulement**
  Now extended to asylum seekers and migrants and anyone else by the ECtHR and by the UN Convention against Torture

- **Binding or non-binding**? Why minority protection when refugee protection may go further
  - EU binding
  - ECHR non-binding but case law important
  - Weak UN regime

- Priorities
  - Cultural rights/ cultural heritage
  - Refugee regimes

Dwight Newman

Religious minorities
The actual changes that unsettled the regime of religious minorities?

- To what degree I should focus on some states?
- SECULARISM: Canada's Supreme Court talks about secularism
- Quebec report of Charles Taylor and… on religion and state secularism. Also inter-culturalism and multiculturalism. Discussion for a possible bill in 2017. Bill62 on state religious neutrality that included a ban on face coverings. Court suspended the

[8] Elspeth Guild, The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights? *International Journal of Refugee Law*, Volume 30, Issue 4, December 2018, Pages 661–663.

operations and the liberal government was not re-elected. So, now there is a law on laicite- the statute bans face coverings in state officials in a wider sense and the law has a narrower list for more ban. 2019 statute. 'Notwithstanding clause'
Look at the Theodore court case
Trinity university in Canada- wanted a private law school but the state said they would not recognise it because of the university's beliefs in same sex relationships
The Tunaha case in the Jumbo Valley as ski resort development that indigenous put forward. The Supreme Court said that they would not protect the religious freedom.
Trinity western university and its law school denied by the state
Rhoda Hausmann on Canada

UK
Robert Frill was told he could not be a candidate for the Lib Dems
Also language against Muslim regimes

Which is the unsettled order?
Intro too long and too generic

My chapter:

- Regional minority group- migrants are included in the mother tongue- a lot of robust scientific evidence because it secures better integration
- Sources?
    - Scholarship
    - IOs
    - But minorities themselves? The beneficiaries? What are the costs of what they want? Only one new minority group that put forward the case.
    - New minorities in Europe do not identify themselves as national minorities – minority agency comes to my work
    - New minorities make states angry and antagonising minority groups: fighting for the turf
    - Dynamics in the different minorities
    - Reasons not to accept new minorities: Human resources/ territorial rights

Ways forward:

- The voice of new minorities and refugees? Maybe we should focus on doing some interviews asking refugees sand migrants about their rights. Empirical
- Dynamics in minorities: 'do no harm' approach, also protect the existing resources of minorities. Relationship of these types of minorities with the state is very different. Migrants and refugees represent instability for the state and it would be much easier to keep them out. Old minorities represent stability for the state and they want to keep them out. The more minorities you have- also important clashes among minorities
- Do they need minority rights or human rights? What is the 'added value'?
- Philosophical normativity or legal normative
- The state: the majority needs an ideology to push.
- The national state is a problem. We are focusing on the land not the people.
- **What is the unsettled order?** The fragmentation of international non-state law. Or the migration? How do I go about framing it? The international minority regime was created to settle order but had some refugee concerns included. Check this out.

- **Nazila Ghanea on religious minorities in her report.** She elaborates the added value to the human rights.
- Australia high court case on indigenous peoples
- Backlash?? How I would explain this to a populist government? These are the same rights as other people have, explain this further.
- Migration has become the new revolution. See the book EUROPA.

Article 9 of the Universal Declaration on Minorities say that the whole system should mainstream minorities and this is not done by the Global Compacts.

Corinne Lennox and Anna-Maria Biro

Minority rights have no visibility and no authority at the UN.
Nancy Fraser: "Abnormal Justice'