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# **Group Rights, Collective Goods, and the Problem of Cross-border Minority Protection**

## **Abstract**

This paper argues that there are both practical and conceptual reasons for relaxing the prevailing state-centric frameworks for minority protection in the global arena. The paper discusses two example cases: the indigenous Sami and the Roma travellers. It draws on analyses of the kinds of rights protected by the key international minority rights documents, and the kinds of goods these rights provide access to. The paper argues that the cross-border nature of certain minorities poses specific challenges to the prevailing system of distributing responsibilities for protecting minorities across individual states, each of which has territorially limited obligations. It concludes by paving the way towards a more cosmopolitan institutional approach to cross-border minority protections.

## **Keywords**

minority rights, human rights, cosmopolitanism, migration, indigenous Sami, Roma travellers, collective goods, culture

## **Group Rights, Collective Goods, and the Problem of Cross-border Minority Protection**

Let us start with a puzzle. The puzzle begins with a common agreement on the need to protect the basic rights of minorities and minority members, including a variety of cultural, ethnic, religious, linguistic, and indigenous groups<sup>1</sup>. The protection of the basic rights of minorities

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<sup>1</sup> The relevant minorities discussed in this paper are the kinds of ethno-cultural and indigenous groups that have traditionally been at the center of debates on multiculturalism and cultural accommodation. The paper does not therefore discuss a variety of other types of minorities (e.g. sexual- or gender minorities, people with disabilities etc.). While it is nowadays also common to draw a distinction between the rights of indigenous peoples and other

can take many forms, although in many cases, this protection is seen to entail the need for *special* protection by way of special minority rights. The case for minority rights has been made both in societal (domestic) contexts, as well as in international law. International human rights treaties and documents (esp. ICCPR<sup>2</sup> Art. 27, UN Minority Declaration 1992<sup>3</sup>, and UNDRIP 2007<sup>4</sup>) provide some of the most commonly used conceptualizations and guidelines for minority protection, thus also setting the stage for minority protections in domestic contexts. In fact, the international human rights framework specifically distributes the responsibility for minority protection between individual states that are thus viewed as primarily responsible for the protection of minorities within their territories. This, however, creates an apparent puzzle:

Given that some minorities – including some of the cultural, ethnic, religious, linguistic, and indigenous minorities commonly viewed as in need of special protection – are groups that reside and/or move across state borders (e.g. the indigenous Sami, or the Roma travellers), how is the existing state-centric system supposed to protect the rights of these ‘cross-border minorities’?

I say ‘an apparent puzzle’, as it is not at the outset clear how or why such cross-border minorities would be problematic for the existing system of distributed responsibilities. Should the individual states fulfil their duties in protecting the basic rights of minorities and minority members within their territories, it would at least seem that the rights of minorities (including cross-border minorities) could be protected, albeit in smaller sections. Having said that, those minorities, not constrained by state borders, provide an interesting test case to the current system of distributed responsibilities, as they do not fall neatly into this system. In certain cases, as I argue in this paper, the protection of the rights of cross-border minorities may require substantive changes to the current state-centric systems of minority protection, and the developing of further, cosmopolitan institutions for their protection.

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(ethno-cultural) minorities, in this paper, I use the term ‘minority’ as an umbrella term for a variety of cultural, ethnic, etc. groups, viewed as in need of special (minority) protection. This also includes indigenous peoples, whose rights protection was historically developed as part of and in connection with the more general minority rights discourse, and separated from this discourse by the development of an independent indigenous rights framework. While I recognize this separation, I view the minority rights and indigenous rights discourses to be sufficiently connected, highlighting two related aspects of the debate, in order to discuss them side by side under the more general umbrella term of ‘minority protections’. On the evolution and division of the minority rights and indigenous rights discourses, see e.g. W. Kymlicka, *Multicultural Odysseys: Negotiating New International Politics of Diversity* (Oxford University Press, Oxford, 2007); G. Pentassuglia, *Minorities in International Law: An Introductory Study* (European Centre for Minority Issues, 2002); G. Pentassuglia, ‘Evolving Protection of Minority Groups: Global Challenges and the Role of international Jurisprudence’, 11 *International Community Law Review* (2009) pp. 185-218; M. Åhren, *Indigenous Peoples’ Status in the International legal System* (Oxford University Press, Oxford, 2016).

<sup>2</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> (last visited 13 July 2017).

<sup>3</sup> UN General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 3 February 1992, A/RES/47/135, available at: <http://www.refworld.org/docid/3ae6b38d0.html> (last visited 13 July 2017).

<sup>4</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: <http://www.refworld.org/docid/471355a82.html> (last visited 13 July 2017).

In this paper, I discuss two example cases – the indigenous Sami, and the Roma travellers – which show that the cross-border nature of such groups poses specific challenges to the existing state-centric frameworks for minority protection. In discussing these two cases, I aim to address the following questions:

1. What exactly is the specific problem posed by cross-border minorities to the existing state-centric frameworks for minority protection?
2. What is the nature and scope of this problem? That is, in which cases, and why, is the state-centric system not capable of protecting the rights of cross-border minorities, and in which cases it is?
3. What might be required, in terms of institutional rearrangements, in order to provide adequate protections for cross-border minorities?

Before I begin to address these questions, a few clarifications and side constraints are in order. First, this paper takes minority rights, as described in the international legal treaties and documents, as (more or less) given. It does not, for example, go into the debates about whether indigenous peoples (such as the Sami) should have special claims to land or self-determination, or how such special claims might be grounded. While this paper discusses some of the relevant debates on how to interpret and understand the relevant (minority) rights, it does not aim to challenge these rights protected by international law.

Second, the paper does not aim to develop or advocate any particular policy measure or institutional solution for solving the potential problems of cross-border minority protection. This is beyond the scope of this work. The paper nevertheless aims to provide a convincing case (based on the specific problematics of cross-border minorities) for challenging and renegotiating the existing state-centric systems of minority protection, and help identify those specific features of the problem that any feasible institutional order aiming to protect (also cross-border) minorities needs to take into account.

Third, it should also be noted that the paper deviates somewhat from the standard understanding of what ‘a minority’ is in international legal documents. The term ‘minority’ is used here as a shorthand for a variety of cultural, ethnic, religious, linguistic, and indigenous groups, rather than as a shorthand for any particular section of these groups within any particular state. That is, the relevant ‘minority groups’ whose protection this paper is interested in are not (contrary to the default position of international and domestic legal frameworks) defined in relation to the state within which the members of such groups reside (e.g. the Norwegian Sami, or the Finnish Roma), but instead as broader cultural, ethnic, religious, linguistic, or indigenous communities that often transcend state borders. I will come back to this definitional issue in section 1.

The paper proceeds as follows. The first section, *Minority Rights in International and Domestic Contexts*, provides a brief overview of the current state of affairs in international and domestic discourses on minority rights, and makes some conceptual clarifications for the discussion that follows. In particular, it highlights some of the normative differences between the justificatory frameworks for minority rights in international and domestic contexts while maintaining a commitment to particular, state-centric frameworks for implementing such rights. The second section, *The Problem of Cross-border Minorities*, discusses two example

cases – the indigenous Sami and the Roma travellers – in relation to the relevant international human rights documents, and the kinds of rights that these documents are designed to protect. This second section addresses in more detail the questions of the nature of the rights of cross-border minorities and especially of the types of collective rights that seem particularly problematic for the state-centric frameworks of minority protection. While it identifies a number of minority rights (also of cross-border minorities) that could well be protected within the prevailing system of distributed responsibilities, it also makes two substantial criticisms towards this system. One of these relates to the existing flaws of the current system (practical criticism), while another identifies a small number of collective rights that may be incompatible with the present state-centric systems of minority protection (conceptual criticism). While the first (practical criticism) could be addressed by improving the functioning of the existing system, the second (conceptual criticism) cannot, thus creating a need to rethink and rearrange the prevailing institutional systems of minority protection in the global arena. The third section, *A Statist Cosmopolitan Challenge*, addresses a potential challenge to my earlier suggestion for the need for a new, cosmopolitan institutional order by discussing some of the reasons that have been given for prioritizing the prevailing state-centric systems of political action. While this section does not aim to provide a conclusive argument against the prevailing state-centric system, it nevertheless shows how some of the reasons used to promote the role of independent states in minority protection may, from the perspective of cross-border minorities, operate as reasons to question such role, and thus also as reasons to look for alternative institutional arrangements for the protection of cross-border minorities and their members.

## 1 Minority Rights in International and Domestic Contexts

Minority rights – that is, the rights of cultural, ethnic, national, linguistic, indigenous groups etc. – have been broadly debated both in the context of particular (commonly, Western liberal) societies, and in international law. A number of states have adopted a variety of minority rights and multicultural policies for the protection and accommodation of minorities within their borders,<sup>5</sup> and minority rights are also protected by international treaties and documents.<sup>6</sup>

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<sup>5</sup> See e.g. *Multiculturalism Policy Index*, Queens University. <http://www.queensu.ca/mcp> (last visited 13 July 2017).

<sup>6</sup> Apart from the minority rights documents discussed in this paper (ICCPR Art 27, UN 1992, UNDRIP 2007), the key minority rights documents also include a variety of regional agreements (e.g. the Council of Europe's *Framework Convention for the Protection of National Minorities* (1 February 1995, ETS 157, available at: <http://www.refworld.org/docid/3ae6b36210.html> (last visited 13 July 2017)) and the *Draft Sami Convention* (a draft treaty between Finland, Norway and Sweden (2005), available in English at <https://www.sametinget.se/105173> (last visited 13.7.2017)), as well as interpretative notes on both UN and regional agreements. As the purpose of this paper is not to provide a comprehensive overview or legal analysis of the international (or regional) minority protections, I restrict my usage of the international minority rights documents to the three abovementioned declarations. It should also be noted that I approach these documents, not as a legal scholar, but as a political theorist whose aim is not to provide a legal interpretation of the documents, but to use them to illustrate a broader point and better understanding of the problematics of cross-border minorities in the prevailing state-centric institutional order.

These two strands of debate – minority rights within state borders, and minority rights in the international legal order – stand in complex relations to one another. The domestic minority policies are often viewed as motivated, as well as constrained, by international law, while the international legal treaties and documents are grounded on a strong presumption of state sovereignty, and the role of the state as the primary agent of justice within its territory. The justificatory frameworks for minority rights, and the interpretation of the ‘right’ to which minority protections are referring to, have varied. In international law, minority rights are strongly grounded on the basic human rights framework, extending the scope of basic human rights to those groups (and members) that may have traditionally been excluded from enjoying such rights.<sup>7</sup> Minority rights are “all the human rights that exist, with a particular focus on the need to make these accessible to vulnerable groups.”<sup>8</sup> In societal contexts, on the other hand, minority rights are often viewed in more concrete terms, as specific types of state policies that aim to protect, not only the basic human rights of minority members, but often also certain distributive ideals. In societal contexts, minority rights are often understood as group-differentiated rights (such as exemptions, assistance rights, special representation rights etc.) that go beyond the common rights of citizenship.<sup>9</sup>

Importantly, for the purposes of this paper, both the international human rights framework of minority protections and the domestic approaches to differentiated rights operate with a common understanding of independent states as primarily responsible for protecting minorities within their territory. In the traditional debates on multiculturalism and minority rights, this focus on state agents draws from the location of these debates within the traditional debates on socio-economic justice.<sup>10</sup> Minority issues are viewed as part of a larger set of debates on social justice, whereby the scope of justice is, by default, constrained to a particular cooperatively connected and institutionally governed society – typically, a nation state.<sup>11</sup> As part of the debates on social justice, the questions of minority protection have

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<sup>7</sup> The description here is compatible with both moral and political understandings of human rights, and my argument to follow need not be committed to or exclusive of either of these views. For a useful overview of the distinction, see P. Gilibert, ‘Humanist and Political Perspectives on Human Rights’, 39:4 *Political Theory* (2011) pp. 439-467.

<sup>8</sup> J. Castellino, *Global Minority Rights: Introduction* (Ashgate, Farnham, 2011) p. xxi.

<sup>9</sup> W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford University Press, Oxford, 2001) p. 42.

<sup>10</sup> Will Kymlicka’s landmark work on the extension of the Rawlsian and Dworkinian frameworks of justice to issues of cultural justice is exemplary of this, and many later theorist have followed suit. For some of the central works on cultural accommodation and social justice, see W. Kymlicka, *Liberalism, Community and Culture* (Clarendon Press, Oxford, 1989); W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, Oxford, 1995); C. Taylor, ‘The Politics of Recognition’, in A. Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, Princeton, NJ, 1994) pp. 25-73; B. Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Palgrave, Basingstoke, 2000); B. Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity Press, Cambridge, 2001); A. Phillips, *Multiculturalism without Culture* (Princeton University Press, Princeton, NJ., 2007); A. Patten, *Equal Recognition: The Moral Foundations of Minority Rights* (Princeton University Press, Princeton, NJ., 2014); A. Vitikainen, *The Limits of Liberal Multiculturalism: Towards an Individuated Approach to Cultural Diversity* (Palgrave Macmillan, Basingstoke, 2015).

<sup>11</sup> Many theorists of global justice have, of course, challenged this focus, arguing that the demands of justice have a global scope. See e.g. S. Gosepath, ‘The Global Scope of Justice’, 32:1-2 *Metaphilosophy* (2001) pp. 135-159; T. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Polity Press, London, 2002); S. Caney, *Justice Beyond Borders* (Oxford University Press, Oxford, 2005); K. Tan, *Justice, Institutions and Luck* (Oxford University Press, Oxford, 2012).

become inherently connected to questions of social organization and institutional structures within a particular society, with the state and state institutions seen as being the primary agents of minority protection.

This presumption of states as being primarily responsible for protecting minorities within their territory is also manifested in the international legal frameworks for minority rights, and the central international minority rights documents.

According to Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR 1966)

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

While the original formulation of the ICCPR Art. 27 provides no explicit reference to the agent to whom the responsibility for minority protection is attached, the later CCPR General Comment on Article 27<sup>12</sup> provides such interpretation of both state actors as the primary agents of minority protection (esp. section 9), as well as of those (also positive) measures that states are expected to take (esp. section 6.1.).

According to Article 1 of the *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (UN 1992):

1.1. *States* shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.

1.2. *States* shall adopt appropriate legislative and other measures to achieve those ends.  
(my italics)

The *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP 2007) draws a slightly more nuanced picture of the role of states in indigenous rights protection, with emphasis on the cooperative aspects of the state vs. indigenous peoples relations. The states are, nevertheless, seen as the default actors that, *in consultation and cooperation with indigenous peoples shall take relevant measures* for the protection of the various indigenous rights mentioned in the Declaration.<sup>13</sup>

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<sup>12</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5, esp 5.1., 5.2, available at: <http://www.refworld.org/docid/453883fc0.html> (last visited 13 July 2017).

<sup>13</sup> See also Y. Jabareen, 'Redefining Minority Rights: Successes and Shortcomings of the U.N. Declaration on the Rights of Indigenous Peoples', 18:1 *U.C. Davis Journal of International Law and Policy* (2011) pp. 119-161; for critique of the minority/indigenous -dichotomy prevalent in current international documents, see W. Kymlicka, 'The Internationalization of Minority Rights', 6:1 *Icon* (2008) pp. 1-32; W. Kymlicka, 'Beyond the Indigenous/Minority Dichotomy?', in S. Allen and A. Xanthaki (eds.), *Reflections on the UN Declaration on the Rights of indigenous Peoples* (Hart Publishing, Oxford, 2011) pp. 183-208.

Notably, for the purposes of this paper, the international and domestic frameworks for minority protection are not only committed to the role of independent states as carrying the primary responsibility for protecting minorities within their territories, they also define minorities specifically in relation to state structures. According to one of the most used and quoted definitions by the *United Nations Special Rapporteur* Francesco Capotorti, ‘a minority’ is:

A group, numerically inferior to the rest of the population of the State, in a non-dominant position, whose members being nationals of the state possess ethnic, linguistic or religious characteristics different from the rest of the population, and who maintain if only implicitly a sense of solidarity directed towards the preservation of their culture and identity.<sup>14</sup>

While this definition is, by no means, a decisive definition of a minority in either international legal or domestic contexts, it nevertheless incorporates two elements that most minority rights discourses have in common. First, it provides a clear point of reference for understanding a minority as a non-dominant group (in contrast to the dominant majority) in any given state. Second, it also provides a cultural or identity-based element to this definition. A minority group is a group that is different (from the dominant majority) via ethnic, linguistic or religious characteristics, and a group whose members maintain (if only implicitly) a sense of solidarity towards preserving this culture and identity.

It should be noted that my own usage of the term ‘minority’ makes a slight deviation from the above characterization of a minority as a group that is defined directly in relation to the rest of the population *within* any particular state. The minorities that I am concerned with in this paper, and that I also use as examples, are groups that would qualify as minorities within any given state, but whose cultural connectedness as well as non-dominance extends beyond state borders. In this sense, my usage of the term ‘minority’ takes the second (cultural- or identity-based) element of the definition as central, as a potential ground for extending the scope within which the non-dominant status of the group is assessed. The minority status, in this usage of the term, need not be connected solely to the non-dominant status of the group within any given state, but can also relate to the non-dominant status across several states. As I will demonstrate, these groups – *cross-border minorities* – pose specific challenges to the existing state-centric frameworks for minority protection by virtue of being groups deserving of special minority protections which defy the practical state-centric frameworks for minority rights implementation.

## 2 Problem of Cross-border Minorities

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<sup>14</sup> F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (1979) UN Doc. E/CN.4/Sub.2/348/Rev. 1. For discussion and critique on Capotorti’s formulation, see e.g. P.V. Ramaga, ‘Relativity of the Minority Concept’, 14:3 *Human Rights Quarterly* (1992) pp. 104-119; Jabareen, *supra* note 13, pp. 122-125; for Capotorti’s own reformulation that drops the citizenship requirement of minorities, see: F. Capotorti, ‘Minorities’, in R. Bernhardt (ed.) 8 *Encyclopedia of Public and International Law* (1985) 385.

The problems posed by cross-border minorities to the existing state-centric frameworks for minority protections may be illustrated by looking at two groups that are commonly agreed upon to be in need of special (minority) protection, but who do not fit easily into the current system due to being groups that reside as well as move across traditional state borders. I discuss the specifics of the two groups – the indigenous Sami and Roma travellers – each in turn.

## 2.1 *The Indigenous Sami*

The indigenous Sami are the original inhabitants of the northern areas of Norway, Sweden, Finland, and Russia, with traditionally semi-nomadic modes of living, such as reindeer herding. While most Sami no longer engage in these traditional modes of living (numerically, the majority of Sami nowadays live in cities as well as outside the traditional Sami territory), they nevertheless maintain a certain ethnic and cultural connectedness via ancestry, language, relation to land, and shared history. As indigenous peoples, the Sami enjoy a special status as well as a broader set of rights (outlined in UNDRIP 2007) in comparison with other minority groups (including national, ethnic, religious and linguistic minorities described in UN 1992).

The UNDRIP recognizes indigenous peoples, such as the Sami, as independent peoples who “have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law” (Art 1). The UNDRIP recognizes the indigenous people’s “right to self-determination” (Art 3), “autonomy and self-government” (Art 4), and “the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions” (Art 5). It further acknowledges that “indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned” (Art 9), as well as “the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired” (Art 26:1).

The underlining ethos of the UNDRIP is both universal and collectivist. The UNDRIP aims to protect the universal human rights of indigenous peoples, and it also recognizes the nature of (some of) these rights as collective – that is, as rights that are possessed, as well as exercised, by the indigenous peoples collectively, as a group, rather than by each individual member of the group individually. In the case of the Sami, this entails, presumably, that they should also enjoy the right to self-determination, and do so collectively, *as a distinct people across the borders of Norway, Sweden, Finland, and Russia*.<sup>15</sup>

Despite its universalist collectivist ethos (that is, the ethos of protecting the same collective rights of indigenous peoples as of other peoples), the UNDRIP is formulated within the traditional state-centric framework that places the main responsibility for the protection of

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<sup>15</sup> This view of the Sami as one people is also supported by the 2005 Draft Sami Convention (notwithstanding the current scope of the Convention’s application to the Sami in the Nordics and not in Russia). For useful analysis of the Convention, including its notion of the Sami as one people, see M. Fitzmaurice, M. ‘The New Developments Regarding the Saami Peoples of the North’, 16:1 *International Journal of Minority and Group Rights* (2009) pp. 67–156; M. Fitzmaurice, M. ‘*The UN Declaration on the Rights of Indigenous Peoples: Recent Developments regarding the Saami People of the North*’, in Allen and Xanthaki (eds.), *supra* note 13, pp. 536–560.



the indigenous peoples rights on the states within which they reside. The UNDRIP describes the relationship between states and indigenous peoples as that of partnership and cooperation, and ascribes several duties to states to provide effective mechanisms for both preventing and redressing assimilation and destruction of indigenous cultures, and for enabling indigenous peoples to thrive socially and economically, both within and outside their own communities. The provision of the mechanisms for indigenous protection, the UNDRIP states, is to be done by the states ‘in conjunction with’ or ‘in consultation and cooperation with’ the indigenous peoples concerned.

My intention here is not to question the advancements of the UNDRIP to indigenous rights protection. What I wish to do, however, is to investigate whether the universalist collectivist nature of rights recognition and the practical frameworks of implementation described in the UNDRIP are compatible.<sup>16</sup> Let us illustrate. In the case of the Sami, the focus on states as the primary agents of indigenous rights protection has led to a situation where the Sami enjoy different sets of legal rights and protections, depending on whether they reside in Norway, Sweden, Finland, or Russia. These differences are already apparent in the different levels of commitment that the four states have towards the international norms of indigenous rights protection. While the three Nordic countries are all signatories of the UNDRIP (with Russia having accepted recommendations to “implement the principles of UNDRIP” while refusing to formally endorse the Declaration<sup>17</sup>), only Norway has ratified ILO 169<sup>18</sup>, and only the three Nordic countries have established official Sami parliaments with substantive authority over indigenous issues in their respective territories.<sup>19</sup> While all the Nordic countries have thus taken substantive measures to protect the rights of the indigenous Sami, including their collective right to self-determination, none of these measures would, however, seem to manifest the universalist collectivist ethos of the UNDRIP to indigenous people’s collective right to self-determination. Being under the jurisdictions of different states, the Sami parliaments operate as independent units that give relative autonomy to the Sami of Norway, of Sweden, and of Finland, but not to the Sami collectively, as a distinct people across these borders, or across the whole Sami territory, crossing the northern borders of Norway, Sweden, Finland, and Russia.

## **2.2 Group Rights as Jointly Held Rights of Individuals**

Let us pause here for a moment to examine the nature and scope of the problem that I have started to identify above. That is, in which ways and to what extent the prevailing state-centric system of distributed responsibilities may fail – either in principle or in practice – to protect the rights of cross-border minorities such as the indigenous Sami.

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<sup>16</sup> For reactions on UNDRIP, including a variety of practical challenges, see e.g. Allen and Xanthaki (eds.), *supra* note 13; for a multiplicity of regional approaches to indigenous rights protection, see also articles in 18:4 *International Journal on Minority and Group Rights* (2011) special issue.

<sup>17</sup> J. Rohr, ‘Indigenous Peoples in the Russian Federation’, 18 *IWGIA report* (2014) p. 54.

<sup>18</sup> ILO 169 (*Indigenous and Tribal Peoples Convention*, 1989, No. 169) being the only legally binding international treaty that deals exclusively with the rights of these peoples.

<sup>19</sup> For an overview on the different channels of political influence and the functionings of the three Sami parliaments, see E. Josefsen, E. ‘The Saami and the National Parliaments: Channels for Political Influence’, IPU and UNDP (2010), available at <http://www.ipu.org/splz-e/chiapas10/saami.pdf> (last visited 13 July 2017).

One common way of differentiating between different types of minority rights is to look at the structure of these rights in terms of the proper holders and exercises of rights. That is, in terms of who, or what, possesses any particular right and by whom this right is exercised. Minority rights can be individually exercised membership rights (such as the right of the members of the Sami community to engage in traditional reindeer herding<sup>20</sup>), or collectively exercised group rights (such as the right of the Sami, as indigenous peoples, to determine their own future). Following Peter Jones,<sup>21</sup> the basic rights of indigenous peoples described in the UNDRIP incorporate clear instances of both individual and collective rights. That is, rights held by individual indigenous persons severally, as well as rights held by indigenous peoples collectively. Importantly, as Jones explicates, the collective rights of indigenous peoples need not presume the holder of these rights as a group entity.<sup>22</sup> The collectively exercised group rights (such as the Sami right to self-determination) need not be understood as rights possessed by the group qua group, but as rights that are possessed by the individual Sami jointly, where the precondition for both possessing and exercising this right is that of the possession of such right by the other individual Sami.<sup>23</sup>

What is important, for my purposes here, is the understanding of the interdependency of certain collective rights (such as the right to self-determination) on those individuals who jointly possess and exercise this right, and the difficulties this brings to the state-centric frameworks for minority protection.

In order to illustrate these difficulties, let us begin with the kinds of cases where the failure to protect the rights of indigenous peoples (as stated in UNDRIP) may not have anything to do with the state-centricity of the system itself, but rather with the less than ideal functioning of this system. For example, when assessing the indigenous Sami's access to land and natural resources, it would seem that, as things stand, this access is most fully (although perhaps not entirely) protected for the Norwegian Sami in the northern regions of Finnmark in Norway. Here, the 2005 Finnmark act<sup>24</sup> provides a framework for regulating and also restricting the external usage of lands, waters and natural resources in the Finnmark region.<sup>25</sup> No equivalent or equally extensive framework that protects the Sami access to land and

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<sup>20</sup> Traditional reindeer herding being the exclusive right of the Sami people in Norway and Sweden (albeit not in Finland or Russia). On the status of reindeer herding and husbandry in the northern indigenous areas, see e.g.: *Sustainable Reindeer Husbandry*, Arctic Council (2002), <http://www.reindeer-husbandry.uit.no/online/indexonline.html> (last visited 13 July 2017).

<sup>21</sup> P. Jones, 'Collective and Group-Specific: Can the Rights of Ethno-Cultural Minorities be Human Rights?', in G. Pentassuglia (ed.) *Ethno-Cultural Diversity and Human Rights* (Leiden: Brill | Nijhoff, 2018, pp 27-58).

<sup>22</sup> Ibid. See also P. Jones, 'Human Rights, Group Rights, and Peoples' Rights', 21:1 *Human Rights Quarterly* (1999) pp. 80-107; P. Jones, 'Human Rights and Collective Self-Determination', in A. Etinson (ed.) *Human Rights: Moral or Political?* (Oxford: Oxford University Press, 2018, pp. 441-459).

<sup>23</sup> For Jones, the importance of understanding the collective rights of the indigenous peoples as rights held by individuals (jointly) lies in the controversy of understanding collective rights as human rights. Jones, *supra* note 21. While I do not take part in this discussion here, I follow Jones's formulation also to the extent in which the denying of Sami self-determination is understood as a violation of the rights of the individual Sami (contra to the case where the right to self-determination would be understood as the right of a group as a group).

<sup>24</sup> *The Finnmark Act*, Act No. 85 of June 17, 2005 relating to Legal Relations and Management of Land and Natural Resources in the County of Finnmark, available in English at <http://www.wipo.int/edocs/lexdocs/laws/en/no/no110en.pdf> (last visited 13 July 2017).

<sup>25</sup> For a useful analysis of the Finnmark act as a state-based means for protecting indigenous land rights, see e.g. Ø. Ravna and N. Bankes, 'Recognition of Indigenous Land Rights in Norway and Canada', 24 *International Journal on Minority and Group Rights* (2017) pp. 70-117.

natural resources is found in Sweden, Finland, or Russia, although there are no conceptual reasons why these other states could not, at least in principle, adopt similar frameworks of indigenous land protection, via which the Sami access to land could be protected in all four countries. Certain border areas taken aside, the Norwegian Sami's access to land is not (at least directly) dependent on whether the Sami in the neighbouring countries enjoy equivalent access to land, nor would it seem to matter who would be viewed as primarily responsible for protecting the Sami rights to land – as long as these rights were, indeed, protected. While the question of access to land may demonstrate some of the flaws of the state-centric system as it currently stands (with different states fulfilling their duties to very different extents), it is not necessarily an example against the state-centric system as such. As long as the states fulfil their duties with sufficient coordination, the Sami rights to land could be protected within the existing state-centric system of distributed responsibilities.<sup>26</sup>

A slightly different scenario, however, emerges in the case of certain collective political rights, such as the indigenous peoples' right to self-determination. Following Jones's framework, the Sami people's right to self-determination is a collective right possessed by each individual Sami jointly, although none of the individual Sami enjoy such right independently of others. Contrary to the previous case, where the Norwegian Sami's enjoyment of their right to land is not (at least directly) dependent on the Finnish Sami's enjoyment of the same right, in the case of collective self-determination, this would seem to be the case. That is, the enjoyment of the Sami in Norway of their right to self-determination is – also conceptually – dependent of the enjoyment of the Sami in Finland of this same right. Furthermore, and contrary to the existing status quo, it would not seem to be sufficient that the Sami in the different countries enjoy equivalent rights of self-determination among themselves, but that the Sami, across the borders of Norway, Sweden, Finland, and Russia, enjoy this right collectively. The Sami of Finland may, of course, enjoy their collective right of self-determination *as the Sami of Finland*, but this still falls short of the collective right of self-determination of the Sami *as the Sami*. Thus, even if the four states fulfilled their duties of protecting the Sami rights to self-determination within their jurisdictions (as Norway, Sweden, and Finland have, by the establishing of Sami parliaments, attempted to do), this would not seem to suffice for the protection of the Sami right to self-determination as one people. Due to the nature of the collective right of self-determination as a jointly held, and therefore also interdependent, right of all Sami, this right challenges, also conceptually, the current system of distributed responsibilities. While it may be the case that many (perhaps even most) rights described in the UNDRIP could be protected by a well-functioning state-centric system of distributed responsibilities, it also seems that a small number of collective rights – most notably, the indigenous peoples' rights to self-determination in cases of cross-

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<sup>26</sup> This may in fact be the case in most instances of rights protection where the enjoyment of a particular right is not (at least directly) dependent on other group members enjoying the same right. For example, the Sami children's access to education in their traditional customs and languages may well be protected on the state level, and the Norwegian Sami children's right to this is not (at least directly) dependent on whether the other Sami children in other countries also enjoy this same right. As I discuss in the following sections, there may nevertheless be tensions between certain cross-border minority rights (such as the right to culture or language) and the state-centric system of distributed responsibilities, although these tensions need not have to do with the nature of the right itself (as a jointly held collective right), but with the nature of the good to which the right gives access.

border minorities – are in direct tension with this system, thus calling for a restructuring of the system itself.

It may be objected that the example I have chosen – the indigenous Sami – is in many respects a special case, and not particularly illustrative of the kinds of difficulties that cross-border minorities may (or may not) bring to the existing state-centric systems of minority protection. As indigenous people, the indigenous Sami enjoys a far more extensive set of rights and protections (as described in UNDRIP), in contrast to other minorities (UN Minority Declaration 1992), including collective rights of self-determination. The indigenous peoples' connection to land also makes them territorial in ways that do not apply to other minorities, thus questioning the extent to which my findings here can be generalized. In order to address this issue, let us turn to the second example case of a cross-border minority, that of Roma travellers.

### 2.3 *The Roma Travellers*

It should be noted right from the outset that the Roma (Romani or Gypsy) are an extremely heterogeneous group of people (including the Romanichals, Kalé, Manouche, Gitano, Sinti, Ashkali, etc.) living in various parts of mainly Europe and the Middle East. In the public terminology of the United Nations<sup>27</sup> and the Council of Europe,<sup>28</sup> the Roma are often discussed with a number of traveller communities (e.g. the Irish travellers), who are not ethnically Roma, but who nevertheless encounter very similar forms of discrimination, and who may also be conceived of as and identify as Gypsy.<sup>29</sup> While not all travellers are Roma, and not all Roma have maintained traveling as their way of life, the term used here – the Roma travellers – aims to capture both the historical dispersion of the Roma across several state territories and the current practices of (some) Roma of the traveling life.<sup>30</sup>

Unlike the indigenous Sami who are broadly recognized as the original inhabitants of their ancestral lands, the Roma are, historically, and in many cases also at present, considered to be migrants. While the Romani World Congress (2000) and the International Romani Union (IRU) have argued for the Roma to be recognized as its own self-determining nation without a territory, there are substantive disagreements on the status of Roma as a national, ethnic, political, or other type of group, as well as on the criteria used to define Roma membership.<sup>31</sup> In both international as well as in many domestic contexts, the Roma and the

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<sup>27</sup> United Nations Office of the High Commissioner for Human Rights: *United Nations Working Group on Roma*, <http://www.ohchr.org/EN/Issues/Minorities/Pages/UnitedNationsRegionalWGonRoma.aspx> (last visited 13 July 2017)

<sup>28</sup> Council of Europe: *Roma and Travellers*, <http://www.coe.int/en/web/portal/roma> (last visited 13 July 2017).

<sup>29</sup> While the term 'gypsy' has often been used as a derogative, there have been attempts of the Roma movement to own this term, and many Roma organizations nowadays refer to themselves as gypsy in their communication.

<sup>30</sup> According to the UNHCR, a large number of Roma are also stateless, living either partially or fully outside any administrative recording (Council of Europe: Commissioner for Human Rights, *Many Roma in Europe are stateless and live outside social protection*, 6 July 2009, available at: <http://www.refworld.org/docid/4a7023c72.html> (accessed 13 July 2017)). While there is no straightforward link between such statelessness and the traditional traveling life of the Roma, I believe this to indicate yet another level in which the Roma travellers can be viewed as cross-border minorities: not only do the Roma reside and move across different state territories, some Roma are also left out of the state system altogether.

<sup>31</sup> See e.g. A. Tremlett, 'Making a Difference without Creating a Difference: Super-diversity as a New Direction for Research on Roma Minorities', 14:6 *Ethnicities* (2014) pp. 830-848; A. McGarry, 'Roma as a Political Identity: Exploring Representations of Roma in Europe', 14:6 *Ethnicities* (2014) pp. 756-774. For an overview

Travellers are nevertheless recognized as minority groups that have been, and often also continue to be, subjected to various forms of exclusion, discrimination and disadvantage.

In this context, the *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (UN 1992) and ICCPR, Art. 27 operate as the key international minority rights documents. Contrary to the UNDRIP that aims to cater for both individual and collective rights of indigenous peoples, there is no explicit mention of the collective nature of the rights of other minorities in these documents. The UN 1992 is formulated precisely as a declaration of the rights of *persons* or, in other words, as rights of those *individuals* that belong to the minority groups in question. The same focus on individual rights is found in Article 27 of the ICCPR that concerns the rights of *persons* belonging to ethnic, religious and linguistic minorities.

Although neither UN 1992 nor ICCPR Art. 27 recognize collective minority rights (that is, rights held by the minority group as a group or by the individuals of such groups jointly), they nevertheless include elements that point towards the collective nature of some of the contents of the individual rights that the documents are designed to protect. The UN 1992 describes the duty of states to “protect the existence of the national or ethnic, cultural, religious and linguistic identity of minorities” (Art 1.1.), and the right of the minority members “to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination” (Art 2.1.). While the term ‘collective’ does not feature in the document, there is no doubt that the relevant ‘identities of minorities’ (national or ethnic, cultural, religious and linguistic) should be viewed as referring to the shared, collective identities of minority members, as identities that differentiate them from the relevant (collective) identities of the majority.<sup>32</sup> The practices of religion, usage of language, and enjoyment of culture are often viewed as precisely the kinds of practices that people engage in together with others, where the good of these practices (religion, language, culture) is viewed as the kind of social good that is both produced and enjoyed collectively.<sup>33</sup> This element of ‘collective exercise’ is also described in UN 1992 and ICCPR Art 27 that protects minority members’ ability to “exercise their rights [...] individually *as well as in community with other members of their group*” (UN 1992 Art. 3.1., *my emphasis*), and reject the right of states to deny the minority members’ “right, *in community with the other members of their group*, to enjoy their own culture, to profess and practise their own religion, or to use their own language” (ICCPR Art 27, *my emphasis*). Further, as recognized by UN 1992, the cultural, religious, linguistic groups etc. may also be groups that extend across state borders, thus creating a need – and a right – for

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on Roma activism in UN politics, see I. Klimova-Alexander, *The Romani Voice in World Politics: The United Nations and Non-state Actors* (Ashgate, Aldershot, 2005).

<sup>32</sup> This is also in line with the second element of Capotorti’s minority definition discussed earlier (section 1).

<sup>33</sup> Charles Taylor’s notion of ‘irreducibly social goods’ or Denise Reaume’s notion of ‘participatory goods’ may be useful here. While there are no doubt many ways to understand the social nature of culture and all it entails, what is important for my purposes here is the understanding of culture a collective phenomena, the enjoyment of which is (at least in most cases) dependent on there also being others who take part in such phenomena. C. Taylor, ‘Irreducibly social goods’, in Taylor (ed.), *Philosophical Arguments* (Harvard University Press, Cambridge, MA., 1995) pp. 127-145; D. Reaume, ‘Individuals, Groups, and Rights to Public Goods’, 38:1 *University of Toronto Law Journal* (1988) pp. 1-27; see also P. Jones, ‘Collective Rights, Public Goods, and Participatory Goods’, in Calder, Bessone, and Zuolo (eds.), *How Groups Matter: Challenges of Toleration in Pluralistic Societies* (Routledge, New York, 2014) pp. 52-72.

the minority members to maintain contact with others across borders. As stated in Article 2.5. (UN 1992), “Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, *as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties*” (my italics). Given the cross-border nature of (some) national, ethnic, religious or linguistic groups, the document further emphasizes the need of the states – as the primary actors and protectors of minorities within their territories – to “cooperate in order to promote respect for the rights set forth in the present Declaration” (Art 7, see also Art 5 & 6).

Given these provisions, one might ask, what then is the specific challenge of cross-border minorities – such as the Roma travellers – to the existing frameworks of minority protection? The key minority rights documents (including UN 1992 and ICCPR Art 27) would, after all, seem to acknowledge the potentially cross-border nature of minority groups, and also point to the need for states to cooperate when protecting the rights of persons belonging to these groups. Moreover, as indicated by the explanatory documents,<sup>34</sup> the protection of the rights of minority members, within any particular state, should not only apply to those minority members that are simultaneously citizens of the given state, but also to non-citizens. In the light of these considerations, it is worth asking whether the failures of the current system are simply failures of states to provide adequate, and sufficiently coordinated, protections to cross-border minorities, or whether there is also some deeper tension between the existing state-centric system of rights protection, and the kinds of rights it is supposed to protect.

#### **2.4 Minority Rights as Individual Rights to Collective Goods**

Let us return to the structure of the kinds of rights that the central minority rights documents (ICCPR Art 27 and UN 1992) are designed to protect. In terms of the holders of rights, these rights are clearly explicated as rights that are possessed by individuals (members of minority groups) rather than by minority groups collectively. According to UN 1992, Roma travellers (as a group), for example, do not possess a right to enjoy its culture, although each Roma traveller (as a member of the Roma traveller group) may be seen to possess such right. Furthermore, and importantly for the purposes of this paper, each Roma traveller (as an individual) also possesses a right to enjoy their culture “in community with other members of their group” thus making the *exercising* of their individual right dependent on other members of the group also possessing this right. The good of culture – to which the content of the right in question refers – is an inherently social good, thus making the exercising of this (presumably) individual right a collective matter.

It may be noted that the above description of an individual right, the exercising of which is dependent on others, is very similar (although not identical) to the notion of a collective right used in section 2.2. In line with Jones’s definition, the Sami right to self-determination is a collective right in the sense of it being a right held jointly by all Sami individuals. None of the Sami individuals, however, hold this right individually independently

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<sup>34</sup> See esp. UN Human Rights Committee (HRC), *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5, esp 5.1., 5.2, available at: <http://www.refworld.org/docid/453883fc0.html> (last visited 13 July 2017).

of others, although they possess this right jointly (as individuals). In the present case, however, the Roma travellers' right to enjoy their culture would seem to be the right of each Roma individual to enjoy their culture individually, although the exercising of this right is dependent on others. The possession and exercising of a right, in this case, come apart.<sup>35</sup> Due to the social nature of culture (and the good of culture as being both produced and enjoyed collectively), this distinction between the individual possession and collective exercise of a right, however, comes difficult to maintain. An individual's right to enjoy their culture is, due to the social nature of culture, dependent on at least some others being able to enjoy such right and, in the case of cross-border minorities, this may also entail cross-border dependency. In the case of Roma travellers, this dependency is further highlighted by the characteristics of the Roma as a traveling community whose culture is, by its very nature, transcends state borders.<sup>36</sup> The individual Roma's ability to enjoy their culture is thus not only dependent on some others (say, those residing within the same country) being able to take part in the collective exercise of enjoying Roma culture, but on the Roma being able to cross borders and enjoy their culture together with those in another country.

It should be clarified that my intention here is not to argue for open borders (based on the Roma travellers right to enjoy their own culture) or to say that none of the rights of the cross-border minorities, including Roma travellers, could not be protected within the existing state-centric frameworks of minority protection. On the contrary, I think that many (perhaps even most) of the rights of the Roma travellers could, at least in principle, be protected within the state-centric system of distributed responsibilities, provided that states did, indeed, fulfil their duties of minority protection. The case of culture as a collective good, however, provides an interesting challenge to this system, and is especially pertinent in cases where the nature of the culture inherently transcends state borders. Contrary to the earlier challenge of cross-border indigenous self-determination, where the tension between this right and the state-centric system of minority protections is based on the nature of the right as a jointly – and interdependently – held right of individual members, the challenge here, however, refers not to the nature of the right in question, but to the nature of the good to which this right provides access. This is an important distinction, as many would like to deny the collective nature of, e.g. Roma travellers' right to culture, while nevertheless accepting the collective nature of the good (culture) to which this right provides access. The challenge here, of course, is that, even if the right to culture (or language, or religion) could be viewed as an individual right in terms of it being possessed by each member of the group individually (rather than individuals jointly, or as a separate group entity), this right would be void, if others were not able to participate in the collective enjoyment of it. In the case of cross-border minorities, such as the

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<sup>35</sup> Jones (*supra* note 21) makes a similar comment in relation to other minority rights than UNDRIP.

<sup>36</sup> It is, of course, controversial to attach any characteristics (including the state-defying characteristics used here) as central to any particular group culture, as this risks cultural essentialism and may be seen to imply too restricted and homogeneous view of culture. As stated earlier, not all Roma have maintained traveling lifestyle, nor would all Roma view state borders as something inherently in conflict with Roma culture. However, as demonstrated by international Roma activism and by the history of Roma transnational migration, I believe there to be enough grounds to view Roma culture as defying rather than enforcing state borders, although I wish not to stereotype Roma culture as inherently in opposition to state borders or state-based institutions in general. On some of the risks of using stereotypes of Roma culture and identity, see e.g. D. Farget, 'Defining Roma Identity in the European Court of Human Rights', 19:3 *International Journal on Minority and Group Rights* (2012) pp. 291-316.

Roma travellers, this would seem to require much more than protecting the minority members' stated right to "establish and maintain contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties" (UN 1992, Art. 2.5). Indeed, it may require far more substantive rights for the minority members to also collectively exercise their culture together with others, regardless of whether they reside within or across state borders.

While it may still remain an open question whether the state-centric system of distributed responsibilities could – perhaps with some minor alterations and more rigorous implementation – protect the rights of minority members to enjoy their culture (also together across borders), not much in the current international order would indicate towards this becoming a reality. Like the indigenous Sami, the Roma travellers currently enjoy very different sets of rights and protections in different countries. The small number of Roma in any particular country, combined with their traveling lifestyle<sup>37</sup>, tend to make the Roma a low priority in any state context. While these problems could perhaps still be traced to the flaws in the functioning of the existing state-centric system (rather than the system itself), the collective nature of the goods that the minority rights aim to protect may be indicative of a more fundamental tension in this system. At the very least, it must be asked why the protecting of the rights of individuals to collective goods such as culture (or language or religion) should be viewed as the task of a system of distributed responsibilities among states, when this system is failing in various respects. That is, when many states are de facto failing to protect minorities within their territories (practical criticism), and when the collective nature of some of the goods to which the minority rights refer to do not fit easily into this already malfunctioning system.

### **3 A Statist Cosmopolitan Challenge**

Let us assume that I have so far been successful in showing two things. 1) That the current, state-centric system of minority protection fails in protecting (some of) the rights of cross-border minorities, and 2) that these failures are not only practical failures of an otherwise functioning system, but also failures within this system to account for certain types of cross-border collective rights (e.g. indigenous self-determination) and cross-border collective goods (e.g. culture). These criticisms would seem to point towards the need to rethink and restructure the existing system of distributed responsibilities, and to develop more cosmopolitan institutions that would be better able to protect the basic rights of (also) cross-border minorities.

But perhaps I am proceeding too swiftly here. Perhaps the flaws of the state-centric system are not as drastic as I have made them out to be, and could be mended by more rigorous enforcing of the current system (for practical failures), and by suitable tweaking of

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<sup>37</sup> Apart from being a relatively small minority in any state context, some (albeit not all or even the majority) of Roma travellers in any state context may also be citizens of a different state (or stateless persons). While the CCPR General Comment on Article 27 indicates the minority protections to be applicable to citizens and non-citizens alike, there is a clear tendency of the states not to extend their concern as widely to non-citizen minorities as they would for minority members that were also citizens of the country within which they reside.



the system to better accommodate cross-border collective rights of self-determination. Perhaps the existing state-centric system, with its state-based institutions, is the best system that we have, even in a world of cosmopolitan obligations.

Before going further, it is important to note that my argument here needs not ignore the variety of transnational institutions and international and regional agreements that are already in place (also) for the protection of minorities in different regions. In Europe, the Association of European Border Regions (AEBR) looks over the interests of several of the European border areas, and provides practical guidance to cross-border cooperation between states.<sup>38</sup> While the protection of the interests of border regions (including, although not exhausting, issues relating to the protection of cross-border minorities) has been most institutionalized within Europe, the specific character and challenges of minority protection in cross-border contexts have also been recognized elsewhere. This applies both to the key international and regional minority rights documents that explicitly recognize the international scope and interest in minority protection, and to the various minority rights bodies that assess and mediate minority rights claims also in border contexts.<sup>39</sup> While regional variations exist – notably, the continuing reluctance of many African states to accept minority rights norms in national and transnational contexts<sup>40</sup> – there is no lack of bilateral and multilateral agreements between states, or transnational institutions (e.g. the European Court of Human Rights and Inter-American Court of Human Rights) that are already used to address minority issues in different regions.

In relation to the example cases discussed here – the indigenous Sami and the Roma travellers – the 2005 Sami Draft Convention provides perhaps the most elaborate regional agreement for the protection of the indigenous Sami across the northern borders of Norway, Sweden and Finland (and, notably, excluding Russia).<sup>41</sup> Several cases relating to the rights of Roma travellers have been addressed in distinctively transnational institutions, including the European Court of Human Rights, although – given the nature of the courts, and its margin of appreciation – such cases remain distinctively state focused.<sup>42</sup> While my intention is thus not to downplay the role or the potential of the already existing transnational institutions and bi- and multilateral agreements between states, I nevertheless wish to point to some of the

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<sup>38</sup> See: Association of European Border Regions (AEBR) *Practical Guide to Cross-border Cooperation*, Third Edition 2000, available at [http://www.aebr.eu/files/publications/lace\\_guide.en.pdf](http://www.aebr.eu/files/publications/lace_guide.en.pdf) (last visited 29 September 2018).

<sup>39</sup> For the explicit recognition of the international scope and interest of minority protections, see e.g. OSCE: *Report of the CSCE Meeting of Experts on National Minorities, Geneva 1991*, especially part III, available at: <https://www.osce.org/hcnm/14588> (last visited 29 September 2018); on analysis on the OSCE High Commissioner on National Minorities' recommendations regarding Bolzano/Bozen region, see F. Palermo and N. Sabanadze (eds.) *National Minorities in Inter-State Relations* (Leiden: Brill | Nijhoff 2011); while the work of the various international and regional expert bodies (incl. UN Special Rapporteur on minority issues, UN Forum on Minority Issues, and the OSCE High Commissioner on National Minorities) recognize as well as support various cooperative efforts between states for minority protection, the basic framework of this work nevertheless remains state focused.

<sup>40</sup> On some of the recent developments, see e.g. J. Gilbert, 'Constitutionalism, ethnicity and minority rights in Africa: A legal appraisal from the Great Lakes region', 11:2 *International Journal of Constitutional Law* (2013) pp 414–437.

<sup>41</sup> 2005 Draft Sami Convention, *supra* note 15.

<sup>42</sup> See also Farget, *supra* note 36; on the margin of appreciation and minority protection more generally, see e.g. E. Benvenisti 'Margin of Appreciation, Consensus, and Universal Standards' 31 *International Law and Politics* (1999) pp 843-854.

challenges of such institutions by providing independent reasons to steer yet further away from the state-centricity of such institutions. The preceding discussions on the nature of certain cross-border minority rights (self-determination) and goods to which these rights provide access to (e.g. culture), already provided some such reasons, and in the discussion that follows, I aim to identify another set of reasons, grounded on a potential criticism of my view, that of statist cosmopolitanism.

In recent years, there have been a number of attempts to bring the state back into the cosmopolitan theories of global justice as a feasible agent via which our obligations both within and across borders can be realized.<sup>43</sup> While these attempts vary both in their views on the content of our obligations and the ultimate role of the state in fulfilling these obligations, what they have in common is the acceptance of the empirical fact that states are an inherent element of the existing global order, and that any feasible theory of global justice must also take this into account. The statist cosmopolitan challenge that I wish to discuss here, however, goes a step further than this. The statist cosmopolitan challenge also claims that states are *the* relevant types of political communities via which political agency is exercised, and that it is precisely via the existing state-centric system that our obligations, also across borders, should be fulfilled. That is, statist cosmopolitanism here not only claims that our obligations could be fulfilled via the existing state-centric system, or that the states may have some role to play in this process – it also claims that states provide the distinctive and unique frameworks for exercising political agency, and that these frameworks are also something that should be nurtured and reinforced.

But what kinds of reasons are there for defending this kind of statist cosmopolitanism, and how do these reasons relate to the kinds of cross-border minorities discussed in this paper? Lea Ypi<sup>44</sup> frames the question of realizing of our cosmopolitan obligations in terms of political agency, and the relevant kinds of associative circumstances in which this agency is obtained. According to Ypi, political agency obtains when it is both feasible and stable. That is, when there are such political, legal and social mechanisms that can effect change (feasibility condition), and when the outcomes of political action have a good chance of surviving without disrupting (and instead enhancing) existing social ties (stability condition).<sup>45</sup> According to Ypi, these two conditions are met in the already existing, historically formed and maintained political communities (states) that provide unique and distinctive associative contexts via which (cosmopolitan) political agency can be realized.<sup>46</sup> The reason for resorting to the existing state structures for allocating duties of justice is thus based on two important features of (most) contemporary states: the existence of such structures and institutional mechanisms that can put political decisions into effect, and the acceptance of the state members of the legitimacy of the state institutions. As the states already possess both the institutional mechanisms and the acceptance of their members to

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<sup>43</sup> See e.g. G.W. Brown, 'Bringing the State Back into Cosmopolitanism: The Idea of Responsible Cosmopolitan States', 9:1 *Political Studies Review* (2011) pp. 53-66; For perhaps the most fully worked out positive argument for statist cosmopolitanism, to which much of my argument is also directed towards, see: L. Ypi, 'Statist Cosmopolitanism', 16:1 *The Journal of Political Philosophy* (2008) pp. 48-71; L. Ypi, *Global Justice & Avant-Garde Political Agency* (Oxford University Press, Oxford, 2012).

<sup>44</sup> Ypi, *supra* note 43, 48-71.

<sup>45</sup> *Ibid.*, p. 48.

<sup>46</sup> *Ibid.*, pp. 59-60.

comply, the states are also seen to be best equipped to implement our duties of justice. This does not, of course, mean that contemporary states – possessing these two features – would automatically implement these duties. On the contrary, the change from understanding our duties of justice as also extending beyond state borders requires a change of mindset via an extensive system of civic education. At the same time, however, it also requires the upholding and reinforcing of the existing associative structures through which political authority is accepted.<sup>47</sup>

Notwithstanding the benefits of the statist cosmopolitan approach (including its strive towards feasible and stable cosmopolitan political agency), here I wish to look at some of its weaknesses, as manifested by the inclusion of cross-border minorities, such as the indigenous Sami and the Roma travellers. My criticism focuses on the second element of the statist cosmopolitan position: its understanding of those associative spheres via which people accept political authority and via which political agency thus becomes stable.<sup>48</sup>

Take first the empirical component of the kinds of associative circumstances that, according to statist cosmopolitans such as Ypi, have led current members of states to accept and comply with its authority. Drawing on historical analysis, Ypi describes these kinds of associative circumstances as realizations of a particular type of cooperative scheme where the members view themselves as both dependent and constrained by each other and by the existing collective institutions, and recognize each other as joint authors of and contributors to these institutions.<sup>49</sup> Notably, one's membership in this associative scheme need not be voluntary (as, in the case of many minorities and indigenous peoples, it has not been), nor does the membership entail a commitment to any substantive set of shared values (thus allowing for certain amount of cultural diversity within the scheme). However, the difficulty when looking at this story of realizing each other's mutual dependency and of accepting each other's authorship and contributions to society from the perspective of many minorities, is that in many cases, this is also a story of exclusion. Many minorities, including the indigenous Sami and the Roma travellers, have not traditionally been viewed as equal members of the state-governed political communities, but as marginalized, second-class citizens and subjects to be governed. From the perspective of these minorities, the unique associative contexts of states do not come with the same historical story of inclusion and the realization of codependence and co-authorship, but with a story of (near-permanent) exclusion and marginalization. For many minorities, the unique associative context that is supposed to ensure political stability, may not be viewed as such, but as a context of domination that the minorities have good reasons to mistrust.

The above criticism of the empirical component of associative circumstances may already provide clues as to why, from the perspective of minority protection, the normative component should also be criticized. That is, the component that promotes and upholds states as the appropriate actors via which cosmopolitan obligations should be allocated. Note that, for Ypi, the distinctiveness and strength of these associative structures comes precisely from

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<sup>47</sup> *Ibid.*, pp. 69-70.

<sup>48</sup> I do not thus address the first, feasibility condition of political agency, although I do recognize that this condition may, depending on how one interprets empirical data, work both for and against the state-centric system of distributed responsibilities.

<sup>49</sup> Ypi, *supra* note 43, p. 60.

their long-term historical development and the members' gradual realizations of codependence and co-authorship across generations. But to insist that it is precisely these structures that should be maintained and nourished, is to ignore the lived experiences and the history of oppression of many minorities. To insist that these minorities should simply join and reinforce the dominant story is to ignore the excluding nature of the story in the first place. This, of course, is not to say that minorities could not be included into the new, more inclusive narratives of co-dependence and co-authorship, although it is to show the relative newness and fragility of these associative structures and the trust on state institutions that is deemed to follow. Moreover, in cases of cross-border groups with claims to self-determination, to insist on holding onto states as the agents of cosmopolitan justice due to the specific and distinctive associative framework upon which the state is based, ignores (or at least marginalizes) the specificity and distinctiveness of these groups' own associations. This is especially problematic in the case of indigenous peoples, such as the Sami, whose claims to self-determination are thus relegated to a secondary and subsequent form of self-determination to that of the state.<sup>50</sup>

None of the above is to say that one could not agree with statist cosmopolitans on the two conditions (feasibility and stability) needed for political agency to obtain, nor that one could not view states as being underpinned by such associative circumstances that could also legitimate state actions. It is, however, to say that, from the perspective of cross-border minorities, those reasons often used to advocate the role of states as the appropriate – and desired – agents of political action, may turn out to be reasons to be extremely critical of this role. At the very least, our focus on cross-border minorities, and the specific problems of cross-border minority protections, should give us grounds to look for other, non-state-based, avenues for allocating responsibilities for minority protection, which would be more inclusive and accommodating of those considerations relevant for cross-border minorities.

#### **4 Conclusion**

In the beginning of this paper, I set out to answer three questions:

1. What exactly is the specific problem posed by cross-border minorities to the existing state-centric frameworks for minority protection?
2. What is the nature and scope of this problem? That is, in which cases, and why, is the state-centric system not capable of protecting the rights of cross-border minorities, and in which cases it is?
3. What might be required, in terms of institutional rearrangements, in order to provide adequate protections to cross-border minorities?

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<sup>50</sup> Again, my intention here is not to argue for Sami self-determination on par with self-determination of the currently recognized states, nor, for that matter, for any particular institutional fix intended to solving the problem. For conceptualizations of indigenous self-determination alongside state self-determination, see e.g. M. Murphy, 'Representing Indigenous Self-Determination', *58 University of Toronto Law Journal* (2008) pp. 185-216; H. Quane, 'New Directions for Self-Determination and Participatory Rights?' in Allen and Xanthaki (eds.), *supra* note 13, 259–287; M. Mörkenstam, 'Recognition as if Sovereigns? A Procedural Understanding of Indigenous Self-determination', *19:6-7 Citizenship Studies* (2015) pp. 634-648.

I have attempted to answer these questions by discussing two example cases – the indigenous Sami and the Roma travellers – in the light of the key international minority rights documents (UNDRIP 2007, UN 1992, and ICCPR Art 27). I showed (question 1) that the prevailing emphasis on the role of independent states as primarily responsible for protecting minorities within their territories has made the system inadequate in properly recognizing and adequately protecting (some of) the rights of cross-border minorities. The nature and scope of this problem (question 2) had to do with both the practical flaws of the existing system, and the incompatibility of certain collective rights with the state-centric system of distributed responsibilities. I showed that while many – perhaps even most – rights of cross-border minorities could, at least in principle, be protected by a sufficiently coordinated and well-functioning system of distributed responsibilities among states, not all rights of cross-border minorities could be fitted into such system, and many that could, would in all likelihood not be. Most notably, I argued that the collective nature of some of the rights (e.g. right to self-determination), and the collective nature of some of the goods to which the minority rights refer to (e.g. culture) were indicative of more fundamental tensions in the system itself, and its (in)capacity to protect the (collective) rights of cross-border minorities. As a possible solution to the problematics of cross-border minorities (question 3), I suggested there to be a need to rethink and to relax the current state-centric systems of minority protection, and to look for alternative, cosmopolitan institutions that would be better able to account for the collective rights and goods of cross-border minorities. While I did not develop an independent argument for any particular type of cosmopolitan institutional order (or elaborated on the details of how such order would look like), what I nevertheless hope to have shown are some of the specific grounds for looking into such cosmopolitan alternatives, and why such alternatives may – from the perspective of cross-border minorities – be preferable to the state-centric models of minority protection.<sup>51</sup>

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