

Daniel Thürer (ed.)

**International Protection of Minorities –
Challenges in Practice and Doctrine**


convivenza

Internationales Zentrum für Minderheiten
Centre International des Minorités
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International Center for Minorities

Daniel Thürer (ed.)

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Preface

CONVIVENZA is an institution based in Switzerland set up with the purpose of promoting and protecting minorities internationally. CONVIVENZA provides a forum for dialogue and aims at gradually building up doctrines and practices in co-operation with the people directly concerned. In 2011, a Conference at the University of Zurich brought together the heads of the respective monitoring bodies of the Council of Europe and other experts. This book contains texts prepared for and presented at the Conference as well as a speech which the then Foreign Minister of Switzerland, Micheline Calmy-Rey, held in the Aula magna of the University on that occasion.

The Zurich Conference was supported by a grant from the Direction of Public International Law of the Department of Foreign Affairs where Dr. Valentin Zellweger was very helpful and supportive. We thank the Rector of the University of Zurich for his warm welcome. We are also grateful to Nina Schmid and Daniela De Marco for their valuable assistance in preparing this book.

Zurich, December 2013

Prof. Daniel Thürer,
Vice-President of CONVIVENZA

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Advisory Council of CONVIVENZA

Prof. Dr. GUDMUNDUR ALFREDSSON

Prof. Dr. KRZYSZTOF DRZEWICKI

Prof. Dr. LAURI HANNIKAINEN

Prof. Dr. PETER HILPOLD

Prof. Dr. RAINER HOFMANN

Prof. Dr. ZDZISLAW KEDZIA

Prof. Dr. GIORGIO MALINVERNI

Prof. Dr. JOSEPH MARKO

Prof. Dr. PETER PERNTHALER

Prof. Dr. MARKKU SUKSI

Prof. Dr. PATRICK THORNBERRY

List of Authors

ROMEDI ARQUINT

Former President of the LIA RUMANTSCHA, Vice-President of CONVIVENZA, Former President of the Federal Union of European Nationalities, Former Member of Parliament of the Canton of Grisons and Former Mayor of the Municipality S-chanf

Dr. iur., lic. phil. CORSIN BISAZ

Senior Researcher at the Centre for Democracy Studies (ZDA) at the University of Zurich, Former Secretary of the Foundation CONVIVENZA

Prof. Dr. iur. THOMAS BURRI

Attorney-at-law, LL.M., Assistant Professor of International and European Law at the University of St.Gallen (HSG)

MICHELINE CALMY-REY

Former Swiss Federal Councillor, Former Head of the Federal Department of Foreign Affairs

Prof. HURST HANNUM

Professor of International Law, The Fletcher School of Law and Diplomacy, Tufts University (USA)

Prof. Dr. KRZYSZTOF DRZEWICKI

Professor of Public International Law at the University of Gdańsk, Senior Legal Adviser at the Office of the OSCE High Commissioner on National Minorities

Prof. Dr. ZDZISLAW KEDZIA

Professor of Legal Sciences of the Institut of Legal Studies of Polish Academy of Sciences, Head of the Chair of Constitutional Law at the University of Poznań, Former Chief Research and Right to Development Branch of the Office of the UN High Commissioner for Human Rights

Prof. Dr. STEFAN OETER

Professor at the University of Hamburg, Chairman of the Committee of Experts of the European Charter for Regional and Minority Languages

List of Authors

Prof. Dr. FRANCESCO PALERMO

PhD, Professor for Comparative Constitutional Law in the Faculty of Law, University of Verona and Director of the Institute for Studies on Federalism and Regionalism at the European Academy (Eurac) Bolzano/Bozen, Member of the Advisory Committee on the Council of Europe's Framework Convention on the Protection of National Minorities, former Senior Legal Adviser to the OSCE High Commissioner on National Minorities

ALAN PHILLIPS

President of the Advisory Committee of the Framework Convention for the Protection of National Minorities

EVA SMITH ASMUSSEN

Professor, Chair of the European Commission against Racism and Intolerance (ECRI)

Prof. em. Dr. Dr. h.c. DANIEL THÜRER, LL.M. (Cambridge)

em. Professor of International and Comparative Constitutional Law at the University of Zurich, Initiator and Vice-President of CONVIVENZA, Member of the European Commission against Racism and Intolerance, Member of the International Committee of the Red Cross, Member of the Presidency of the OSCE Court of Arbitration and Reconciliation, Member of the Permanent Court of International Arbitration, The Hague

ALEXANDER ZHURAVSKIY

Director of the Department of Interethnic Relations of the Ministry for Regional Development of the Russian Federation

VLADIMIR ZORIN

Deputy Director of the Institute of Ethnology and Anthropology of the Russian Academy of Science, Former Minister on Federal Affairs, National and Migration Policy of the Russian Federation

Conference Papers

From the Protection of Minorities to the Management of Diversity – Means and Methods of Minority Protection in Modern International Law

Hurst Hannum

Almost exactly 20 years ago, the CSCE adopted a historic statement on human rights at its meeting on the Human Dimension in Copenhagen. In addition to identifying a broad range of human rights, the Copenhagen Concluding Document articulated a set of minority rights that represented the first substantive attempt to define minority rights since the League of Nations (apart from the minimalist formulation found in article 27 of the Covenant on Civil and Political Rights).

Stimulated by fears that conflicts between minority and majority groups would threaten the newly democratizing countries of eastern and central Europe, the CSCE and Council of Europe adopted, in a very short period of time, a number of normative instruments and mechanisms concerned with minorities. These included creation of the post of CSCE High Commissioner on National Minorities in 1992; adoption of the European Charter for Regional or Minority Languages in the same year; and adoption of the European Framework Convention for the Protection of National Minorities in 1994. Both treaties entered into force in 1998, and today they have 24 and 39 parties, respectively. Both the OSCE and Council of Europe also have created a number of programs concerned specifically with the Roma and Sinti.

At roughly the same time, in 1992, the UN General Assembly finally adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, after considering it for over a decade. Ironically, the country that introduced the concept of the declaration and that was widely believed to be a paradigm of minority relations – Yugoslavia –

was by 1992 in the throes of dissolution, a process that continues today. To encourage compliance with the declaration, a Working Group on Minorities was created within the UN Sub-Commission on the Promotion and Protection of Human Rights.

After the UN human rights reform process in 2005-2006, a somewhat weaker Forum on Minority Issues continues as a subsidiary body of the Human Rights Council; the forum serves as an adjunct to the Independent Expert on Minority Issues, a special procedure created in 2005. The Office of the UN High Commissioner for Human Rights also produced a guide to minority rights in 2001.

Interestingly, none of these instruments is overseen by a court with the authority to issue legally binding judgments (although the European Court of Human Rights does consider cases of alleged discrimination, under article 14 and Protocol No. 12). In addition, many minority rights are set out in very general terms, nuanced by phrases such as “where appropriate ... shall endeavor to ensure, as far as possible ... should consider ... due regard ...” This does not mean that the undertakings are illusory, but it reflects the concern expressed by the UN General Assembly in 1948, in the same resolution that adopted the Universal Declaration of Human Rights, where the Assembly noted that “it was difficult to adopt a uniform solution for this complex and delicate question” of minorities.

Oversight mechanisms to protect minority rights tend to offer advice, not to determine whether or not these rights have been violated. The advisory committees to the Framework Convention and Language Charter clearly fall into this category, and we will learn more about their efforts tomorrow. The goal of the High Commissioner on National Minorities is not to protect rights per se, but rather to find mutually acceptable solutions and to prevent conflict. This is, of course, no less important than protecting rights, but it is quite a different task.

Similarly, UN mechanisms tend to identify “best practices” that they recommend that states adopt, rather than focussing on the legal nature of protected rights. The Human Rights Committee does adopt a quasi-judicial approach to its consideration of complaints pursuant to the Optional Protocol that raise issues under article 27 of the Covenant, but it and the other treaty bodies tend to adopt a more promotional role in their general comments and

their concluding observations on state reports. The Committee's general comment on Article 27, for example, goes well beyond the text of the Covenant, as it attempts to reflect a contemporary understanding of minority rights, rather than reflect their status in 1966, when the Covenant was adopted.

European and UN institutions have done a relatively impressive job of both norm creation and, to a lesser extent, implementation of minority rights. However, any evaluation of minority protection depends in great degree on the expectations that one has, not only expectations for human rights but for international law generally. There is no doubt that Europeans, and perhaps others, are more aware of minority issues, and the EU accession process has made respect for minority rights a requirement for admission into the EU club. The UN guide to minority rights that I mentioned earlier is striking in the space it devotes to minority protection in Europe, particularly compared to the much more minimal (or non-existent) regional mechanisms for protecting minority rights in the Western hemisphere, Africa, or Asia.

At the same time, however, majority-minority conflict seems to have increased in many European countries in the past decade. One need only mention Danish cartoons, riots in French suburbs, burquas, and minarets to be reminded of the tensions that continue to plague countries that pride themselves on being liberal and democratic. While the title of this conference may be read to imply that minority protection already has been achieved, at least in Europe, such a conclusion would be premature.

In the United States, as well, despite significant progress in the past 40 years in combating racism, de facto segregation of housing by race is still common, and discrimination against those who "look Arab" is a continuing problem. The constant refrain, which is heard not just from those on the far right of the political spectrum, is that "they" are not like "us"; "they" just happen generally to have darker skin or a different religion than the majority population.

The protection of minority rights is thus not yet an accomplishment; it remains a goal. It is important to recognize that we have been only partially successful in protecting minority rights, as we turn to consider the much broader issue of diversity within society.

The title of this conference implicitly poses a number of questions, and, indeed, perhaps a question mark at the end of the title would be appropriate. For example, are the rights currently recognized adequate to protect all of the minority interests that are worthy of protection? Are existing norms and procedures sufficient to “protect” minority rights? What is the relationship between minority protection and the much larger (and less legalistic) issue of how to “manage” diversity?

This last question raises a myriad of issues that arise from the fact of diversity itself. While it may be beyond the capacity of this meeting to address them all, they are worth reflection. First, what do we mean by “diversity”? Are we concerned only with the more visible aspects of diversity, in ethnicity, language, clothing, or race? Are all cultures equally worth preserving and protecting, or should the natural selection process of evolution be allowed to determine how they will change and which will survive? In a diverse society, does the majority also have the right to protect its cultural identity, in the same manner as minorities within it are entitled to protect their identity? And, perhaps the ultimate issue, within a state that is ethnically, culturally, religiously, and/or linguistically diverse, is it possible for the population to develop a sufficiently strong sense of solidarity so that a sense of “state community” is able to replace the traditional nationalism that – implicitly, at least – rejects diversity in favor of cultural homogeneity?

While I cannot promise to answer all (or even any) of these questions, I would like to devote the remainder of my remarks to the broader issues that they raise and address the issue of the relationship between rights and social policy, not only in Europe but around the world.

In this talk, I have referred for convenience to “minority rights”, but it is important to remember that international instruments generally protect the rights of “persons belonging to minorities”. This may reflect the individualistic bias of human rights – which, by definition, are based on the very fact of our being human, not on the groups to which we may belong. However, it also should remind us that rights are designed to enhance the lives of real people, not abstract groups. Of course, some activities – cultural, educational, religious, and others – may be meaningless unless their collective as well as individual exercise is protected. However, this should not be confused with the protection of religions or cultures per se.

I would suggest that the issue of diversity should be viewed from a similar perspective. The diversity that a tolerant society should protect is the diversity that enables individuals to make cultural and other choices with only a minimum degree of societal pressure to conform to majoritarian norms. It should not generally matter to government authorities which language or religion or lifestyle I choose, whether individually or communally.

Such choices are not unlimited, however. Like almost all human rights, individual freedom may be properly limited on grounds such as protection of the rights of others, public order/*ordre public*, and public morality. Cultural practices that discriminate against women or racial groups or religions that may injure children may legitimately be restricted. One of the real breakthroughs in international law since 1945 is that it is now the task of *international* human rights monitoring institutions, like the European Court of Human Rights, to ensure that such limitations are not imposed disproportionately, but the limitations themselves simply reflect the balance that every society strikes between individual and community interests and rights.

Minority rights do protect the exercise of religion, language, and culture, and their guarantee should ensure a fairly large degree of diversity within society. Limitations cannot interfere to such an extent that the essence of the right itself is undermined. Thus, bans on public behavior that society finds offensive should be imposed with care, but international human rights law does not provide a ready answer to the question of whether bans on miniskirts in Saudi Arabia, burquas in Belgium, or topless bathers in the United States are appropriate. The European Court of Human Rights has consistently stated that it is impossible to identify “a uniform European conception of morals”, and the task is almost impossible on a global scale. In addition, of course, it is not the goal of international human rights law to create 192 states in which culture and morality are defined in exactly the same manner.

Where bans are imposed against reasonable manifestations of one’s religious or cultural beliefs, however, they are more suspect. Switzerland’s referendum on minarets is but the most recent example, and arguments over religious sites are common in the Middle East, south Asia, and elsewhere. Pandering to religious intolerance or discrimination is not a permissible reason to impose limitations on human rights, and such an attitude should not be confused with legitimate restrictions that reflect a society’s deep commit-

ment to, for example, equality of women or concepts of public modesty. (As a parenthetical observation, it is striking that so many of the “disputes” about diversity involve the role and perception of women in society, although minority/majority disputes are certainly not limited to these issues.)

Respect for others is not equivalent to respect for others’ beliefs or cultural practices, and many of us probably reject in their entirety the beliefs espoused by certain groups, such as neo-fascists, extreme libertarians, or even Scientologists. However, emphasizing an individual’s right to hold and express beliefs may be easier to encourage within society than suggesting that everyone must respect beliefs and cultures that they find personally repugnant or have simply decided not to adopt. Developing “a new ethic of responsible intercultural relations”, as recently proposed by the Venice Commission in a new publication on blasphemy, insult and hatred, may ask too much. Emphasizing respect for the rights of individuals, on the other hand, may provide a reasonable foundation on which to build peaceful co-existence, social inclusion, and tolerance for other beliefs.

There is another, even more difficult, aspect of minority rights and diversity that we also need to address. Today, human rights norms protect not only minority identity, but they also call for the “effective participation” by members of minorities in political and economic affairs. Thus, there is increasing emphasis on ensuring that minority voices are heard, not just tolerated, within the dominant society. Indeed, the goal is often not just to ensure that minority voices are heard, but to guarantee that minorities are entitled to some form of representation in the political system.

Unfortunately, guaranteed minority representation at various levels of government may simply entrench ethnic or religious identities rather than promote tolerance or participation. While there are some exceptions, the consociational and similar political theories that exalt representativeness over democracy just don’t seem to work very well. Managing diversity through the representation of relevant groups within a state used to be exemplified by Yugoslavia, Cyprus, and Lebanon, yet policy-makers appear not to have learned very much from the demise of the first and the continuing problems of the second and third. As the European Court of Human Rights stated clearly in last year’s judgment in *Sejdic and Finci v. Bosnia and Herzegovina*, privileging some groups (as through the granting of special rights to the

three “constituent peoples” of Bosnia) may result in discriminating against others.

“[W]here a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible ... [N]o difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.”
[para. 23]

These words highlight the difficulty of promoting meaningful diversity without improperly trampling on the rights of individuals. When elections become little more than an ethnic census, the resulting diversity is likely to be hollow.

Just prior to the historic CSCE meeting in 1990 that I referred to at the beginning, I published a book that argued in favor of recognizing a collective right to autonomy or self-governance, in order to reconcile competing claims of self-determination and territorial sovereignty. At that time, human rights were almost exclusively understood in individualistic terms, which failed to address the pressing concerns of minorities and indigenous peoples around the world.

Today, however, the increasing emphasis on diversity and communities is perversely contributing to a reassertion of 19th-century nationalism, on the part of both “old” and “new” minorities, as well as majorities. Not all of these movements are secessionist or violent, but many are characterized by an aggressive assertion of identity, often accompanied by demands for guaranteed political power.

I am not implying that we do not need to continue to battle against racism and discrimination against “unpopular” or marginalized groups – we do. Discrimination in Europe against Muslims, Roma, and immigrants is problematic; discrimination against Afro-descendants remains widespread in the Western Hemisphere; despite official bans, discrimination based on caste and status is rife in south Asia; and much of Africa remains in the thrall of ethnic and religious conflicts, some of which serve as proxies for greed and corruption. Thus, the fight for minority rights, properly understood, must remain at the forefront of international human rights efforts.

At the same time, the so-called “international community” should not pretend that international norms offer much guidance on the “management of diversity” that is the subject of this conference. Social and political engineering must arise out of the domestic context, and outside interveners often have a short-term perspective. Viewed from any perspective, for example, the 20-year disintegration of Yugoslavia has been a disaster, and it is difficult to identify any principle of either minority rights or diversity management that was applied consistently. We also should remember that “the West” is not the world, and European or American approaches to diversity management may not be particularly relevant outside Europe and the Western Hemisphere.

So, what do we conclude about the direction of minority protection and management of diversity? Let me suggest four principles:

First, the norms of minority protection that have been articulated in the past two decades form an essential part of international human rights law. However, like human rights law in general, they are not designed to resolve every political, social, or economic ill, and their enforcement requires attention to their limits as well as to their protective aspects.

Second, minority protection should remain focused on the individual, acting in community with others, rather than on attempts to achieve harmony among groups within society. The latter is an important goal, but it is more likely to be achieved through education, persuasion, and example, rather than through the imposition of global human rights norms.

Third, diversity has its limits. None of us would be pleased to see the world divided into hundreds of culturally or religiously homogeneous statelets, but the end of the cold war brought neither the end of history nor the end of nationalism. Solutions that artificially preserve borders or impose indefinite complex power-sharing arrangements on unwilling parties in the name of preserving diversity are unlikely to be sustainable. Within societies, the degree to which diversity is encouraged is a philosophical or political choice. Domestic “management” of diversity will vary from state to state, which is permissible so long as universal human and minority rights are protected.

Finally, the focus on diversity within a state should not become an excuse to ignore the serious problems facing marginalized segments of the population. Members of national minorities are not the only ones who suffer from social

and economic exclusion (although they do tend to suffer disproportionately more), and public policies designed to improve the life of all members of society may be more effective than those targeted solely at certain groups.

The protection of minorities and the management of diversity are essential to the smooth functioning of any society, but they are not the same. Rights, by their very nature, are more fundamental and universal than social policies, and only when human rights are respected are societies likely to benefit from the full participation of all segments of society.

Europe is fortunate in that it is beginning to move from the protection of the rights of minorities as part of a diverse and inclusive society. Achieving sustainable diversity without fracturing the underlying consensus on which any society must be based is a daunting task, however, and the European experiment in managing diversity will be watched closely by the rest of the world. I wish you success.

Minority Policies of OSCE

Krzysztof Drzewicki

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I. Introduction

This contribution tends to reflect upon a few important political and legal challenges facing the minority-related mandates and policies of the OSCE and its High Commissioner on National Minorities (HCNM or HC). However, before embarking upon them all the three key terms reflected in the title and throughout this paper prompt for introductory clarifications.

As has already been explained elsewhere,¹ the title term 'minority' is meant as an abbreviated version not for any numerical minority but for the notion of 'national or ethnic minorities'. While the term 'national minority' is largely used in the European context, its universal (United Nations) equivalent

¹ See DRZEWICKI KRZYSZTOF, Minority Protection within the OSCE, in: THÜRER D./KEDZIA Z. (eds.), *Managing Diversity. Protection of Minorities in International Law*, Zürich/Basel/Geneva 2009, 100-101.

has first been a notion of ‘ethnic, religious or linguistic minorities’ and subsequently ‘national or ethnic, religious and linguistic minorities.’² Both terms actually refer to the same concept of persons belonging to national or ethnic minority groups.

In spite of the absence of a generally accepted official definition of the term ‘national/ethnic minority’ in international law, one may nonetheless deduce from its jurisprudence the most specific features which characterise the notion in its at least ‘commonsensical’ understanding³: 1) distinctive features in terms of ethnicity, language, religion, history and cultures; 2) numerical minority in a non-dominant position; 3) temporal component relating to a longer stay on the territory of the country; 4) subjective conviction and sense of belonging to and being a member of minority to preserve distinctive features.

The lack of an agreed precise definition of minorities may however have also positive implications since its flexibility allows accommodating dynamically certain groups which are not regarded at a given moment as traditional minorities but could in the course of time and changing perceptions be regarded as fully-fledged ethnic or national minorities. This may relate, for instance, to migrant communities or other unrecognized minority groups which enjoyed their cultural identity or were allowed to develop it after years of oppression.

As far as the second title term is concerned one can define ‘policy’ as a course of specific conduct adopted, in this case, by the OSCE with regard to national minority issues. By an adopted conduct not only specific and delib-

² For the first formulation see Article 27 of the International Covenant on Civil and Political Rights (1966) and for the second the UN General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992).

³ For more see DRZEWICKI (FN 1), 100-101. For a larger study of the definition issue see PACKER JOHN, Problems in Defining Minorities, in: FOTTRELL D./BOWRING B. (eds.), *Minority and Group Rights in the New Millennium*, The Hague: Martinus Nijhoff Publishers, 223-274, and VERSTICHELANNELIES, Participation, Representation and Identity. The Rights of Persons Belonging to Minorities to Effective Participation in Public Affairs: Content, Justification and Limits, Antwerp-Oxford-Portland 2009, 9-27.

erate actions are meant but equally failures to adopt a desired conduct or inactions resulting from a deliberately passive behaviour. Importantly, like in every organisation, an adopted specific conduct is an amalgamation of deliberate political decisions of members and bodies tasked with implementation duties. This distinction plays a role in establishing whether a success or failure in minority policies can be attributed to decision-makers or implementers. Closely related appears a distinction between stages at which minority policy succeeds or fails (planning, designing, pursuing and supervising) because impact assessment should identify not only positive effects but also possible remedies.

And the third term refers to the Organization for Security and Co-operation in Europe (OSCE), formerly (1975-1994) named the Conference on Security and Co-operation in Europe (CSCE).⁴ It was established for bridging East and West by dealing with European co-operation on politico-security issues in their broader context together with economic, human rights and humanitarian issues. This broader approach has been further developed as the concept of the so-called 'comprehensive security' that is a security made up of hard-security (disarmament), soft security, economic and environmental dimension and the so-called human dimension (pluralist democracy, the rule of law, human rights, including minority rights, humanitarian issues and a lot of others).⁵

The concept of comprehensive security, as a relatively new approach, has passed through its formative period and become a great asset of the whole Organisation and its main organs, specialized bodies and field missions. Regrettably however the practical application of comprehensive approach to security has brought about not only successes but also a lot of difficulties, disappointments and failures about the whole OSCE. It is a widely shared view that this concept should not as such be abandoned but profoundly re-

⁴ The CSCE was renamed OSCE by a decision of the Budapest Summit on 5-6 December 1994 within moves to strengthen institutionalisation of the Helsinki process from 'Conference' to 'Organization' in the circumstances of emerging needs of the post-Cold War developments to ensure security and democratic governance based on the rule of law and human rights.

⁵ For more on the three dimensions of security see OSCE Handbook, Vienna: OSCE Press and Public Information Section, 2007, 2-12.

considered and re-adjusted to the present challenges while strengthening the OSCE's guiding policy principles. Ongoing conflicts and continuing situations of unresolved nature, such as the so-called 'frozen conflicts', and those recent ones, such as conflict between Russia and Georgia and conflict in Kyrgyzstan, have showed plainly that the OSCE has become either less relevant or just impotent to resolve serious security problems.⁶

From the perspective of national minority issues the greatest disappointments with the practical side of the concept of comprehensive security can be illustrated by a few cases from a longer list of those characterised by inter-ethnic tensions, instability and open conflicts. To mention but a few:

- 1) inability to have prevented the Balkan war(s) in the course of 1990s and lengthy decision-making to start direct intervention;
- 2) persistent inability to move forward effectively the negotiations on the frozen conflicts (e.g. Nagorno-Karabakh, Transdniestria, Abkhasia) which gradually become even long-lasting and 'deep-frozen' conflicts with minority issues remaining a part of these unresolved conflicts;
- 3) failure of the OSCE in Georgia as regards South Ossetia and virtually no progress in diplomatic negotiations. Thus in the OSCE area yet another 'frozen conflict' has been created. An instructive example of a resulting 'paralysis' has been the fate of the work completed by the Human Rights Assessment Mission (HRAM) to Georgia carried out by teams of the ODIHR and HCNM. Its final report has soon after submission become forgotten and no action was taken. Another conclusion is that the OSCE becomes easily played off if predominantly superpowers take over negotiation, like French-Russian talks which resulted in a complete defeat of the Organisation;

⁶ It was best reflected by a statement of the Greek Prime Minister who pointed to the existence of "*a climate of mistrust and tension [...] among OSCE participating States due to partial or selective implementation of the principles of the Helsinki Final Act*" and that thus the "*OSCE's efforts to promote peace and stability [...] remain in a state of deadlock.*" – see Greek Chairmanship of the OSCE. Papandreou to participating States: "Let's break the deadlock of mistrust", 4/2009 OSCE Magazine, 4-5.

- 4) failure in effective promotion of democratic governance and symptoms of recurrent resort to violence with victims among local communities (e.g. Tajikistan conflict or recent events and continuing tensions in Kyrgyzstan);
- 5) partly unsuccessful arrangements for Kosovo in spite of large-scale international assistance, fragility of inter-ethnic situation in former Yugoslav Republic of Macedonia and persistence of the existence of divided Cyprus, and many others.

The present paper will address only a few issues in overall search for solutions and remedies, notably those concerning the normative background of minority-related commitments and policies, demands for their better implementation as well as the emergence of new challenges posed by new actors (e.g. the European Union) or new groups (migrant communities) at stake.

Adoption of well-defined and well-addressed minority policies requires a critical examination of commitments and standards which form a basis for the OSCE minority policies. Against such a background a selected number of fundamental and sectoral minority policies can better be examined. For the needs of characterisation of the normative background for minority issues a reference is recalled to the distinction of the following four OSCE frameworks as elaborated elsewhere: politico-security principle of the Helsinki Final Act of 1975, human dimension substantive commitments, human dimension commitments on monitoring implementation, and conflict prevention mandate of the OSCE, notably of the High Commissioner on National Minorities.⁷

II. Minority Issues and Politico-Security Principles of the Helsinki Process

The first framework consists of the Declaration on Principles Guiding Relations between Participating States of the Final Act of Helsinki (1975) which among its ten principles of modern international relations included the prin-

⁷ See DRZEWICKI (FN 1), 110.

ciple no. VII – ‘Respect for human rights and fundamental freedoms including the freedom of thought, conscience, religion or belief’. In its eight paragraphs the Principle VII of the Decalogue enumerated the most important aspects making up the respect of human rights for all without discrimination, including those on the right of persons belonging to national minorities to equality before the law and to opportunities for the actual enjoyment of human rights (Para. 4).⁸

The inclusion of the principle on the respect for human rights, including minority rights, was a major achievement which consequently internationalised these issues making them a legitimate concern for the OSCE community. The Decalogue restored thus a balance to the interpretation of the principle of non-intervention in domestic matters which formerly was regarded by undemocratic states as a shield against references to domestic human rights violations as infringement of international law. Without this principle the OSCE could not establish and pursue its own minority policy because otherwise states would have regularly claimed exclusively domestic character of matters concerning national minorities.

The importance of this framework remains unquestionable as it upholds human rights and minority issues as one of the OSCE’s priorities and as an essential part of the comprehensive security. Actually, a reinforced opposition should be strengthened against attempts at returning to old interpretation whereby any criticisms of human rights violations constitutes interference into domestic matters of the OSCE participating states.

Significantly, national minority issues continue to determine security and cooperation in Europe and thus they are placed highly and regularly on the OSCE’s agenda of the main bodies and field missions. It is so because they continue to be characterised by their extremely sensitive character domestically in still too numerous states and regions. This is why it is not surprising that national minority issues have been identified in all the four frameworks distinguished above. The first remains thus its validity and needs further strengthening to continue to serve as an umbrella principle affecting and

⁸ See its and other minority-related texts in: National Minority Standards. A Compilation of OSCE and Council of Europe Texts, Strasbourg: Council of Europe Publishing, 2007, 11 *et seq.*

determining three more specific frameworks. More dangerous for the concept of comprehensive security within the politico-security dimension seems however to be a risk of diluting such of its principles as those on inviolability of borders, territorial integrity of states and prohibition of the use of force.

This new risk surprisingly surfaced on the occasion of war in Georgia when these principles had been emphasised more boldly in statements of the European Union than those of the OSCE itself. If the trend of gradual undermining of the Helsinki Decalogue is going to prevail it is tantamount to marginalisation of the OSCE or its slow demise.

III. Minority-related Substantive Commitments

The second framework has integrated minority standards within a broader set of human dimension commitments, including human rights, democratic governance, election monitoring, the rule of law, humanitarian and other issues.⁹ This process however demonstrated two different faces. Until the end of the Cold War (1975-1989) the OSCE was very cautious on human rights issues because a fundamental divide between East and West continued to prevail. Actually, in that period there were only two significant manifestations of the minority-oriented commitments: the above mentioned Principle no. VII Paragraph 4 of the Decalogue and a set of provisions on national minorities and regional cultures in the Section dealing with ‘Co-operation in Humanitarian and Other Fields’ of the Final Act.¹⁰

The post-Cold War period saw the actual eruption of national minority commitments. The most extensive political commitments were laid down in the Copenhagen Document in 1990 (so-called ‘shopping list’) and were fol-

⁹ For a compiled publication of human dimension texts see OSCE Human Dimension Commitments. Volume 2 Chronological Compilation, 2nd Edition, Warsaw: OSCE/ODIHR 2005.

¹⁰ In addition, a very modest contribution to the development of national minority commitments was achieved by inclusion of one modest provision into the 1983 Madrid Concluding Document and six provisions in the 1989 Vienna Concluding Document.

lowed by the adoption of a report by the CSCE Meeting of Experts on National Minorities in Geneva in 1991. The Copenhagen Document includes over 30 operational paragraphs, while the Geneva Report over 40. Together they contain thus the most extensive set of standards on national minorities although drawn up as binding political commitments and not legal obligations. It can safely be concluded that a catalogue of commitments as provided for by the Copenhagen and Geneva documents constitutes so extensive regulation that deserves to be called a ‘political mini-treaty’ on national minority standards.¹¹ In spite of these achievements the formation of the OSCE minority policy based upon minority standards needed above all more detailed guidelines for action. This gap has been largely filled by a new body – High Commissioner on National Minorities, established in 1992 (see section 5 below).

This way the OSCE has become the very first international organisation which started to set standards in the field of national minorities going beyond the mere general statement of the principle. This comprehensive standard-setting success has led to the end of the post-war period of regrettable and shameful ‘normative deficit’ of international regulations on the rights of persons belonging to national minorities. The Copenhagen and Geneva documents exerted directly an impact on other international organisations,¹² most notably on the Council of Europe which decided to draw up a binding legal instrument on national minorities.

The final outcome of this decision – the Framework Convention for the Protection of National Minorities (FCNM), adopted in 1995, entered into force in 1998. As a feedback, this has had strengthened minority standards by developing a coherent and mutually coordinated interpretation by both Organisations and by extending their applicability to states which are not members

¹¹ DRZEWICKI (FN 1), 114-115. This achievement may best be shown by comparing national minority provisions of the Copenhagen and Geneva documents with Article 27 ICCPR which was formulated in a single and modest sentence reflecting a general, rudimentary and fragmentary regulation on the rights of persons belonging to national or ethnic minorities.

¹² A modest case of such inspiration was the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the General Assembly on 18 December 1992.

of the CoE or those members which are not parties to the FCNM but continue to be bound by the OSCE commitments (e.g. Belgium, France, Greece or Turkey, even if some of them made interpretative declarations to the OSCE minority provisions).¹³ This unique process has been of vital importance for the OSCE policy on national minorities. Not only then its minority commitments were transformed into legal rules of the Framework Convention but also created an enhanced space for the applicability of both politically and legally binding rules in the OSCE area.

On the whole the OSCE substantive human dimension commitments constitute an impressive body of political undertakings. They create both standards concerning directly human rights and fundamental freedoms, including minority rights, and place them in a broader environment together with the rule of law issues, democratic governance and other commitments. Consequently, as noted by Bürgenthal,¹⁴ the OSCE has pioneered a “holistic approach to human rights, which proceeds on the assumption that individual rights are best protected in states which adhere to the rule of law and democratic values and are so constituted as to permit these concepts to flourish”. What Bürgenthal submitted about the OSCE concept of comprehensive security has also had its direct reflection on the importance of links between democratic framework and implementation of minority rights and minority policies.

It is in this context that it should be recalled what has become the milestone in modern evolution of human rights. The participating States of the OSCE proclaimed that the “*questions related to national minorities can only be satisfactorily resolved in a democratic political framework based on the rule of law, with a functioning independent judiciary.*” It has further been acknowledged that the rights of persons belonging to national minorities must be fully respected as part of universal human rights. This is above all

¹³ For more on the dimensions of this feedback see DRZEWICKI KRZYSZTOF, The Framework Convention as a Pan-European Instrument. A Perspective of the OSCE High Commissioner on National Minorities, in: VERSTICHEL A./DE WITTE A. ALLEN/LEMMENS B. AND P. (eds.), *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?*, Antwerp/Oxford-Portland 2008, 215-229.

¹⁴ BÜRGENTHAL THOMAS, *International Human Rights in A Nutshell*, Second Edition, St. Paul, Minn. 1995, 167.

what can be read from the conclusions of the Copenhagen Human Dimension Conference which were later endorsed by the Charter of Paris for a New Europe (1990).¹⁵ Furthermore, the link between democratic framework, including respect for human and minority rights, should also be seen from a perspective of contribution to stability and peace in the light of well-established conclusions of peace research whereby *'democracies do not fight each other'* or *'wars [...] are non-existent (or very rare) among democracies'*.¹⁶ Thus the more OSCE gains in developing democratic framework the more its 'security' mission has a chance to be accomplished.

How these impressive and intertwined tools have contributed to the practice of the OSCE minority policies? This is a very complex question since the cause-effect relationship is not working that simply. Ironically, in some parts of Central and Eastern Europe the (re)establishment of democratic governance created a more conducive climate than under former communist autocracy to reinforcement of ethnic cleavages or even to eruption of clashes and open conflicts, like in the Balkans and Central Asia.

Among the greatest disappointments with the OSCE there are also other failures in reaching the goals of comprehensive security with democratic frameworks. The commitments to that end have not been taken seriously enough by all states and often not even to a minimum extent. Some states openly ignore them and others tolerate them merely as appearances for diplomatic purposes. We can thus submit that the OSCE has an unresolved problem with ensuring the respect for the fundamental values of democracy, the rule of law and human rights, though to a diversified extent. From this perspective three groups of states can be distinguished.

One is a group of states which since 1990/1991 have not shown substantial symptoms of serious moves to achieving these ends (e.g. Belarus and five

¹⁵ See Para. 30 of the 1990 Copenhagen Document and a section on Human Dimension of the Charter of Paris for a New Europe(1990). 'Human Dimension' of the Charter of Paris for a New Europe, 1990 – see National Minority Standards (2007), op. cit., 13 and 17.

¹⁶ For more on those conclusions see GLEDITSCH NILS PETTER, Democracy and Peace: Good News for Human Rights Advocates, in: GOMIEN D. (ed.), Broadening the Frontiers of Human Rights: Essays in Honor of Asbjørn Eide, Oslo 1993, 290-291.

Central Asian Republics). Their record on democracy, human and minority rights is usually poor and improvements are introduced slowly or even virtually. Whatever are the reasons for such policies they may lead to dramatic inter-ethnic tensions and conflicts. It is a medium-term (Belarus) or long-term (Central Asia) perspective because not only decades are necessary for implanting and developing the rules and mechanisms of democratic governance but above all a gradual creation of genuine democratic culture is absolutely indispensable.

Second discernible group is made up of states which have reached a degree of democratic governance allowing them, for instance, to receive a *'laissez passer'* to the Council of Europe, however they continue to suffer from structural deficits of democracy and the rule of law (e.g. Ukraine, Russia, Moldova). All of them remain nevertheless under weak monitoring procedures of the OSCE and tougher mechanisms of the Council of Europe (e.g. jurisdiction of the European Court of Human Rights and numerous other procedures¹⁷). This group needs further consolidation of democratic governance and democratic culture to overcome autocratic trends still perceptible among the ruling elites, notably of the military and state security sectors.

Yet there is a third group of states which have passed the Council of Europe and European Union tests for admissions to membership but still reveal symptoms of human and minority rights problems. The latter group of states however has demonstrated a sufficient degree of democratic maturity, culture and ability to cope with such problems, sometimes with the help of international monitoring involvement (CoE, OSCE or EU). Importantly, those human and minority rights problems have emerged at a level far from threatening substantially domestic and regional stability (e.g. Slovakia, Hungary, Romania).¹⁸

¹⁷ Russia and Ukraine are at the top of states against which the highest number of individual applications is submitted to the European Court and of judgments finding one or more violations of human rights. See website of the European Court of Human Rights (<www.coe.int>).

¹⁸ This conduct can be illustrated by a dispute in 2010 between Slovakia and Hungary about changes in legal regulations concerning the use of state and minority languages. The dispute was peacefully ended through bilateral negotiations with the help of the HCNM.

In conclusion one must admit that as far as specifically minority issues are concerned one can safely submit that their normative framework is a success in itself. The OSCE has worked out remarkable body of political commitments which was a precedent among international organisations and established a pattern for others to follow. Taking together the Copenhagen/Geneva set of commitments developed further into more detailed standards by the HCNM it is legitimate to say that the OSCE has created a comprehensive normative system upon which effective minority policies could be designed and pursued. As a minimum, the set of commitments has established an accepted reference system for minority policies. Participating states of the OSCE can hardly question the content and validity of minority commitments. The reasons for which they often fail to implement effectively minority standards are complex and need more enhancement of implementing policies, including operational field activities. Expected improvements require not only more standards-friendly conduct of states within their jurisdictions but also the effective system of international monitoring.

IV. Monitoring of the Human Dimension Commitments

In the field of monitoring of compliance of the human dimension commitments the OSCE's role has evolved substantially since 1975. In the course of decades, and notably after the Cold War, a variety of monitoring measures and mechanisms were gradually established and developed. One group of means has served for wider applicability to monitor compliance with human dimension commitments, thus including those on human rights and national minority issues. Another group of means of monitoring has been established specifically for monitoring implementation of national minority commitments (e.g. HCNM).¹⁹

An encouraging development has been that the first group of monitoring arrangements was envisaged by the Final Helsinki Act itself in a form of follow-up or review meetings. In practice they largely failed or brought

¹⁹ For more on these changes see DRZEWICKI (FN 1), 117-120.

about poor results.²⁰ The development of more advanced and diverse monitoring arrangements became possible only towards the end of Cold War. This was a reaction to both the improved political climate and extension of the scope of substantive human dimension commitments. Major organizational changes have been introduced by the establishment of new institutions, notably the Office for Democratic Institutions and Human Rights (ODIHR), OSCE Representative on Freedom of Media, Personal Representatives of the Chairman-in-Office, High Commissioner on National Minorities, long-term missions, and others.

The new organizational set-up has functionally been strengthened by a number of new or improved procedures and mechanisms. A significant step in the post-1989 endeavours to strengthen monitoring procedures was made when a Human Dimension Mechanism was established during the Third Follow-Up Meeting in Vienna (1989).²¹

This Mechanism was further complemented by the Moscow Mechanism in 1991 by a system of missions of independent experts or *rappoteurs* to facilitate the resolution of a particular question related to human dimension. It provides for five separate procedures. Two of them have been linked to the Vienna mechanism (an initiating state may suggest another state should invite a mission of experts, and in case of refusal by that state to do so, the requesting state may propose, if supported by five other states, to establish a mission of experts against the will of the state). Three other procedures for establishing missions under the Moscow Mechanism, which are not linked with the Vienna Mechanism, entail the following arrangements – voluntary invitation of a mission of experts by a participating state, decision by the Permanent Council (formerly Committee of Senior Officials) to establish a mission of experts or *rappoteurs*, and establishment of an ‘emergency’ mis-

²⁰ The three Follow-Up Meetings were held in Belgrade (1977-1978), Madrid (1980-1983) and Vienna (1986-1989). The follow-up meeting in Belgrade ended up with one conclusion only – about convening a next meeting.

²¹ The Vienna Mechanism envisaged such stages as response to requests for information on a situation concerning human dimension made by another participating state, holding a bilateral meeting to discuss a situation, bringing a situation to the attention of other participating states, and discussing the issues raised at OSCE meetings.

sion of *rapporteurs* in cases of a “particularly serious threat” to the fulfilment of human dimension provisions.²²

The Vienna and Moscow Mechanisms constituted improvements in the procedural development of predominantly diplomatic means. Procedural innovations of the Moscow Mechanism, like missions of independent experts or *rapporteurs*, were not entirely successful. They were activated on a number of occasions but also there were cases of their failures. Both insufficient will of states as well as complicated and meticulous character of its procedural arrangements contributed to infrequent and reluctant use of the Moscow Mechanism.²³

A new and regular arrangement was introduced in a form of Human Dimension Implementation Meetings (HDIM) in 1993, convened at present annually for two weeks. It is a forum for governments and NGOs for a periodic monitoring debate. This body has also become a source of deep disappointment but still has a chance to evolve towards a major platform for reviewing implementation of human dimension commitments. Such an evolution can perhaps become even more commendable in case of failure of the United Nations reform of human rights sector, notably of the Universal Periodic Review (UPR). Even the development within the HDIM of the Supplementary Human Dimension Meetings and Human Dimension Seminars focused on specific human dimension issues (e.g. on freedom of the media, defence lawyers, democracy and effective representation, human rights defenders, etc.) has not improved the situation. Instead, all the HDI meetings and seminars evolved rather towards scenario-based theatre plays with series of read-out statements than to creating platforms and mechanisms for open, vivid and adversarial debates between the governments and NGOs. No less disappointing is a debate under agenda item on national minorities. Half of the time envisaged for discussion is booked for Roma and Sinti issues. This

²² For more details of both procedures and their practical application see OSCE Handbook (FN 5), 91-92; and SEPULVEDIA MAGDALENA/VAN BANNING THEO/GUDMUNSDOTTIR GUDRUN D./CHAMOUN CHRISTINE/VAN GENUGTEN WILLEM J.M., Human Rights Reference Handbook, Third revised edition, Costa Rica 2004, 177-179.

²³ See conclusions drawn upon a mission to Turkmenistan – DECAUX EMMANUEL, The Moscow Mechanism Revisited, Helsinki Monitor 2003, No. 4, 355-370.

disproportionate approach makes the debate on other minority problems in the whole OSCE area very brief and thus superficial. For governments it is an opportunity to present positive developments, while for NGOs to raise publicly their concerns and criticisms. Remarkably, for the High Commissioner on National Minorities it is an occasion to concentrate on specific issues in his activities and to test the governments and NGOs with regard to certain new ideas or approaches.²⁴

One may conclude that monitoring compliance of human dimension commitments is not working properly. Numerous institutions and mechanisms, which have been developed, serve the implementation of commitments with diversified effects. The situation calls for urgent debate on and change of minority policies. Before embarking upon such assessment the role of the HCNM need to be examined.

V. Conflict Prevention Mandate of the OSCE and its HCNM

The OSCE is a predominantly political and security organization. Its fundamental objective – maintenance of peace, security and stability – is achieved through disarmament, arms control and other similar measures. A modern approach to ensure security heavily relies on prevention. Formally all operational bodies, institutions and missions serve eventually for prevention. As far as security in the context of national minorities is concerned a special body was established in the OSCE to that end – High Commissioner on National Minorities. The post of High Commissioner was established by the ‘CSCE Helsinki Document 1992: The Challenges of Change’ as a highly autonomous and independent political body working in confidence as ‘an

²⁴ A good illustration of this tactics was a submission of the High Commissioner on similarities between classic and ‘new’ minorities (migrants) which also served for testing a possible extension of his activities to the latter groups or communities. Likewise, such meetings serve the HCNM to present new sets of recommendations or guidelines drawn up under his initiatives.

instrument of conflict prevention at the earliest possible stage.²⁵ One may thus conclude that the position of the HCNM was created as an instrument for international security; hence the HCNM does not become engaged in all minority-related issues but only in those with security aspects or implications.

The focus of the mandate on conflict prevention has neither deprived the High Commissioner of nor prevented him from being involved in the concomitant monitoring human dimension commitments, most notably those on minority rights. This largely stems from the interpretation of paragraph 6 of the mandate, whereby the High Commissioner ‘*will take fully into account the availability of democratic means and international instruments*’ to respond to a situation, and their utilization by the parties involved. The potentials of paragraph 6 can thus also be seen from the perspective of the HCNM’s contribution to strengthening standard-setting on national minority issues. This has become a deliberate policy of the High Commissioner for the needs of his predominantly conflict-prevention mandate. From the very beginning the HCNM realized that even such comprehensive body of standards as the Copenhagen/Geneva commitments appeared insufficient and above all somewhat still general. Those commitments required to be more specific and translated into the action-oriented guidelines which he could refer to in his conflict prevention discussions with the OSCE governments. This has led to an idea of commissioning experts to draw up sets of thematic recommendations or guidelines. Since 1993 the HCNM generated the adoption of seven such sets of normative texts in the fields of education, use of languages, participation in public life, access to broadcast media, policing in multi-ethnic societies, national minorities in inter-state relations and integration of diverse societies.²⁶

²⁵ Paras. 1-2 and 4 of the mandate. See Concluding Document of Helsinki, The Fourth Follow-up Meeting, 10 July 1992, Chapter II. For more on the background of the post and its mandate see ZAAGMAN ROB/ZAAL HANNIE, ‘The CSCE High Commissioner on National Minorities: Prehistory and Negotiations’, in: BLOED ARIE (ed.), *The Challenges of Change: The Helsinki Summit of the CSCE and its Aftermath*, Dordrecht 1994, 95-111.

²⁶ These are the following sets: 1) The Hague Recommendations regarding the Education Rights of National Minorities in 1996; 2) The Oslo Recommen-

Upon a careful examination of these instruments one should note that they play two roles: one is actually to fill gaps or identify more detailed modalities on specific minority general standards, while the other is to serve as a non-binding instruction for the HC and governments about how to implement minority commitments at domestic level. All these instruments, made up of normative texts and following explanatory notes, are drafted very diligently and meticulously. They provide a comprehensive guidance which the High Commissioner may use in his conflict prevention activities. In other words, seven thematic recommendations on minority commitments demonstrate that the High Commissioner has designed and developed his own normative minority policy. Furthermore, it has geared it up so far at domestic level that frequently he is invited either to draw up draft legislation on minority issues or to provide assessment of draft bills already available. Altogether the HCNM's normative policy at both international and domestic levels made him a powerful actor in exerting a meaningful influence on minority situation in the OSCE area.

It needs also to be noted that the HCNM's position within the OSCE division of labour has evolved meaningfully. Although the HCNM has no formal standard-setting powers his position has been appreciated so far that other bodies and institutions of the OSCE have respected the HCNM's competence or autonomy in dealing with minority issues more broadly than only from conflict-prevention perspective. The Permanent Council discusses minority issues predominantly on the occasion of bi-annual reporting speeches by the Commissioner. The same goes for the ODIHR although there is only one minority issue which has been shared with the HCNM, namely the question of Roma and Sinti. They both deal with this question from their different perspectives and in a spirit and practice of regular co-operation and mutual coordination. In other minority-related areas the ODIHR has not attempted at 'interfering' with the HCNM's field of competence and action. On the con-

dations regarding the Linguistic Rights of National Minorities in 1998; 3) The Lund Recommendations on the Effective Participation of National Minorities in Public Life in 1999; 4) The Guidelines on the Use of Minority Languages in the Broadcast Media in 2003; 5) The Recommendations on Policing in Multi-Ethnic Societies (2006), and 6) The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations (2008). See National Minority Standards (2007), *op. cit.*, 45-152.

trary, whenever a case of overlap is at stake coordination endeavours are taken in a co-operative climate, like in matters concerning participation of HCNM's advisers in election observation missions.

It can therefore be inferred that the position of the HCNM on minority issues has evolved far beyond his statutory arrangements predominantly resting upon the conflict prevention mandate. The HCNM mandate has undergone a gradual transformation under an impact of changing situation in Europe which strongly needed more of his direct conflict-prevention involvement in the first decade of his activities than in the second one. During the first decade human dimension commitments constituted merely a toolbox for the HCNM in his main role of a 'fireman' extinguishing focuses of conflicts. In the second decade the HCNM has slowly shifted his focus from short-term conflict prevention to medium term activity which transforms human dimension commitments from a mere toolbox to a broader area of involvement in respect for and protection of minority standards as such.

Within the OSCE the High Commissioner developed for himself a leading position on minority issues which are dealt with from the perspectives of normative compliance with international standards and demands of conflict prevention. These two new and combined roles of integrating conflict-prevention with human dimension commitments were tested in recent years with regard to a proposal to introduce a minority provision into the European law and to a demand for extension of the notion of national minority to migrant communities (see section 7 below). These two cases of normative challenge and influence of the HCNM upon standards and policies of the OSCE in the field of minority issues merit a brief examination.

VI. The HCNM Impact on the EU's Normative and Policy Frameworks

In the course of the formation of his normative frameworks the High Commissioner decided at some stage to intervene in the case of the emerging risk of double-standards on minority standards between his mandate and that of the European Union.

The problems stemmed from the earlier reticence of the European Union demonstrated in legislating on the protection of minorities.²⁷ Two major EU instruments at that time were silent on the protection of minorities.

The EU Charter mentioned merely “membership of a national minority” among several grounds upon which any discrimination shall be prohibited (Art. 21(1)). Likewise, a minority rights provision was deliberately ignored in the draft European Constitution of 10 July 2003. Only “last resort” attempts, among other interventions by the HCNM, appeared to be instrumental in remedying a “great failure”.²⁸ After the thorny process of the final negotiation and endorsement of the draft Treaty establishing a Constitution for Europe during the Intergovernmental Conference, a minority rights provision was eventually inserted therein on 18 June 2004. The draft treaty was signed by the heads of state or government on 29 October 2004 in Rome.

The whole effort to introduce a minority rights provision into the European constitutional framework was nearly rendered futile after France and the Netherlands rejected the European Constitution in their referenda in 2005. Subsequent EU chairmanships succeeded, however, in relaunching the constitutional debate and revived the draft European Constitution in the shape of a less complex and more streamlined body of fundamental rules in the Treaty of Lisbon. In its Article 1(a) the Lisbon Treaty eventually maintained the minority rights provision transferred from the 2004 Draft European Constitution. This way the Lisbon Treaty introduced an explicit provision on minority rights into primary EU law. The Consolidated Version of the Treaty on European Union provides in its Article 2 that:

²⁷ For more on the successful intervention by the HCNM to have a minority rights provision included in the Lisbon Treaty and TEU (Art. 2) in spite of initial resistance see DRZEWICKI KRZYSZTOF, ‘National Minority Issues and the EU Reform Treaty. A Perspective of the OSCE High Commissioner on National Minorities’, *Security and Human Rights*, 2008, no. 2, 137-146.

²⁸ According to some views this achievement represents a “historic step” of introducing the term ‘minorities’ into EU constitutional law” and regards the respect for minority rights as a founding value of the EU. See TOGGENBURG GABRIEL N., *A Remaining Share or a New Part? The Union’s Role vis-à-vis Minorities after the Enlargement Decade*, in: WELLER M./BLACKLOCK D./NOBBS K. (eds.), *The Protection of Minorities in the Wider Europe*, London 2008, 103.

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, *including the rights of persons belonging to minorities*. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. (emphasis added).

This brief account of the HCNM's intervention into normative framework of another international institution demonstrates a surprising impact achieved and possible implications.²⁹ Above all, the risk of double standards has been avoided and respect for minority rights not only remains an admission requirement for candidate states, as was under the 1993 Copenhagen criteria, but has also become the value and demand for members admitted earlier to the Union ('old' members). This change was largely generated by the HCNM who publicly criticised the double-standards approach of the European Union with regard to national minorities.

Moreover, minority rights have been formulated as the individual rights of persons belonging to national minorities and as a part of human rights. Thus Article 2 of the Treaty on European Union established a legal framework conducive to a more advanced law- and policy-making on national minorities. As a matter of principle Article 2 does not absolve all the EU members from the HCNM's conflict-prevention mandate which maintains the validity of the latter. The new legal situation may open a stage of closer cooperation between the HCNM and the EU far beyond the enlargement process alone.³⁰

It cannot further be overlooked that the entry into force of the Lisbon Treaty on 1 December 2009 introduced for the first time a provision on national minorities into EU constitutional law. This has completed a years-long battle for inclusion of minority clause into the EU legal order. The time has now

²⁹ For more see DRZEWICKI (FN 27), 136-146.

³⁰ For more on the further implications of the enlargement of the mandate of the HCNM by three "added dimensions" (expansion of the volume of minority problems, inter-state minority tensions becoming internal EU problems, bringing into the EU by its new members of their minority problems with non-EU states), see DRZEWICKI KRZYSZTOF, *The Enlargement of the European Union and the OSCE High Commissioner on National Minorities*, in: WELLER/BLACKLOCK/NOBBS (FN 28), 160-161.

come to fill the European constitutional frame with legal content made up of both substantive rules and mechanisms for the effective promotion and protection of the rights of persons belonging to national minorities. While the conflict prevention mandate of the High Commissioner on National Minorities remains valid for all participating states, including all EU member states, the Lisbon Treaty may have certain potential in strengthening his position in general and notably in the course of his contribution to the enlargement process.³¹

For the EU the Lisbon Treaty opens up a new stage of further opportunities for the genuine and profound advancement of human and minority rights if sufficiently strong will follows. What are then the implications of the new normative situation? The new provision actually somewhat imposes on the EU a duty to respect for human rights, including minority rights, and relates the Article 2 values, among others, to a possible applicability of the infringement procedure (Art. 7 TEU).

No less far-reaching consequences have been stipulated by Article 6 TEU whereby the Union recognizes above all the same legal value of the Charter of Fundamental Rights of the European Union of 7 December 2000, as the EU Treaties.³² Furthermore, all these new provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties (Art. 6 para. 1 TEU). Likewise, the Charter's Article 51 Para. 1 sets out that the provisions of this Charter "*are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.*" Like TEU (Art. 6/1), the Char-

³¹ It has been a tradition that the European Commission invites every year the HCNM and team of his experts for exchange of views on factual and legal minority situation in a state candidate for membership in the EU. This practice allows the EC to draw up an annual progress report with reference to reliable data and profound knowledge accumulated by the HCNM's Office.

³² Another noteworthy innovation is in Art. 6 Para. 2 TEU which says that: "*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties*".

ter also emphasizes that it *“does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.”*

In strict legal interpretation the message is that the Union’s bodies and institutions take account of and respect for human and minority rights but without extending their competence, while states are bound by this duty only “when they are implementing Union law”. These provisions with their limitation effects will have to be tested in practical application to define their real content and scope.

It remains to be seen what impact can be expected of all those new provisions coupled with earlier regulations. There is no doubt that human and minority rights provisions received stronger position in the EU primary law, although after Lisbon the EU has not become a human rights structure. One may envisage changes with regard to the so-called dual approach to the questions of national minorities that is by equality and non-discrimination approach, and a minority-rights approach.³³ The earlier approach in the EU, based predominantly on the principles of equality and non-discrimination, will need henceforth to have been supplemented by a minority-rights approach. Instead of emphasising the differences between both approaches, the time has probably come to attempt to recognize both elements as complementary and equally applicable within Union law and policy. This new legal situation may be conducive to attempting reconciliation between the two approaches.

However, before most of legal interpretations will emerge and be developed there is vast space for minority policy actions in the new normative situation of the European Union. A modest contribution of the High Commissioner by his successful advocacy for a minority provision in the Lisbon Treaty will most likely facilitate formation of a new status and new policies regarding national minorities. This will strengthen conflict prevention mission of the

³³ For more on the conceptual divergence between the two approaches characterised as ‘membership-blind’ (the non-discrimination approach) and ‘membership-sensitive’ (the minority rights approach) see RÄIKKÄ JUHA, *Is a Membership-Blind Model of Justice False by Definition?*, in: RÄIKKÄ J. (ed.), *Do We Need Minority Rights. Conceptual Issues*, The Hague/Boston/London 1996, 3-19.

High Commissioner amongst the membership of the European Union but also legitimate hopes arise with increasing human and minority rights impact within the external relation of the EU.

VII. 'Old' and 'New' Minorities

The second case of normative challenge is about the concept of new minorities and approaches thereto from the perspective of minority policies of the OSCE and HCNM. With the growing number of migrants in some countries, mainly in Western Europe, a debate has commenced about how to ensure their smooth integration into the societies of states of their residence. Research showed that the first and even second generation of migrants continue to be faced by integration problems in their daily lives. The outcomes of insufficient integration have been identified, for instance, in a clear trend to self-isolation or 'ghettoisation' of their residence areas and lower indicators of their living standards and higher level of social problems (e.g. unemployment, morbidity, poverty, criminality, undereducation, etc.). In some areas of Europe the accumulative effects of these trends has threatened local and regional stability and peace, like in Italy and France.

Soon the problems of migrant communities appeared on the agendas of governments and international organisations. Moves were also made to involve the High Commissioner on National Minorities in addressing the question of migrant communities or new minorities.³⁴ The HCNM raised the issue upon a formal request of the OSCE Parliamentary Assembly which at its Edinburgh session in 2004 called upon the HCNM to "*initiate a comparative study of the integration policies of established democracies and analyse the effect on the position of new minorities*".³⁵ In his reaction the HCNM ex-

³⁴ PACKER JOHN, *Confronting the Contemporary Challenges of Europe's Minorities*, Helsinki Monitor, 2005, no. 3, 227-231; and, DRZEWICKI KRZYSZTOF/DE GRAAF VINCENT, *The Activities of the OSCE High Commissioner on National Minorities (July 2005 June 2006)*, European Yearbook of Minority Issues, 2005/6, Vol. 5, 326-328.

³⁵ Paragraph 71 of the 2004 Edinburgh Declaration of the OSCE Parliamentary Assembly, available at <www.oscepa.org>.

plained that the conflict prevention focus of his mandate generally points to giving greater priority in his work to ‘traditional’ rather than ‘new’ minorities.

Nevertheless the HCNM decided to respond to the call from the Assembly by commissioning such a study from the Migration Policy Group (MPG), a competent research institute. The HCNM presented the study, entitled *Policies on integration and diversity in some OSCE participating States*, along with his own analysis and comments, at the July 2006 session of the OSCE Parliamentary Assembly in Brussels.³⁶

The study did not aim at defining the notion of ‘new minorities’ but the term was referred broadly to those persons and groups, settled in the country, whose presence is a result of more recent immigration. Taking account of the inherent complexities of possible definition the study has focused on the ‘how’ of integration rather than the ‘who’, instead of restricting this approach to a narrowly defined group. This way the study showed how closely interrelated are problems of integrating traditional and new minorities. Within his fundamental concept the High Commissioner promotes the policy of ‘integration respecting diversity’. This policy and its instruments can also be of relevance in situations concerning ‘new minorities’ since similar rules and methods are applicable in such fields as education, use of languages, access to media or participation in public life.

This relevance is not however tantamount to the automatic extension of the scope of the HCNM’s mandate to ‘new minorities’ as there are yet a lot of differences between the two groups. Any potential extension of the HCNM’s mandate would require either its amendment or at least a *pactum tacitum* on such an extension. The initial intention of the participating States in 1992 in Helsinki was to make the High Commissioner focused on and around traditional minorities. This understanding was strengthened by the Balkan war and further conflict situations regarding old minorities in the OSCE area.

With the MPG study and its conclusions in hand the HCNM addressed the whole question at a few meetings of the OSCE bodies and institutions as a

³⁶ The study, along with an HCNM cover note and the HCNM speech to the OSCE Parliamentary Assembly, is available at <www.osce.org/hcnm>.

sort of ‘test-case’. Although this was not an official request by the HCNM he has not received a broad support for a possible extension of his mandate to deal also with new minorities. Thus from the HCNM’s perspective, rather than engaging in controversial discussions on definitions, it is important to focus on the “how“ of integration rather than on the “who“ by devising a set of instruments that might help prevent conflicts within our European societies.³⁷

In 2009 a new step was made in this direction. After a preliminary study made by experts the High Commissioner decided to initiate the work on this complex issue but under a broader heading of his concept of ‘integration with respect to diversity’ designed at policies for the management of diversity that is by protecting identity and opposing involuntary assimilation. In conclusion, the HCNM has chosen to address the question functionally from a perspective of the main objective – integration with respect for diversity in multi-ethnic societies. His focus on traditional minorities is not an obstacle for the governments to take account in their domestic integration policies of the experience accumulated by the HCNM in the course of over 20 years in such areas as the use of languages, access to education and media, policing in multi-ethnic societies and participation by minorities in public life.

VIII. Conclusion

This paper has been aimed at examining the most important political and legal challenges facing the minority-related mandates and policies of the OSCE and its HCNM. It is a topical issue since the OSCE is criticised for increasing number of cases of failures and for loosing thus its relevance for

³⁷ An excellent example of such an approach is a set of the HCNM’s Recommendations of 2006 on ‘Policing in Multi-Ethnic Societies’. Although the HCNM has had in mind the needs of national minorities in the context of policing but these recommendations can be, if governments so desire, made applicable to other ethnic or racial groups resident on their territories. See also DRZEWICKI KRZYSZTOF, *Introducing Recommendations on Policing in Multi-Ethnic Societies – a new tool for the OSCE High Commissioner on National Minorities*, Helsinki Monitor, 2006, No. 2, 175-183.

ensuring stability and peace in Europe. In addition to its ongoing challenges the OSCE has been also confronted with new dilemmas posed by new actors or new groups (migrant communities). All these challenges require first a brief assessment of standards and commitments which constitute a basis for the OSCE minority policies. Following submissions made earlier elsewhere this assessment has been carried out with reference to four OSCE frameworks or dimensions (see p. 27 above). All of them are a part of broader approach developed in the OSCE – the ‘comprehensive security’, a concept bringing together politico-military, economic and environmental, as well as human dimension considerations and commitments.

The first framework has been created by the principle of respect for human rights and minority rights which were internationalised thus no more regarded as domestic competence of states solely. This principle continues to serve as an overall umbrella for dealing by the OSCE with minority issues. It thus provides legitimacy for the bodies and institutions of the OSCE to raise, discuss and decide on cases of violations of minority commitments and threats to stability. There is ample evidence that this principle of the OSCE Decalogue is increasingly challenged by those participating states which have problems with ensuring a minimum level of respect for human and minority rights. These attempts are the best confirmation for the continuing validity of the principles of the Final Act of 1975. There can be no excuse for rejecting legitimate interference by the OSCE into domestic matters of states violating minority rights.

The second framework is probably the most successful in comprehensive standard-setting achieved. Among all international organisations the OSCE has worked out the most extensive and advanced set of minority commitments (the Copenhagen and Geneva documents contain a catalogue of over 70 operational paragraphs on minority standards). This catalogue has further been supplemented by seven detailed sets of recommendations and guidelines drawn up under inspiration of the HCNM to serve as rules for his action in this field. These regulations comprise virtually all major minority issues and consequently states can hardly rely, in their arguments, on substantial lacunae or inconsistencies, particularly that minority rights are a part of broader system of human rights and can thus benefit from their jurisprudential advancement. The OSCE catalogue of minority commitments influenced the content of the CoE’s Framework Convention and as twin-sets they

both reinforce each other. With such an impressive normative framework on minority commitments it remains only to focus on its consolidation, judicialisation and practical implementation. The latter requires positive conduct of states and well-working system of international monitoring.

The idea of further consolidation and judicialisation is designed to strengthen minority standards by judicial means. A fully-fledged system for the protection of minority rights requires development of jurisprudence. There are symptoms of emerging case law largely at domestic level but also albeit modestly through international courts. This task is particularly important because still a lot of minority rules and provisions need to be developed as self-executing rules or clarified as to the content of rules which are not yet sufficiently mature for direct applicability or need to be translated to specific duties of states. One of the possible ways of consolidating the minority-related jurisprudence at international level could be establishing a complaints procedure within a system of the Framework Convention for the Protection of National Minorities.³⁸

Two further prerequisites for practical implementation – positive conduct of states and well-working system of international monitoring – constitute the most daunting obstacles for overcoming. The first stems from the OSCE principle that respect for national minority rights can only be satisfactorily ensured in a democratic framework. Thus the very presence in the OSCE of states which either are undemocratic or show symptoms of democratic deficits creates serious impediments for implementation of minority standards. Without improvements of democratic governance in those states one can hardly expect achievement of the effective protection of minority standards.

The other prerequisite actually is about the third of the distinguished frameworks – monitoring of the human dimension commitments. In spite of efforts made to develop or improve and establish new means and mechanisms the OSCE monitoring is the weakest point in implementing human dimension within the comprehensive security. The monitoring process has become too diplomatic and politicised. Expert and independent bodies are used rarely or,

³⁸ See, for instance, DRZEWICKI K., *Advisability and Feasibility of Establishing a Complaints Mechanism for Minority Rights, Security and Human Rights*, 2010, no. 2, 45-59.

if set up, their findings and conclusions are disregarded. A good part of real problems concerning minorities are not openly discussed. The shield of confidentiality superseded former prohibition of interference into domestic matters. Successful implementation of minority policies occurs usually when small states are at stake and various means of pressure are applied upon and against them. When great powers are involved silent diplomacy prevails while standards are largely overlooked or ignored. While certain independent monitoring bodies have improved implementation record, some deliberative organs, like the Human Dimension Implementation Meetings, have become a source of deep disappointment.

The fourth OSCE framework – the High Commissioner on National Minorities – enjoys a further-reaching position than his mandate provides for. Although established as an instrument of conflict prevention in regard to tensions involving national minority issues the HCNM has also exerted enormous influence on the use of democratic means and international instruments. Seven sets of recommendations and guidelines expanded the field of minority regulations. These and other successful activities gave him a virtually monopolistic role within the OSCE on matters concerning national minorities, including those remaining formally outside his mandate (e.g. his contributions to standard-setting and implementation of standards).

With a view to continuing his mission of success in the conditions of limited resources the HCNM should consistently abandon to deal with issues for which other and numerous international institutions are better placed, funded, experienced and equipped with. One such example is Roma and Sinti issues. Another manifestation has been a series of attempts to convince the HCNM to extend his mandate to comprise also migrant communities or new minorities. A lot of time and resources were actually wasted before a reasonable conclusion was drawn to refocus attention from studies of new minority issues to the profound examination of integration of minorities. Conclusions of the present and further integration studies can always be voluntarily applied by governments in their integration policies, instead of attempting to integrate new minorities into his mandate in the climate of criticisms by the majority of governments. Traditional minorities are still in need of regular conflict prevention activities of the High Commissioner. A substantial shifting of focus by the HC on other groups might be detrimental to classic minorities.

Not only the High Commissioner should eliminate less relevant questions from the scope of his activities but also he should continue seeking his allies. While division of labour and coordination with the Council of Europe works on the whole in a satisfactory way, the HCNM should invest more time in making the European Union more minority-oriented than so far. After all this was the HCNM who was among most influential external entities that contributed to the inclusion of minority provision into the Lisbon Treaty (now Art. 2 TEU). This way he can strengthen minority policies in specific EU member-states and in Union's external relations within the OSCE area. Minority policies could include stronger and large-scale programmes and projects activities in the field supported by the European Union.

Within the OSCE a lot has been achieved in the field of promoting and protecting minority rights. We must however be aware that inter-ethnic relations are an extremely fragile area. One incident or a restrictive provision in legislation can generate tensions and conflicts with dangerous potentials threatening stability and peace in Europe. Our business is not yet finished. Crisis of the OSCE is a matter for particularly deep concern as it is weakening the achievements in ensuring the effective protection of minority standards. Governments of some participating States regrettably continue to comprehend their roles in terms of expansion of their territories or spheres of influence while human beings with their rights and freedoms remain for them less important. Change of such a mentality by building stronger civic societies is an absolute priority.

Differences and similarities in the work of ECRI and the Advisory Committee for the Framework Convention for the Protection of National Minorities

Eva Smith Asmussen

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I. Introduction

I was a member of the first Advisory Committee and served for 6 years. I have just completed my second period, which means I have been a member for 10 years. I became a member of ECRI in 1994 and have been a member since then.

During these years I have sometimes had to leave a plenary before it ended, but I don't think I have missed a single plenary meeting in any of the committees and I have been on numerous country visits.

II. The Mandate of the Two Bodies

The most obvious difference between the Advisory Committee and ECRI is that the work of the Advisory committee is based on a treaty, which ECRI's is not. This means that the member states are under an obligation to file reports to the Advisory Committee at regular intervals and that the reports of the Advisory Committee go through all the paragraphs of the convention to make sure that the country is fulfilling its commitments.

ECRI – on the other hand – was set up by the European Heads of States to give a new impetus to the fight against racism. ECRI's mandate covers all measures necessary to combat discrimination and prejudice against individuals or groups on grounds of race, colour, language, religion, nationality or national or ethnic origin. This is a much broader scope which to a large degree leaves ECRI free to decide which areas seem most important in a given country. Nevertheless ECRI has adopted a fairly uniform approach to all countries to make sure that they are all treated on an equal footing.

Another difference is that the States decide for themselves whether they want to become a member of the Framework Convention for the Protection of National Minorities, while every member state of the Council of Europe is within ECRI's mandate.

Finally, ECRI's plenary is made up of one expert from each member state – 47 all together – while the Advisory Committee has 19 members with the membership circling among the member states.

III. Country Visits

One could imagine that considering the very different basis for the two committees their reports would reflect on different themes. This is only partly true. It is true that ECRI does not concern itself with road signs in two languages or the language in which to address local authorities and ECRI is only interested in mother tongue education if it amounts to discrimination. At the same time the Advisory Committee does not cover for example asylum seekers or refugees.

But when that is said there are many overlapping areas. The Roma people for example. The Romas are victims of discrimination in virtually all states and therefore within ECRI's mandate. At the same time they are recognized as national minorities in almost all member states and consequently within the mandate of the Advisory Committee. Also article 6 of the Framework Convention calls for the member states to "encourage a spirit of tolerance and intercultural dialog and take effective measures to promote mutual respect and understanding and cooperation among all persons living on their territory ..." and further "take appropriate measures to protect persons who may be subjects to threats or acts of discrimination ...". This brings the text of the convention into the very heart of ECRI's mandate.

For this reason – even though the reports of the two committees follow a different structure – a good part of the content essentially covers the same subjects. To a degree the two Committees visit the same groups even if the questions for them do differ somewhat.

It is obvious that the two committees could benefit from a closer cooperation. One thought would be to coordinate visits either so that both visits take place at the same time – or trying to space them as much as possible.

The second approach has been tried but proved very difficult. ECRI plans its country visits for 5 years and in the planning period could easily accommodate the Advisory Committee. The problem is, that the Advisory Committee cannot plan its visits until it has the report from the country – and even though there is a set date for that, many countries are late. So the Advisory Committee has to estimate in advance whether a country will be late – and how late. Often this is not possible and once the Advisory Committee receives the report it wants to go soon – otherwise it is difficult for the country to understand that it should keep the time limit.

On the other hand it is also difficult for ECRI to change the time of its visits. The plan has been published and the countries have prepared for a visit in a given year. If it is suddenly changed to a year or two later the country may think that they can also suggest a different year which will make ECRI's work impossible, since the whole idea with the 5 year plan is to make sure to have nine or ten country visits a year which is the very limit for ECRI's capacity.

Therefore – even though the goal was that visits should be at least a year apart and preferably two – in the last period there have been visits being made within the same year.

IV. Work on General Themes

From the very beginning ECRI has worked on General Policy Recommendations (GPR) addressed to states. The idea is to analyse areas where racism and discrimination is likely to occur. Describe the problem areas and come up with ways to handle the problem. In this work the knowledge from the country to country reports is used since ECRI's attention has often been raised by one or more country visits. Some countries may have tried to solve the problem and their efforts are sometimes used as examples of good practices in the GPR. It is also common for ECRI to refer to its GPR in its later country reports as inspiration for the state.

So far ECRI has adopted 12 GPR's, covering for example: The creation of specialised bodies to combat racism and intolerance, combating racism against Roma/Gypsies, combating racism while fighting terrorism, combating intolerance directed against Muslims in Europe, the fight against anti-semitism, combating racism and racial discrimination in policing. The last recommendation adopted by ECRI concerns combating racism and racial discrimination in the field of sports.

The Advisory Committee has adopted two Thematic “commentaries” on specific issues. This work was launched in 2004 and the aim is to summarize its experience and views on the most important issues it has come across in its monitoring work in order to further guide State Parties and other actors in the implementation of the rights granted by the Framework Convention.

To date the Advisory Committee has adopted two commentaries: Commentary on Participation and Commentary on Education.

Of course both bodies will study the work from the other body and use the knowledge in their own work.

V. Activities of Communication with Civil Society

The third pillar of ECRI's work is work with Civil Society. It is imperative that ECRI's thoughts be filtered down within the society which makes this work most important. ECRI holds a yearly two-day seminar with the specialist bodies fighting racism and intolerance in the different member states. These seminars are always well attended and give the participants an opportunity to discuss common problems and get to know each other. Also ECRI tries to work closely with civil society before adopting GPR's. For example with FIFA before adopting the GPR on racism in sport. Finally ECRI arrange two or three round tables a year, normally following the publication of a country report. Here ECRI bring all actors together: government officials, police, prosecutors, researchers, NGO's, minority representatives and representatives for ethnic minorities. The purpose is to promote the knowledge of ECRI's reports but also to bring all the actors together and give them the opportunity to talk to each other.

The Advisory committee also arranges roundtable with much the same aim as ECRI but of course the invited people are mostly Minority representatives and government officials.

A few times ECRI has invited a representative from the Advisory Committee to speak at their round tables.

The round tables are an area where much more could be done to work together. If more round tables were organized jointly it could enhance the visibility of both bodies.

VI. Cooperation with Other Human Rights Bodies

Both bodies work closely with other counsel of Europe bodies, with European Union bodies and with United Nations bodies.

Council of Europe – The European Charter for Regional or Minority Languages

Stefan Oeter

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I. Introduction

In his outlines of priorities for the years 2012-2013, the Secretary-General of the Council of Europe, Thorbjørn Jagland, in February 2011 stressed: “Living together in sustainable democratic societies implies that we identify and develop appropriate answers to address societal challenges and protect our democracies from the risk of radicalisation and fragmentation. Therefore, addressing xenophobia and racism, as well as enabling our societies to remain ethnically, culturally and religiously diverse is crucial. This is the rationale for our activities in fields such as culture, cultural heritage, intercultural dialogue, including its religious dimension, as well as the protection of minority languages and youth work. In this context, promoting better understanding and tolerance through education and culture as well as initiatives to

ensure social cohesion will be crucial.”¹ These words contain in a nutshell some of the core values of the Council of Europe – the belief that cultural diversity forms one of the cornerstones of European identity and that all must be done to preserve such diversity as far as possible. Managing diversity thus is a core mission of the Council of Europe – and treaties like the European Charter for Regional or Minority Languages² are an attempt to operationalise in legal terms such mission. This becomes evident if one looks to the preamble of the Charter, which includes an explicit commitment to the mentioned values, by “stressing the value of interculturalism and multilingualism”.³ Linked to such commitment, the preamble also emphasizes:

“Considering that the protection of the historical regional or minority languages of Europe, some of which are in danger of eventual extinction, contributes to the maintenance and development of Europe’s cultural wealth and traditions;”

Admittedly, the drafting history of the Charter had started with a much narrower mission – the original intent of the various drafting exercises in the 1980s and early 1990s simply had been to codify the traditional concepts of minority protection in a legally binding treaty.⁴ But the complex and cumbersome drafting process led to a result that proves to be much wiser than its drafters – the Charter in the end became more an instrument of standard-setting in the complex field of managing diversity than a traditional minority

¹ Outline Priorities 2012-2013, Council of Europe Doc. SG/Inf(2011)4 FINAL of 17 February 2011, available via internet at: <<http://www.coe.int/document-library/default.asp?urlwcd=https://wcd.coe.int/ViewDoc.jsp?id=1743147>>.

² European Charter for Regional or Minority languages, adopted on 5 November 1995, entered into force on 1 March 1998, ETS No. 158.

³ Concerning the values underlying the Charter (and expressed in its Preamble) see BOYSEN SIGRID, in: BOYSEN SIGRID et al., Europäische Charta der Regional- oder Minderheitensprachen. Handkommentar, Basel 2011, Einführung para. 2, and Präambel paras. 22 et seqq.

⁴ See the Explanatory Report to the Charter, paras. 3 et seqq. – published (together with the text of the treaty) as a booklet by the Council of Europe Publishing; as to the drafting history of the Charter see also BOYSEN (FN 3), Einführung paras. 4 et seqq.

rights treaty.⁵ This departure from its original goals has often been criticized.⁶ I think, however, that the new avenue taken in the drafting process, the forward-looking avenue of diversity management, is one of the main virtues of the Language Charter.

The Charter avoids any formulation in categories of individual or collective rights.⁷ Instead, it uses the terminology of ‘objective’ standards⁸, binding the member states in its formulation and operation of language policies in sectors like education, administration, judiciary, media, cultural affairs. Nevertheless, the drafters of the Charter could not avoid creating substantive obligations which might give rise to subjective rights as a consequence.⁹ The process of formulation thus could not insulate the instrument from the context of minority rights where the original draft had been a part of. The creation of the treaty regime of the Language Charter had always formed part of the political discussion in Europe on the formation of an international regime of minority protection.¹⁰ Already in the early 1980’s, the Conference of Local and Regional Authorities in Europe (CLRAE) started, with the support of the Parliamentary Assembly of the Council of Europe, drafting a “European

⁵ See also BOYSEN (FN 3), Einführung para. 11, and WOEHLING JEAN-MARIE, *The European Charter for Regional or Minority Languages: A Critical Commentary*, Strasbourg 2005, 20.

⁶ See for example PENTASSUGLIA GAETANO, *Minorities in International Law*, Strasbourg 2002, 131; SIEGERT ANJA, *Minderheitenschutz in der Bundesrepublik Deutschland*, Berlin 1999, p. 92, footnote 148; see also DE VARENNES FERNAND, *Language Protection and the European Charter for Regional or Minority Languages: Quo Vadis?*, in: DUNBAR ROBERT/PARRY GWYNEDD (eds.), *The European Charter for Regional or Minority Languages: Legal Challenges and Opportunities*, Strasbourg 2008, 25, at 29 et seqq.

⁷ See, for example, PENTASSUGLIA (FN 6), 130.

⁸ See BOYSEN (FN 3), Einführung para, 11.

⁹ See also BOYSEN (FN 3), Einführung para. 13.

¹⁰ Concerning the attempts to create a workable regime of minority protection in Europe see SCHERER-LEYDECKER CHRISTIAN, *Minderheiten und sonstige ethnische Gruppen. Eine Studie zur kulturellen Identität im Völkerrecht*, Berlin 1997, 141-167.

Charter of Minority Languages”.¹¹ The work of drafting such an instrument went slowly, however, until 1990. At that stage the European states decided that a solid instrument was needed in order to be able to cope with the problems of ethnic conflict that had become a serious political problem after the end of the ‘cold war’.¹² Explicit legal guarantees enshrined in a multilateral legal instrument should safeguard a series of rights granting minority members protected domains in education, culture, the media and public administration. Several draft conventions were prepared by various organs of the Council of Europe, like the Venice Commission draft and a proposal for a minority-related Additional Protocol to the European Convention on Human Rights.¹³ However, one after the other, the ambitious projects of ‘progressive’ minority rights instruments ended in crash landings. The project of a ‘European Charter for Regional or Minority Languages’ is one of the two rudiments that survived the failure of more far-reaching ambitions. Compared to the instruments most international lawyers had struggled for, it constitutes a very peculiar regime, due to its so-called ‘à la carte approach’.¹⁴ Such ‘à la carte’ construction is not a complete novelty – at least the European Social Charter, the Council of Europe instrument that codifies economic and social rights, follows a comparable model. The Language Charter obviously was inspired in its construction by such example. Most observers were afraid that the (expected) tendency of selective ratification of arrangements of legal obligations might lead to drastic shortcomings in the normative ambitions underlying the instruments of ratification.¹⁵ It was expected that States would tend to use the selection of their ‘menu’ as an invitation to ratify only the (minimum) standards which existed already prior to ratification in their national legislation. International treaty law in such a construction would only consolidate the achieved state of legislation, but would not contribute seriously to developing the state of national policies and legislation.

¹¹ *IBID.*, at 146/47; see also the explanatory report to the European Charter for Regional or Minority Languages, paras. 3-8, and BOYSEN (FN 3), Einführung para. 9.

¹² See BOYSEN (FN 3), Einführung para. 10.

¹³ Relating to these draft instruments, see SCHERER-LEYDECKER (FN 10), 151-159.

¹⁴ See PENTASSUGLIA (FN 6), 130/31, and BOYSEN (FN 3), Einführung para. 15.

¹⁵ As an example, see PENTASSUGLIA (FN 6), 131.

II. The Construction of the Language Charter as a Differential Instrument

Fortunately, the subsequent process of ratification of the Charter has taken a completely different course, a course that proved wrong the critical forecasts that had been given in the mid-nineties.¹⁶ Not surprisingly states had a tendency to take the existing state of internal legislation as a given basis of their instrument of ratification; but the pre-existing legislative state of the art served only as a starting-point, because the ratifying states, in order to take the minority communities politically on board, often made ambitious political pledges and incorporated a considerable portion of normative ambition into its instrument.¹⁷ Taken at face value, the instrument of ratification often promised far-reaching reforms of national language policy, while the practical implementation in quite a number of cases tended to step back and to delay the realization of the promises made with the ratification of the Charter.¹⁸ In addition, some developments arising out of the Charter as a more or less automatic dynamic had not really be foreseen. The Charter includes, for example, an official definition of the term “minority languages”, which leads to the result that some languages are covered by the Charter that traditionally had not been given any attention and protection.¹⁹ When entering into the monitoring process by drawing up their state reports, member states were realizing this consequence and began to deal with the deficiencies in the

¹⁶ See BOYSEN (FN 3), Einführung para. 17.

¹⁷ See, as an example, the description of the German process for preparing ratification in: OETER STEFAN/WALKER ALASTAIR, The Case of the Federal Republic of Germany, in: SPILIOPOULOU ÅKERMARK SIA et al. (eds.), *International Obligations and National Debates: Minorities around the Baltic Sea*, Marichamn 2006, 227, at 259 et seqq.

¹⁸ See OETER STEFAN, Ensuring the Charter is Effective in the European Legal Order, in: Council of Europe (ed.), *Minority Language Protection in Europe: Into a New Decade*, Strasbourg 2010, 187, at 89 et seqq. OETER BILBAO

¹⁹ Concerning the definition of minority languages in Art.1 (a) ECRML see Scherer-LEYDECKER (FN 10), 147/48; see also the explanatory report to the European Charter for Regional or Minority Languages, paras. 18-21, 30-33, as well as WOEHRLING (FN 5), 53 et seqq., and BOYSEN (FN 3), Art. 1 paras. 1 et seqq.

protection of these hitherto neglected languages (Kven in Norway²⁰ or Limburgish in the Netherlands²¹ are good examples of such developments).

If one wants to understand the problems of implementation which usually arise after ratification of the Charter, there is an important point to be kept in mind. The Charter does not protect minorities as such, namely groups with certain characteristics that make them a specific community distinct from the majority population of a state. It also does not envisage directly the protection of individual rights of members of minorities.²² The Charter is clearly not conceived as a human rights treaty, but as a treaty on political problems of (linguistic) diversity management that is intended to create a series of 'objective' standards and obligations for member states, standards which have to be observed when states design their language policies.²³ Primary object of protection thus are not minorities as groups or individual members of such minorities, but 'languages' as a cultural phenomenon²⁴ – and phenomena of societal multilingualism that the Charter intends to stabilize by a number of instruments of diversity management. There is no doubt, the protection of languages in practical detail means also – as a more or less inevitable consequence – protecting the speakers of a minority language in its linguistic rights. Indirectly, the Charter thus protects also individual rights

²⁰ See First Evaluation Report of the Committee of Experts on Norway of 1 June 2001, paras. 11, 20, the second report on Norway of 29 Aug. 2003, paras. 14, 23, 29-31, 58, 63, 7, as well as the third report on Norway of 1 Dec. 2006, paras. 13, 19, 26, 33-40 – all available under: <<http://www.coe.int/t/dg4/education/minlang/Report/EvaluationReports/Norway>>.

²¹ See First Evaluation Report of the Committee of Experts on the Netherlands of 9 Febr. 2001, paras. 2, 12, 18, 28, the second report on the Netherlands of 17 June. 2004, paras. 17, 33, 37/38, 41, 49/50, as well as the third report on the Netherlands of 27 Nov. 2007, paras. 16, 26, 27-29, 34-41, 53-57 – all available under: <<http://www.coe.int/t/dg4/education/minlang/Report/EvaluationReports/Netherlands>>.

²² See WOEHLING (FN 5), 27.

²³ See PENTASSUGLIA (FN 6), 130; see also the explanatory report to the European Charter for Regional or Minority Languages, para. 11, as well as BOYSEN (FN 3), Einführung para. 11.

²⁴ See BOYSEN (FN 3), Einführung para. 11.

and constitutes (at least indirectly) a human rights instrument.²⁵ But the political understanding upon which the project of the Charter was based has a specific direction: the political actors involved always stressed the question of language maintenance, thus the ‘objective’ character of the instrument. The Charter thus only speaks of “languages” and of “speakers” of such languages, not of ‘minorities’ or ‘linguistic communities’. Despite this clear understanding, it is not always easy to respect such ‘political correctness’. By protecting ‘languages’, as an emanation of culture which is dependent upon communicative arrangements, the Charter in the result protects also ‘linguistic communities’, although not as bearers of rights, but only indirectly, as a kind of reflex.²⁶ The Charter deliberately avoids any use of collective rights concepts in its wording, sometimes nearing the grotesque in its complex strategies of linguistic avoidance, but it cannot avoid protecting in substance members of linguistic minorities – and indirectly also minorities as collective units.²⁷ It is also beyond dispute now that the Charter, although not an explicit human rights instrument, provides in a number of cases for individual rights bearing human rights character.²⁸ One must only read obligations like Art.8 para.1 (b), which provides for various schemes of guaranteed primary school education in minority languages – education in the relevant minority language, a substantial part of education in the language or the teaching of the language as an integral part of the curriculum – with a final option “to apply one of the measures provided for under i to iii above at least to those pupils whose families so request and whose number is considered sufficient.” It is difficult to interpret such a clause without coming to some

²⁵ See in that direction the explanatory report to the European Charter for Regional or Minority Languages, paras. 11 and 13; see also WOEHLING (FN 5), 31.

²⁶ See also WOEHLING (FN 5), 27.

²⁷ See also the explanatory report to the European Charter for Regional or Minority Languages, para. 11.

²⁸ See more in detail see BOYSEN (FN 3), Einführung para. 12, and WOEHLING (FN 5), 31.

kind of a ‘human rights dimension’ granting a right for the parents and children concerned.²⁹

The Charter has two operative parts, Part II and Part III.³⁰ Part II provides for a ‘minimum code’ of elementary standards that creates obligations for states vis-à-vis all minority and regional languages which exist upon the territory of a member state – and it is up to the Committee of Experts to qualify languages as being “minority languages” in the sense of the Charter or not.³¹ There is no ‘menu’ concerning Part II – the (programmatic) standards laid down in this part are binding in all its aspects and apply to each minority language covered.³² The standards as such, however, are rather vague and are more formulated as policy objectives than as concrete legal standards that could be applied immediately by administrative authorities and courts.³³ The ‘chapeau’ of Art.7 accordingly requires that: “In respect of regional or minority languages, within the territories in which such languages are used and according to the situation of each language, the parties shall base their policies, legislation and practice on the following objectives and principles: ...”

A list of elementary objectives and principles of protection of minority languages follows in suite, phrased in rather abstract terms, such as “the recognition of the regional or minority languages as an expression of cultural wealth”, “the need for resolute action to promote regional or minority languages in order to safeguard them”, “the facilitation and/or encouragement of the use of regional or minority languages, in speech and writing, in public and private life”, and “the provision of appropriate forms and means for the teaching and study of regional or minority languages at all appropriate stag-

²⁹ See more in detail LANGENFELD CHRISTINE, in: BOYSEN SIGRID et al., *Europäische Charta der Regional- oder Minderheitensprachen. Handkommentar*, Basel 2011, Art. 8, para. 6.

³⁰ As to the differences between Part II and Part III see the explanatory report to the European Charter for Regional or Minority Languages, paras. 38-41; see also BOYSEN (FN 3), Einführung para. 14, and WOEHLING (FN 5), 29.

³¹ See WOEHLING (FN 5), 71 and 104 et seq., and BOYSEN (FN 3), Art. 2 para. 3.

³² Explanatory report, para. 39; see also BOYSEN (FN 3), Art. 2 para. 2.

³³ See also BOYSEN (FN 3), Art. 2 para. 4.

es”.³⁴ At first reading, these ‘objectives and principles’ seem to be formulated so vague and open that one might wonder whether they have any added value at all. This would misjudge, however, the genuine relevance of Part II. Admittedly, the provision does not state a set of concrete and unconditioned standards capable of being applied with ‘direct effect’ by national authorities and judges. But, despite its open formulation, Art. 7 with its set of ‘objectives and principles’ gives a legal yardstick for measuring the compatibility of national policies with the Charter.³⁵ In fixing specific objectives of a ‘meaningful’ language policy concerning minority languages, it imposes an obligation to pursue such objectives, and not to pursue contradictory goals of linguistic assimilation and of imposing a uniform national language as the only means of communication. Even more, Art. 7 establishes certain principles of a wide-ranging character, such as “the respect of the geographical area of each regional or minority language in order to ensure that existing or new administrative divisions do not constitute an obstacle to the promotion of the regional or minority language in question”.³⁶ Since the aim of an effective protection of minority languages is far from dominating the practical arrangements of language policies in most European states, the ‘objectives and principles’ laid down in Art. 7 are of much more practical relevance than one might think. They may be relevant in three different dimensions. Firstly, Part II offers a basic degree of protection where states have largely opted out of a certain segment when selecting its menu.³⁷ Secondly, there are some ‘objectives and principles’ in Art. 7 that cover issues not raised under Part III, like the mentioned principle on the respect of the geographical area of a language when designing administrative divisions.³⁸ Thirdly, they provide a basic standard of protection for minority languages that hitherto have been ne-

³⁴ Cf. the explanatory report to the European Charter for Regional or Minority Languages, paras. 58-75; cf. also WOEHLING (FN 5), 106 et seqq.

³⁵ See also BOYSEN (FN 3), Art. 7 para. 1.

³⁶ See more in detail WOEHLING (FN 5), 109 et seqq., and BOYSEN (FN 3), Art. 7 para. 28 et seqq.

³⁷ Concerning this situation, see the explanatory report, para. 42; see also WOEHLING (FN 5), 95.

³⁸ As to this commitment, see the explanatory report, paras. 59/60; see also WOEHLING (FN 5), 95.

glected in a member state, and which accordingly have not been included in the set of languages protected under Part III. This must not always be a case of a small or unimportant language – Romani, for example, falls only under Part II in practically all the member states of the Charter, although people of Roma origin in some of the states constitute by far the biggest ethnic (and linguistic) minority.³⁹ Part II here safeguards an elementary protection of languages such as Romani. This might induce the state to develop a policy of language maintenance and development in cases where such languages traditionally were kept out of protection, but it may also serve as a catalyst to realize the existence of hitherto ‘unknown’ or repressed minority languages that might warrant for a certain protection. The Netherlands, for example, detected during the preparation of its Initial Periodical Report that Lower Saxonian and ‘Limburgish’ might be qualified as minority languages in the sense of the Charter, a learning process which started a debate whether and how these languages might be protected in future.⁴⁰

Part III then contains the specific ‘menu’ of protection for recognized minority languages with options of a much more concrete nature.⁴¹ It has often been asked why the drafters have chosen such a complex structure with the optional menu under Part III as the core section of obligations under the Charter. One should be aware, however, that the task to protect and promote minority languages cannot be achieved simply with a transformed set of general civil and political rights, operationalised in a minority specific perspective (like it is done in the Framework Convention for minority rights in general). Protection of minority languages in its essence is about positive obligations of states in the fields of education, media, culture, official use in

³⁹ This is the case in Hungary, for example – see the Initial Periodical Report by Hungary presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter, 7 September 1999, pp. 18-20 (available under: <http://www.coe.int/t/dg4/education/minlang/Report/PeriodicalReports/HungaryPR1_en.pdf>).

⁴⁰ See First Report of the Committee of Experts on the Netherlands of 20 September 2001 (FN 21), paras. 10, 21, 22.

⁴¹ See BOYSEN (FN 3), Art. 2 paras. 6 et seqq.

administration and courts.⁴² Minority languages cannot be protected by simply obliging states to abstain from harmful acts. As the Advisory Committee on the Framework Convention for the Protection of National Minorities notes in its 3rd thematic commentary on the language rights of persons belonging to national minorities, “preventing assimilation requires not only abstention from policies clearly aimed at assimilating persons belonging to national minorities into the mainstream society”.⁴³ It also implies positive action in order to “promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, including their language”, as is stated in Article 5 of the Framework Convention. This will, the Advisory Committee argues, in particular with regard to numerically small minorities, require “the active promotion and encouragement of the use of minority languages in order to prevent their disappearance from public life.”⁴⁴

For a sensible degree of protection and promotion, states accordingly must take a broad range of positive measures, offering certain types of education in minority languages at state schools, offering programmes in minority languages in public service radio and television, enabling speakers to use their language before administrative authorities and courts, which again requires a specific organisation and personnel with specific linguistic capabilities.⁴⁵ It is difficult to oblige states towards rather specific kinds of positive measures, however, while taking refuge in abstract, all-embracing formulations. When we want to spell out these positive obligations in a manner as concrete as

⁴² See WOEHLING (FN 5), 27, and BOYSEN (FN 3), Einführung para. 22; see also WOEHLING JEAN-MARIE, The European Charter for regional or Minority Languages and the Principle of Non-Discrimination, in: DUNBAR ROBERT/PARRY GWYNEDD (eds.), The European Charter for Regional or Minority Languages: Legal Challenges and Opportunities, Strasbourg 2008, 63, at 74 et seqq.

⁴³ Advisory Committee on the Framework Convention for the Protection of National Minorities, Draft of Thematic Commentary No.3 on the Language Rights of Persons Belonging to National Minorities under the Framework Convention, para. 24.

⁴⁴ Ibid.

⁴⁵ See BOYSEN (FN 3), Art.2 para. 6; see also DUNBAR ROBERT, The Charter as a Living Instrument: Legal Challenges and Perspectives, in: Council of Europe (ed.), Minority Language Protection in Europe: Into a New Decade, Strasbourg 2010, 178 et seqq.

possible, this is suitable only in a catalogue of options as it is used in the Language Charter (or in the European Social Charter, the structural model copied when drafting the Charter⁴⁶). With the various options set out in the text of Part III, the envisaged positive measures gain a degree of concreteness that would never be achieved in a catch-all formula typically used in standard human rights treaties. The recourse to a ‘menu structure’ like in the Social Charter thus was a logical step to be taken.

The Charter in its Part III contains a list of nearly 100 proposed obligations, under which a state has to select 35 options as a minimum.⁴⁷ States “are free, within certain limits, to determine which of these provisions will apply to each of the languages spoken within their frontiers”.⁴⁸ The flexibility thus granted to member states when tailoring its set of obligations “takes account of the major differences in the de facto situations of regional or minority languages (numbers of speakers, degree of fragmentation etc.). It also has regard to the costs entailed by many of the provisions and the varying administrative and financial capacity of the European states”.⁴⁹

Despite the flexibility, or perhaps even due to such flexibility, the individual obligations contained in the menu are rather precise. One should read Art. 8 on education, for example. Every subparagraph contains, to take out the set of options for primary education as an exemplary case, the option “to make available primary education in the relevant regional or minority languages”, the option “to make available a substantial part of primary education in the relevant regional or minority languages”, the option “to provide, within primary education, for the teaching of the relevant regional or minority language as an integral part of the curriculum”, or fourthly, the possibility “to apply one of the measures provided for under I to iii above at least to those pupils whose families so request and whose number is considered suffi-

⁴⁶ See BOYSEN (FN 3), Einführung para. 11.

⁴⁷ Art. 2 para.2 ECRML; see also the explanatory report, paras. 43-47, and BOYSEN (FN 3), Art. 2 paras. 7 et seqq.

⁴⁸ Explanatory report, para. 22; see also BOYSEN (FN 3), Art. 2 para. 8.

⁴⁹ Explanatory report, para. 22; see also BOYSEN (FN 3), Einführung para. 11 and Art. 2 para. 6

cient”.⁵⁰ The example used here should make evident the rationale of the menu approach. The various options are alternative instruments of fostering minority languages in school education.⁵¹ A state cannot apply all four forms of protection at the same time, but has to choose one of these possibilities when designing its language policy in the education field. By making the choice explicit, and asking the state which choice he has made or he wants to make, the provision becomes much more concrete than an abstract, all-embracing formula covering the whole field of primary education in one obligation.⁵² The attempt to draft an overall formula, like it was done in the Framework Convention, but also in the Venice Commission draft and in the draft Additional Protocol, cannot avoid but hiding the inherent choice under an open and vague wording covering all the different options. The Charter thus manages to become very technical in its construction of the undertakings, pressing the states into a straight jacket of rather precise and concrete obligations. States have a choice which obligations they want to take, but if they have taken a set of obligations, they have much less leeway in arguing that a certain policy conforms to its undertakings than they have under the Framework Convention, for example.⁵³ One should compare only the technical wording of the options under Art.8 ECRML with the parallel provision of Art. 14 para. 1 of the Framework Convention: “The Parties undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language.” And paragraph 2 of Art. 14 continues: “In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those

⁵⁰ See more in detail LANGENFELD (FN 29), paras. 23 et seqq.

⁵¹ Ibid., paras. 16 et seqq.; see also WOEHLING (FN 5), 150-152.

⁵² This advantage is overlooked when critics of the Charter’s approach claim: “The notion that a variety of factual situations can be addressed through a diversity in legal duties rather than the means of implementing a body of common prescriptions appears questionable ...” – PENTASSUGLIA (FN 6), 131.

⁵³ See already OETER STEFAN, *The European Charter for Regional or Minority Languages*, in: Council of Europe (ed.), *Mechanisms for the Implementation of Minority Rights*, Strasbourg 2004, 131, at 135.

minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language.”

The technical detailedness of the Charter’s individual undertakings makes compliance control under the Language Charter an easy and a difficult task at the same time: Easy, since the interpretation of the individual options is not a very complex task – most specific options are clear and precise in its content and do not need much interpretation; difficult at the same time, however, because it is a challenging task to keep an overview of the concrete menu of obligations of each member state. No state has an identical set of obligations to the other; also the rationale of each menu is different, and calls for differentiated analysis of law and facts. Each menu is understandable only on the basis of the socio-linguistic situation of the languages in question and of the fundamental structures of the national legal orders.⁵⁴ Menus of federal states tend to be extremely complex, whereas centralized states tend to grant each language the same protection, irrespective its socio-linguistic situation, the size of its speakers and its geographical coverage.⁵⁵ Due to the complexity of the menu, state authorities are in an obvious danger of losing overview themselves – sometimes it is evident from the information given in the reporting procedure that the competent state organs misunderstood the meaning of certain options, selected the ‘wrong’ options, or selected nearly by ransom certain options in order to fill up the menu, hoping that they would not be criticized for doing nothing in implementation of certain standards. The menu is not completely left to the discretion of the Contracting States; a Contracting State has to choose 35 options as a minimum, and has to subject himself to at least three obligations each in education and in the cultural field, and to one obligation at least in the official use in administration, before courts, in the media field and in economic and social life.⁵⁶ This sounds minimal, but Germany for example has made the experience that such a corset of minimum obligations can be rather challenging – attempts to

⁵⁴ See also WOEHLING (FN 5), 96-99.

⁵⁵ As to the differences in ratification menus see also BOYSEN (FN 3), Einführung paras. 17 et seqq.

⁵⁶ See only the explanation in the explanatory report to the Charter, paras. 44/45; see also BOYSEN (FN 3), Art. 2 para. 7.

lift the formal protection of Romani up to the level of Part III have proven to raise extreme difficulties.⁵⁷

III. Institutional Arrangements and the Monitoring Procedure

The question how to monitor the implementation of such a complex arrangement of differential obligations constitutes a significant challenge. The drafting committee that had been entrusted by the Council of Europe (and its member states) with the task of designing a viable instrument for the protection of minority languages opted for a seemingly quite traditional approach. The European Charter for Regional or Minority Languages follows the traditional approach of Council of Europe Conventions in the human rights field and sets out a standard reporting procedure.⁵⁸ Member states have to submit reports on their policies pursued in accordance with Part II of the Charter and on the measures taken in application of those provisions of Part III chosen by them, in a format which is prescribed by a standard form adopted by the Committee of Ministers.⁵⁹ The first periodical report is due one year after the Charter has entered into force for a state. The respective Government's Office of Minority Affairs or a specific ministry determined as the primary responsible organ inside the government usually collects all the information necessary to report on the Charter's implementation and puts the bits and pieces of information together to a more or less comprehensive report.⁶⁰ In contrast to the Framework Convention, the responsible ministry usually is

⁵⁷ See OETER STEFAN, *Aus europäischer Sicht: Die Regional- und Minderheitensprachen und ihr Platz in den deutschen Schulsystemen*, in: Bundesrat für Niederdeutsch (ed.), *Mit den Regional- und Minderheitensprachen auf dem Weg nach Europa*, Leer 2011, 34, 59.

⁵⁸ See more in detail PENTASSUGLIA (FN 6), 201/202, and OETER (FN 53), 136 et seqq.

⁵⁹ See the explanatory report to the Charter, para. 127; see also, more in detail, WOEHRLING (FN 5), 246 et seqq., and REIN DETLEV, in: BOYSEN SIGRID et al., *Europäische Charta der Regional- oder Minderheitensprachen. Handkommentar*, Basel 2011, Art. 15 paras. 12 et seqq.

⁶⁰ See REIN (FN 59), Art. 15 para. 6, and OETER (FN 53), 136.

not the Ministry of Foreign Affairs, but the ministry mainly dealing with minority language issues inside a specific state – i.e. usually the Ministry of the Interior, of Education or of Culture. This ministry consults the other ministries and government offices whose competences are affected by the Charter, and it often also consults with the minority organisations representing the language groups involved.⁶¹ In federal states or states with structures of regional autonomy, the member state bureaucracies and the regional authorities also need to be consulted. Such consultation procedures may be rather time consuming, as in the case of Germany, where the Federation has very few legislative and administrative competences relevant for implementing the Charter.⁶² Here the coordinating body in the Federal Ministry of the Interior instituted a whole scheme of coordination conferences with the ‘Länder’ bureaucracies and the minority organisations in order to collect the information needed to draw up a sensible report.⁶³

The reports are presented to the Secretary General of the Council of Europe. At the same time, the reports must be made public in the country concerned, usually by printing it as a government paper distributed publicly, also often by making it public on the internet homepage of the government.⁶⁴ The Secretary General forwards the reports to the Committee of Experts established under the Charter, which has the responsibility of examining the reports in detail.

The Committee of Experts, a body provided for under Art. 17 of the Charter, is composed of one member per each Contracting Party, appointed by the Committee of Ministers for a term of six years from a list of three national experts presented by the state concerned.⁶⁵ With each new ratification, the Committee of Experts thus is growing larger, but in a mid-term perspective it seems not probable that it will grow much beyond thirty members, because

⁶¹ Cf. REIN (FN 59), Art. 15 paras. 8 et seqq.

⁶² See BOYSEN (FN 3), Einführung para. 19, as well as OETER/WALKER (FN 17), 255 et seqq.

⁶³ See REIN (FN 59), Art. 15 para. 11.

⁶⁴ See Art. 15 para. 2 ECRML; cf. also BOYSEN (FN 3), Art.6 paras. 1 et seqq.

⁶⁵ See the explanatory report, para. 131, and more in detail REIN (FN 59), Art. 17 paras. 3 et seqq.

there is a strong group of states that – for rather different reasons – are not going to ratify the Charter.⁶⁶ The composition of the Committee of Experts is heterogeneous, which is a positive aspect. Nearly half of the members are law professors or scholars with a particular expertise in social rights and minority rights; the other most important group comprises linguists and social scientists specialised in socio-linguistic issues.⁶⁷ Roughly a third of the Committee’s members belong to linguistic minorities themselves.

In the process of monitoring the implementation of the Charter, the involvement of civil society is of extreme importance.⁶⁸ The Charter itself invites “bodies or associations legally established in a Party”, which means primarily minority bodies or associations, to “draw the attention of the committee of experts to matters relating to the undertakings entered into by that Party under Part III of this Charter”.⁶⁹ Associations or bodies representing minorities or struggling for the rights of minorities thus may not only brief the Committee’s members behind the scene, like this is done at the UN level, but are allowed to act openly, to submit formally statements, pieces of information and critical comments to the reports of states.⁷⁰ The Committee of Experts explicitly is authorised by Art. 16 para. 2 of the Charter to make use of such information, after consulting the Party concerned, thus giving the respective state a right to be heard.⁷¹ The Committee may “take account of this information” in the preparation of its report, may include it in its statements of facts, may openly refer to it.⁷² The – inevitably one-sided – informations given in the state’s Periodical Reports thus are balanced by informations submitted by minority associations or bodies and by human rights organisations. The quality of monitoring to a certain degree depends upon the en-

⁶⁶ Concerning the reasons in the cases of Belgium and the Baltic States see LEJEUNE YVES, *The Case of Belgium*, in: Council of Europe (ed.), *Minority Language Protection in Europe: Into a New Decade*, Strasbourg 2010, 43 et seqq., and TRIFUNOVSKA SNEŽANA, *The Case of the Baltic States*, *ibid.*, 67 et seqq.

⁶⁷ See OETER (FN 53), 137, and REIN (FN 59), Art. 17 para. 7.

⁶⁸ See OETER (FN 18), 192 et seqq.

⁶⁹ See also the explanatory report, paras. 128/29.

⁷⁰ See also WOEHLING (FN 5), 251 et seqq.

⁷¹ See OETER (FN 18), 193.

⁷² See also REIN (FN 59), Art. 16 paras. 12 et seqq.

gagement (and professionalism) of minority NGOs – but the degree of institutionalisation and professionalism of such NGOs unfortunately varies enormously throughout Europe, which often creates a problem not only for the monitoring of treaties like the Language Charter, but also for their implementation.⁷³ Legal arrangements alone cannot guarantee a loyal implementation of the set of undertakings ratified under the Charter; societal pressure is needed in that regard, political debate, public attention – and without engaged and professional NGOs mobilising the public and orchestrating political pressure, implementation often becomes deficient.⁷⁴

For the details of procedure, I quote from one of the reports of the Secretary General of the Council of Europe to the Parliamentary Assembly on the application of the Charter:

“It rapidly became clear that when examining the national reports the Committee of experts needed to enter into a dialogue with the national authorities concerned in order to clarify some aspects of the report and obtain additional information. This dialogue is carried on in the first place in the form of written questions and answers. However, the Committee has normally found it necessary to follow up this written correspondence by sending a delegation, consisting of three members of the Committee, on an ‘On-the-Spot-Mission’ to the country concerned. These visits provide an opportunity for a more intensive exchange of information with the governmental authorities, other public bodies (such as ombudsmen), parliamentarians and representatives of the speakers of the various regional or minority languages.”⁷⁵

With other words: Reports are often rather deficient. Sometimes you have the impression that the state organs concerned did not really understand the meaning of the undertakings selected by them for the instrument of ratification, either at the date of ratification or at a later stage when reporting – and

⁷³ See OETER (FN 18), 192 et seq.

⁷⁴ See also GRAMSTAD SIGVE, *The Charter’s Monitoring Mechanism: A Practical Perspective*, in: Council of Europe (ed.), *Minority Language Protection in Europe: Into a New Decade*, Strasbourg 2010, 29, at 33.

⁷⁵ Biennial report by the Secretary General to the Parliamentary Assembly on the Application of the European Charter for Regional or Minority Languages, Doc. 8879 of 18 October 2000, 2; the report may be found under: <<http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc00/EDOC8879.htm>>.

such non-comprehension inevitably leads to inadequate information concerning the obligations in question. Sometimes the relevant authorities have difficulties in obtaining the necessary information as to what is really happening ‘on the ground’, and sometimes authorities are also simply trying to hide deficits in implementation behind a veil of irrelevant remarks or by remaining completely silent on certain delicate points.⁷⁶ Sometimes the deficiencies of reports are of an even more banal nature: the bureaucrats preparing the reports are sometimes inexperienced or simply ignorant of the issues at stake.

As a consequence, the practice of ‘on-the-spot visits’ has become an extremely important tool for the Committee of Experts.⁷⁷ Most time of the ‘on-the-spot visits’, the duration of which ranges from two days to a whole week, is spent in discussions with representatives of civil society, in particular minority organisations, and in talks with local and regional administrations working in the minority areas. Debates with central authorities are usually held at the end of an ‘on-the-spot visits’, which means that the responsible central authorities can be confronted with pieces of information gained in the prior phase of the visit indicating deficiencies in the implementation of a number of undertakings. Private talks with civil society representatives, without the presence of state officials, is a ‘must’ in such a set-up, and helps to gain a large amount of valuable information concerning the problems linked to the implementation of the treaty provisions.

The procedure is mainly driven by the work of the ‘country rapporteur’ appointed by the committee in advance and by the lawyer from the secretariat responsible for the report.⁷⁸ The Committee’s secretariat, by the way, is extremely small, consists of only three or four officials working on the reports. The country rapporteur and the staff member prepare the first examination of the state report, draw up the questionnaires and prepare the ‘on-the-spot visits’. The examination itself, as well as the drafting work for the questionnaires, during the first years was done in plenary sessions of the Committee. But since the number of reports simultaneously being in the process of ex-

⁷⁶ See already OETER (FN 53), 138.

⁷⁷ See also more in detail REIN (FN 59), Art. 16 para. 15, and OETER (FN 53), 139.

⁷⁸ See REIN (FN 59), Art. 16 para. 10.

amination is growing more and more, the Committee had to change to a kind of ‘chamber’ procedure’.⁷⁹ Members of the committee are split up in various working groups, where they deal with the details of checking the information given in the state reports and with drafting the Committee’s evaluation report. The proposed draft, however, finally must always be discussed in the whole committee, giving each member a chance to come back to every detail.⁸⁰

The evaluation report of the Committee of Experts then is presented to the Committee of Ministers of the Council of Europe, the main decision-making organ of the Council.⁸¹ As art. 16 para.4 of the Charter provides, the report for the Committee of Ministers shall contain “proposals of the committee of experts to the Committee of Ministers for the preparation of such recommendations of the latter body to one or more of the parties as may be required”. Accordingly, the Committee of Ministers takes not only note of the Committee’s of Experts report, but decides upon ‘recommendations’ adressed to the state concerned.⁸² Up to now, the Committee of Ministers has always adopted the proposed recommendations annexed to the report of the Committee of Experts. The report of the Committee of Experts is not automatically made public. Publication needs a specific decision, which requires in practice consent by the state concerned.⁸³ Fortunately enough, all states parties have without any hesitation consented to publication, which has set a valuable precedent for future practice.

Every three years a new periodical report is due to be presented by the member states⁸⁴. Taking into consideration the time needed to examine a country report in accordance with the procedure explained above, this is a relatively short time span. Usually it takes one and a half to two years until a country

⁷⁹ See more in detail OETER (FN 53), 138/139.

⁸⁰ See OETER (FN 53), 140.

⁸¹ Concerning the procedure at the Committee of Ministers (usually sitting in its formation of deputies) and the preparatory Rapporteur Groups) see REIN (FN 59), paras. 21 et seqq.

⁸² See OETER (FN 53), 140.

⁸³ Art.16 para. 3 second sentence ECRML; see also REIN (FN 59), para. 23.

⁸⁴ Ibid., para. 25.

report is examined and the Committee of Ministers has adopted its recommendations. This means that soon after finishing one round of examination, the respective state has to start anew its internal procedure of collecting information for its next periodical report – which gives the whole reporting procedure the character of a constant dialogue upon questions of implementation.⁸⁵

IV. The Main Factors of Success

What are the cornerstones for the success of such an ambitious treaty, seen under the perspective of ten years of experience with monitoring the instrument? A treaty like the ECRML firstly reminds national, regional and local authorities of its responsibilities towards the protection and promotion of minority languages – signing and ratifying this treaty means giving a promise to do a lot in favour of such languages being discriminated against or even being in danger of perishing.⁸⁶ An international treaty, if solidly constructed, fixes certain unquestionable policy goals – after ratification it is not up to seasonal politics to decide whether protecting and promoting minority languages is a valuable objective of public policy, since the objective has been fixed in stable terms – and creates an institutional arrangement of compliance management reminding states that they have to take a lot of measures in favour of pursuing the fixed policy goal.⁸⁷ In this perspective, international treaties tend to stabilize the priority of certain policy objectives – with the ratification of the treaty states make a big promise to pursue a specific policy objective and take a set of measures needed to achieve such objective. Politicians might sometimes be tempted to forget at a later stage about their former rhetoric on prioritizing certain policy objectives and on taking decided measures in favour of it, may perceive the whole talk about

⁸⁵ See also GRAMSTAD (FN 74), 33.

⁸⁶ See OETER (FN 18), 187.

⁸⁷ Concerning the underlying rationale of international agreements, namely to stabilize mutual expectations, see (from a rational choice perspective) GUZMAN ANDREW T., *How International Law Works. A Rational Choice Theory*, Oxford 2008, 120 et seqq.

the topic as a nuisance – but this does not help in case that the objective and the measures needed to achieve it are fixed in an international treaty.⁸⁸ The monitoring process constantly reminds them of their legal obligations under international law, and states organs – at least in democratic states based upon the rule of law – should take seriously the promises they once made in legal form and should strive to achieve the goals once set.

To link this abstract reflection to the ECRML: States undoubtedly made big political promises when ratifying the European Charter for Regional or Minority Languages – and trying to fulfil these promises might sometimes be a big nuisance indeed. It is the task of the Council of Europe as depositary organisation, and of the relevant treaty bodies in particular, to remind states that obligations once taken under international law should be honoured when you want to be taken seriously as a civilized and law-abiding state.⁸⁹ At the end, it does not matter any more what have been the primary political motives for entering into such obligations, whether they have been taken primarily for the purpose to impress an internal audience, a certain constituency of voters, or to improve the state's image in the club of European states as an external audience, or whether there was a serious intent to improve the state of protection of minority languages.⁹⁰

Nevertheless, the role of a treaty like the ECRML and of its institutions is rather limited in a political perspective.⁹¹ The effectiveness of the obligations entered into under such a treaty primarily depends on the sincerity of the policy commitments made in the instrument of ratification – and it depends also on the quality of corresponding national legislation and the effectiveness

⁸⁸ See OETER (FN 18), 188.

⁸⁹ Concerning the challenges of such task, see DUNBAR ROBERT, *The Charter as a Living Instrument: Legal Challenges and Perspectives*, in: Council of Europe (ed.), *Minority Language Protection in Europe: Into a New Decade*, Strasbourg 2010, 171 et seqq.

⁹⁰ See OETER (FN 18), 188.

⁹¹ See OETER (FN 18), 188; see also, as an attempt to assess the impact of the Charter, CRNIĆ-GROTIĆ VESNA, *The Impact of the Charter*, in: Council of Europe (ed.), *Minority Language Protection in Europe: Into a New Decade*, Strasbourg 2010, 35 et seqq.

of executive and judicial organs at national level.⁹² International treaties cannot replace national legislation – and the commitment of state organs to implement such legislation and the underlying policies. The international level only serves as a supplementary tool – as a fall-back position.⁹³ It reminds states of its obligations once incurred, evaluates strengths and weaknesses of national (minority language) policies, and insists upon standards when – in particular after changes of governments – new political majorities and new governments attempt to brush aside past achievements (and past aspirations transformed into legal obligations under international law).

At this stage of analysis, a further level of actors has to be brought into the game – the vast landscape of civil society and its various individual and collective actors.⁹⁴ Without a lively and dynamic civil society, an international legal instrument like the European Charter for Regional or Minority Languages is largely doomed to failure. Not only that its monitoring mechanism would not work without active participation of civil society – even more, the impact of the Charter on national policies and administrative and judicial practices would probably be rather minimal if civil society would not take up critical issues and put pressure upon governments and administrations.⁹⁵ Long-standing experience tells that the effective implementation of a treaty like the ECRML depends largely upon the effectiveness of civil society organizations. There are countries with well-developed NGO's and lobbying associations struggling for the public good – and when they are effective, they can exert significant pressure upon governments to fulfil its legal obligations. There exist other countries with a relatively weak organization of civil society – the implementation of treaty obligations then is largely left to the mercy of governments, with all the volatilities and temptations of populism and opportunism that plague political actors.⁹⁶

A third factor having a certain significance here is the place and role of the European Charter for Regional or Minority Languages in the overall setup of

⁹² See also BOYSEN (FN 3), Einführung paras. 18 et seqq.

⁹³ See also OETER (FN 18), 188 et seqq.

⁹⁴ See more in detail OETER (FN 53), 148 et seqq.

⁹⁵ See OETER (FN 18), 192 et seqq.

⁹⁶ Ibid., 193.

the European legal order – a set-up which is not yet really completed in the field of the protection of cultural diversity.⁹⁷ As an isolated legal instrument, the ECRML might be doomed to failure; only as part and parcel of a decided European policy in favour of the protection of cultural diversity, it might have a serious impact on the future development of European language policies.⁹⁸ There are some positive developments giving reason for hope, but there exist also serious worries in this regard.

V. The Achievements of the Charter

The achievements of the Charter are difficult to measure, but it is beyond doubt that in a large number of cases, states have reacted to deficiencies in the implementation of the Charter's standards by changing legislation and adapting administrative practice to the requirements set up by the Charter.⁹⁹ This does not say that the state of implementation has become that good that further efforts would not be needed any more. We are far from such state of perfection – in most member states, serious structural deficiencies persist and prove very resistant towards change, as the monitoring practice of the Committee of Experts lays open with nearly every evaluation report.¹⁰⁰ The following remarks might illustrate the typical patterns and problems of deficient implementation, but also the contribution the Charter can make

⁹⁷ Concerning the deficiencies of EU law in that regard see TOGGENBURG GABRIEL N. (ed.), *Minority Protection and the Enlarged European Union: The Way Forward*, Budapest 2004; SHUIBHNE NIAMH NIC, *EC Law and Minority Language Policy*, The Hague 2002; DE WITTE BRUNO, *Language Law of the European Union: Protecting or Eroding Linguistic Diversity?*, in: CRAUFURD SMITH RACHEL (ed.), *Culture and European Union Law*, Oxford 2004, 205 et seqq.

⁹⁸ See already OETER (FN 18), 194 et seqq.

⁹⁹ See also CRNIĆ-GROTIĆ (FN 91), 38 et seqq.

¹⁰⁰ See the surveys of the Committee of Expert's monitoring practice by BULTRINI ANTONIO, in: *European Yearbook of Minority Issues* 2 (2002/03) 435 et seqq., and 3 (2003/04) 377 et seqq., as well as by CRNIĆ-GROTIĆ VESNA, *European Yearbook of Minority Issues* 4 (2004/05) 541 et seqq.; 5 (2005/06) 273 et seqq.; 6 (2006/07) 387 et seqq.; 7 (2007/08) 497 et seqq., and 8 (2009) et seqq.

– when it induces change – to improve the state of the art in diversity management in European countries.

As a first, and very serious, problem of diversity management may be identified the problematic position of the so-called ‘Part II-languages’ in national language policies. These languages usually are the languages of scattered urban minorities having difficulties in forming a workable ‘linguistic community’¹⁰¹, or (mostly unstandardized) languages of remote rural communities that traditionally were not taken seriously as means of communication at the public sphere.¹⁰² These ‘repressed’ (or at least ‘neglected’) languages usually enjoy no specific protection whatsoever, which means that there are no specific arrangements in the public education system securing language maintenance, that they are completely excluded from official use, that there is practically no media coverage and nearly no support for them in official schemes of cultural policy.¹⁰³ The extremely asymmetric situation of ‘diglossy’ normally implies that there is a clear danger of extinction of these languages. The provisions of Part II of the Charter, which are of a largely programmatic character, call upon states to develop a policy of language maintenance also in favour of these languages.¹⁰⁴ The vague and open nature of the objectives set in Art.7 implies that there are no clear and precise requirements of what measures need to be taken under the Charter in order to protect and promote these languages. However, continuing to do nothing in favour of these languages threatened with extinction, as was the traditional pattern of most member states in these cases, would clearly violate the nor-

¹⁰¹ Under the Charter, this problem is taken into consideration under the heading of ‘non-territorial languages’ – see Art.7 para.5 ECRML – see also WOEHLING (FN 5), 130 et seqq.

¹⁰² See as an example AGRESTI GIOVANNI, *The European Charter for Regional or Minority Languages and France: Stocktaking and Prospects for a Ratification in Abeyance: Discourse Analysis and the Configuration of the “Doxa”*, in: DUNBAR ROBERT/PARRY GWNEEDD (eds.), *The European Charter for Regional or Minority Languages: Legal Challenges and Opportunities*, Strasbourg 2008, 183 et seqq.

¹⁰³ As an exemplary case see VIOLA MARCO, *The Protection of Small Languages in Trentino*, in: Council of Europe (ed.), *Minority Language Protection in Europe: Into a New Decade*, Strasbourg 2010, 155 et seqq.

¹⁰⁴ See the explanatory report to the Charter, paras. 57/58, 61-64.

mative programme laid down in Part II.¹⁰⁵ A number of member states of the Charter have detected in the course of drawing up their reports that certain ‘neglected’ languages are covered by Part II of the Charter and accordingly have begun to wonder what to do in these cases. This implies first a recognition of the languages, and such recognition subsequently implies that something should be done in favour of their protection.¹⁰⁶ It is obvious that formulating a sensible policy concerning these languages needs a considerable time, and it would be unrealistic to expect a sudden change of policy that would solve all the problems at once. The official recognition of the problem and the starting of a constructive dialogue with the representatives of the respective speakers, however, forms a considerable progress in itself that should not be underestimated.

The Roma minorities constitute a particular problem under Part II. More or less all member states bound by the Charter have to deal with Romani speaking communities living under problematic conditions. Our experience demonstrates that states, when dealing with Roma issues, have to cope with more or less similar problems in designing and implementing its policies to improve the social situation and the living conditions of Roma. There is a widespread understanding, under researchers as well as under responsible bureaucrats, that more has to be done in favour of the Roma communities. There is a certain perplexity, however, as to what exactly should be done.¹⁰⁷ To a large degree, the problems of Roma are problems of social marginalization and of discrimination falling beyond the scope of the Charter.¹⁰⁸ The Charter only covers the issues of language discrimination and language maintenance. Traditional ‘affirmative action’ policies that try to improve the social integration of people of Roma background, however, are not easily to

¹⁰⁵ See BOYSEN (FN 3), Art. 7 paras. 2 et seqq.

¹⁰⁶ *IBID.*, paras. 6 et seqq.

¹⁰⁷ See only the Strasbourg Declaration on Roma of 20 Oct. 2010 and the Minutes of the Council of Europe High-Level Meeting on Roma, Strasbourg, 20 Oct. 2010, where the declaration was adopted – Council of Europe Doc.ROMS (2019) PV final, available under: <<http://www.coe.int/document-library/default.asp?urlwcd=https://wcd.coe.int/ViewDoc.jsp?id=1709581>>.

¹⁰⁸ See also the Thematic Commentary No. 3 of the Advisory Committee (FN 43), at para. 36.

combine with measures of language maintenance relating to Romani.¹⁰⁹ Strengthening a separate ‘Roma identity’ is often seen as consolidating the social ‘ghetto’ in which Roma all too often are entrapped.¹¹⁰ The success of traditional assimilation policies, on the other hand, is not very convincing either, as examples like Hungary demonstrate.¹¹¹ Even if states parties decide to strengthen the cultural identity of Roma by specific measures in favour of Romani as a medium of communication, such a policy is difficult to implement. It needs the cooperation of Roma communities; but Roma communities are reluctant to cooperate with states in these matters and to ‘publicize’ their language, which traditionally served as a kind of ‘secret code’ reserved to members of the community. Nevertheless, some states experiment with practical measures in this direction.¹¹²

As far as languages protected under Part III are concerned, the set of provisions on education in Art.8 of the Charter probably is the most decisive part of the package trying to ensure the survival of minority languages.¹¹³ As the second biennial report of the Secretary General on the application of the Charter phrased it: “Education is a crucial and challenging field, in which it appears that similar problems exist in several States Parties, *i.e.* inadequacy of the conceptual and organisational framework for minority language education (at pre-school, primary school, secondary school), inadequate or even non-existent specific training for regional or minority language teachers and a serious lack of training materials.”¹¹⁴ This sentence expresses in a very

¹⁰⁹ See also HALWACHS DIETER, Romani Teaching: Some General Considerations Based on Model Cases, European Yearbook of Minority Issues 9 (2010/11).

¹¹⁰ See only KONTRA MIKLÓS et al., Conceptualising and Implementing Linguistic Human Rights, in: KONTRA MIKLÓS et al. (eds.), Language: A Right and a Resource. Approaching Linguistic Human Rights, Budapest 1999, 1, at 13.

¹¹¹ See SZALAI ANDREA, Linguistic Human Rights Problems among Romani and Boyash Speakers in Hungary with Special Attention to Education, in: KONTRA MIKLÓS et al. (eds.), Language: A Right and a Resource. Approaching Linguistic Human Rights, Budapest 1999, 297-315.

¹¹² See OETER (FN 57), 58.

¹¹³ See also WOEHRLING (FN 5), 143.

¹¹⁴ Biennial report by the Secretary General to the Parliamentary Assembly on the application of the Charter, Doc. 9540 of 11 September 2002, 3 (available under:

abbreviated form the experience that minority language education in most member states is in a deplorable state. Even if states are proud of their efforts, these remain often fragmentary, leaving it to the local school authorities whether they want to offer any education in or of the minority language.¹¹⁵ Since usually resources are scarce in the education sector in general and local authorities prefer to service the wishes of the majority, minority language education usually is underfinanced, has to cope with a shortage of teachers and finds itself shifted to marginal hours.¹¹⁶ Despite some well-developed models of minority language schools run by minority organisations and an impressive engagement of individual teachers also in ordinary state schools, the lack of a systematic scheme of minority language education covering all the places where parents might wish their children to visit such education is extremely hampering.¹¹⁷ As a consequence, children are denied, even if their parents wish such an education for their children, the chance to get a minority language education – and this despite the clear and unconditional obligation resulting in that sense from all the options under Art.8 para.1 sub-paras. (a), (b) and (c). The sets of options for pre-school education in Art.8 para.1 (a), primary school education in Art.8 para.1 (b) and secondary school education in Art.8 para.1 (c) distinguish various forms of minority language education – complete education in the minority language, making available a substantial part of education in the minority language, the teaching of the minority language as an integral part of the curriculum or the granting of such a possibility “at least to those pupils whose families so request and whose number is considered sufficient”.¹¹⁸ One may discuss the minimum threshold required for the creation of such an educational offer. However, Art.8 places beyond doubt that states must offer such

<[http:// assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc02/EDOC9540.htm](http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc02/EDOC9540.htm)>).

¹¹⁵ See also LANGENFELD (FN 29), paras. 9 et seqq.

¹¹⁶ As a short summary of the problems of minority language education see paras. 54-56 of the draft Thematic Commentary No. 3 of the Advisory Committee (FN 43).

¹¹⁷ As an example see the German case of North Frisian – cf. OETER (FN 57), at 48 et seqq.

¹¹⁸ Concerning the substance of these undertakings see LANGENFELD (FN 29), paras. 16 et seqq.

an option to all parents “within the territory in which such languages are used”.¹¹⁹

Even if some form of minority education is offered – and usually this is done only in the minimum form of some teaching *of* the minority language as subject-matter in school, not with the minority language as medium of instruction – this offer often is limited to some stages of education, like primary schools or secondary schools.¹²⁰ Minority language education as a tool of language maintenance makes only sense, however, if such education is continued throughout the whole school career.¹²¹ Minority language education has only a chance to attract enough children from a multilingual background if such continuity in access to teaching and learning of minority languages at all levels of the education system is secured, because only under this condition there is a chance for the minority language of becoming consolidated as an additional means of communication which may be used by its speakers in all spheres of life. Some two or three years of language education, in contrast, tends to serve as a ‘folkloristic’ alibi, but does not play a useful role in consolidating the communicative reach of a language. The Charter is very clear in that point – but common practice in a number of states shows a completely different picture. The committee has pointed to these weaknesses in most of its evaluation reports and will put a lot of emphasis on these structural deficiencies also in future rounds of reporting.¹²²

In most states unfortunately there is also a lack of any form of systematic monitoring of the efforts undertaken in minority language education.¹²³ In

¹¹⁹ As to the meaning of this formula see BOYSEN (FN 3), Art. 1 paras. 32 et seqq.

¹²⁰ Concerning this problem, see also KONTRA (FN 110), 10/11; see also paras. 73-75 of the Thematic Commentary No. 3 of the Advisory Committee (FN 43).

¹²¹ Concerning the problem of continuity see para. 75 of the Thematic Commentary No. 3 of the Advisory Committee (FN 43)

¹²² See also the surveys of the Committee’s monitoring practice mentioned above at note

¹²³ See only the Committee of Experts reports on the application of the Charter in Germany, First Evaluation Report on Germany of 6 July 2002, paras. 142, 181, 219, 297, 328, 359, 400, 438, 480, as well as Finding K at the end of the report (available under <<http://www.coe.int/t/dg4/education/minlang/Report/EvaluationRe>

Germany, for example, despite its very detailed regulatory framework for school education, there is only scarce control of what school institutions are really doing in practice.¹²⁴ The fragmentary and unsystematic nature of the whole educational structure finds its expression here. The same is true for teacher education in a number of states, as one of the crucial bottle-necks of any reform of minority language education.¹²⁵ The committee has all too often found a situation where the state makes on the one hand serious pledges to improve and enlarge minority language education in schools, while on the other hand there is an insufficient supply of minority language teachers, due to shortcomings in teacher training. In some situations, like Northern Frisian and Lower Sorbian in Germany, teacher education in minority languages is even cut back in the course of budgetary reallocations although even more teachers would be needed than were traditionally trained.¹²⁶ Various parts of the state are pursuing contradictory policies in these cases. The committee in these cases must highlight such contradictions in state policies and must point to the serious setbacks this might create in the implementation of the Charter, which gives the minority communities concerned a better chance to attack politically such phenomena of ignorance towards international legal obligations.

Structural deficiencies of a comparable nature can also be identified in other fields of diversity management. The use of regional or minority languages before the courts, for example, proves to be an extremely difficult issue.¹²⁷ The legal provisions concerning regional or minority languages normally guarantee the possibility to use them, but in practice this possibility is

ports/GermanyECRML1_en.pdf>. The findings have not changed throughout the second, third and fourth report.

¹²⁴ See also OETER (FN 57), 59-61.

¹²⁵ See also para. 76 of the Thematic Commentary No. 3 of the Advisory Committee (FN 43).

¹²⁶ See only the Committee of Experts first report on the application of the Charter in Germany (FN 123), paras. 180, 481-485.

¹²⁷ See also ENGBERS JUTTA, in: BOYSEN SIGRID et al., Europäische Charta der Regional- oder Minderheitensprachen. Handkommentar, Basel 2011, Art. 9 paras. 1 et seqq.

availed of only in exceptional cases.¹²⁸ Frequently, inadequate language skills on the part of the judicial personnel are compounded by a lack of qualified interpreters to whom recourse can be had in cases where a regional or minority language is used.¹²⁹ Speakers of minority languages accordingly are afraid of being perceived as ‘trouble-makers’ and thus prefer in practice to use the majority language.¹³⁰ If states would really take seriously the project codified in Art. 9 of the Charter, namely the effort to upgrade the social standing (and the communicative reach) of minority languages by giving them a place in judicial proceedings, they would have to create an organisational infrastructure which could fill the obligations with life.¹³¹ Only if minority language speakers know that there are judges and clerks trained to use their language in proceedings and court matters, they will dare to use the formal rights granted to them. The committee has consistently pointed to this problem and its repercussions in the organisation of the judiciary in a number of reports – and states are learning, it seems, to take the point more seriously than they used to do until some years ago.

Similar problems of insufficient patterns of institutional organisation and human resources management are often detectable concerning administrative authorities, where there is sometimes even a serious lack of knowledge on the part of the officials about the obligation to produce or accept documents in a regional or minority language.¹³² In general, local administrations are better equipped (and more willing) to make use of minority languages in their dealings with clients than central state administrations¹³³. Irrespective of the obligations undertaken by states under Art. 10 para.1 of the Charter, central state bureaucracies regularly react with indulgence towards the idea of using more than one language in its transactions – with the exception of

¹²⁸ For the reasons see ENGBERS (FN 127), para. 12.

¹²⁹ See also the biennial report by the Secretary General to the Parliamentary Assembly on the application of the Charter (FN 114), p. 3.

¹³⁰ See also OETER (FN 53), at 145.

¹³¹ See also para. 59 of the Thematic Commentary No. 3 of the Advisory Committee (FN 43).

¹³² See again the biennial report by the Secretary General to the Parliamentary Assembly on the application of the Charter (FN 114), 4.

¹³³ See also OETER (FN 53), at 146.

multinational states like Switzerland or Finland.¹³⁴ In most other states, it seems to be a horrifying vision for centralist bureaucrats to meet a file led in another language than the official language. Admittedly, files would have to be translated in such cases. But besides the file problem, there are not much problems of extra-expenses for administrations in accepting minority languages as a means of communication and interaction.¹³⁵ It is more a problem of adequate use of personnel than a question of big translation services, since in most minority territories there will be enough minority language officials in the staff to equip specific contact offices with adequate personnel; an administration must only feel a need to create such a structure.¹³⁶ There are positive models demonstrating how easy such a change might be brought about. The committee routinely points to these models in order to convince administrations to take their obligations under Art.10 of the Charter seriously and to fill them with life.

In general one might say that the effective protection and promotion of regional or minority languages often requires a change of mentalities, on the part of both the speakers of these languages and the representatives of the public authorities.¹³⁷ This may be linked to the broader need to raise awareness among the majority language community of the existence of regional or minority languages and their place in the national cultural heritage.¹³⁸ Here the media are of utmost importance. Being largely absent from the media is a serious handicap to the maintenance and development of a language in the circumstances of modern society.¹³⁹ This is particularly a problem for the

¹³⁴ Concerning the case of Switzerland see PITSCH CONSTANTIN, *The Case of Switzerland*, in: Council of Europe (ed.), *Minority Language Protection in Europe: Into a New Decade*, Strasbourg 2010, 87 et seqq.

¹³⁵ See in this regard also ENGBERS (FN 127), Art. 10 paras. 7 et seqq.

¹³⁶ See also para. 58 of the Thematic Commentary No. 3 of the Advisory Committee (FN 43).

¹³⁷ See again the biennial report by the Secretary General to the Parliamentary Assembly on the application of the Charter (FN 114), 4.

¹³⁸ See also para. 44 of the Thematic Commentary No. 3 of the Advisory Committee (FN 43).

¹³⁹ See MORING TOM/DUNBAR ROBERT, *The European Charter for Regional or Minority Languages and the Media*, Strasbourg 2008, 9 et seqq.

smaller languages that do not represent an audience big enough to be of interest to commercially based media. The State therefore has a responsibility here to make sure that the special needs of regional or minority languages are sufficiently catered for especially in media with a public service mission.¹⁴⁰ The extent to which it does so seems to vary considerably from one State Party to another. In general, even where there is a comprehensive legal framework for fulfilling a State's undertakings under the Charter, the Committee of Experts has observed that concrete regulations capable of being applied by individual officials are often lacking, making the specific objectives difficult to attain.¹⁴¹ It has also concluded in several cases that there is a lack of a coherent policy for the protection and development especially of the weaker minority languages covered by Part III of the Charter. States tend to hide themselves behind the 'independence' of public service media. For this reason, they sometimes opted only for the obligations directed towards the regulatory framework for private media. But left alone, private media usually will not serve adequately the needs of minority language speakers, at least in the case of smaller language communities.¹⁴² These groups do not form a commercially viable audience, at least in television. If states want to fulfil here their obligations, they must operate with 'must carry'-obligations in their regulatory schemes, a possibility that most regulatory arrangements provide for in principle.¹⁴³ States are reluctant, however, to burden private stations with such 'must carry'-obligations, and even if they include them in the licensing requirements, they tend to neglect enforcement of such requirements. As a result, implementation in this field is rather deficient in a number of member states of the Charter, a point which has been stressed in the Committee's evaluation reports.

The main points of concern which are mentioned here demonstrate that the implementation of the Charter is an open enterprise where a lot of problems

¹⁴⁰ See again the biennial report by the Secretary General to the Parliamentary Assembly on the application of the Charter (FN 114), 4.

¹⁴¹ See the analysis of the monitoring practice of the Committee of Experts undertaken by Moring & Dunbar (FN 139), at 34 et seqq.

¹⁴² See also Moring & Dunbar (FN 139), 48 et seqq.

¹⁴³ See also Moring & Dunbar (FN 139), 51 et seqq, as well as paras. 45-46 of the Thematic Commentary No. 3 of the Advisory Committee (FN 43).

still have to be solved. One might put this in rather negative terms by saying that the standard of implementation of the Charter's obligations still is rather deficient. The Charter, however, is a very ambitious instrument that has come into force a bit more than ten years ago – and for most member states even much more recently. It would be unrealistic to expect a perfect state of implementation; this would be possible only if states simply had mirrored their pre-existing minority policy in a set of international legal obligations. But fortunately they have not done this in the case of the Charter, despite the 'menu approach' of the instrument. In another perspective, the huge amount of deficiencies in implementation discovered by the Committee of Experts during its examination of state reports proves the impressing amount of 'normative ambition' built into the state's instruments of ratification. Member states want to improve their record in minority language maintenance, and implicitly have made a lot of ambitious pledges in order to improve their language policies towards minority languages.

These pledges are not that easy to fulfil – most of the deficiencies observed by the Committee of Experts are structural deficiencies which are difficult to overcome, even with a high dose of political good-will. The improvement of the standard of implementation thus will take considerable time. In the meantime, the Committee of Experts has to remind states again and again of the pledges they have made towards the Council of Europe member states – and implicitly also towards their own minority language communities. It is to be admitted that these normative pledges are not always crystal clear, that there exist ambiguities and space for discussion on the right interpretation.¹⁴⁴ But the Charter has set up an institutional arrangement where states are not completely free to interpret their obligations according to their taste – they are forced into a discursive arrangement where they have to justify their normative positions and have to discuss with the Committee of Experts (and the other member states) on the adequate operationalisation of the Charter's undertakings.¹⁴⁵

States do not always like acts of admonition from the outside – some of the promises made with the Charter are rather painstaking in its implementation

¹⁴⁴ See DUNBAR (FN 89), 173 et seqq.

¹⁴⁵ See GRAMSTAD (FN 74), 33.

and states sometimes would like to forget about these pledges. But here we are at the essence of international law – states may make political promises and may a day later forget about these promises. However, if you transform such promises in an international legal obligation it is not that easy any more to get rid of the promise once made¹⁴⁶. It has become part of the legal framework in which state authority is embedded, and the people concerned will be glad to come back to such obligations as often as the reference might help them in getting their points through.

The experience of the first ten years of operation of the Charter's mechanism are all in all encouraging. The specific points of criticism that were raised in the examination reports have found a rather positive resonance. There was some critique by governments concerning specific points, but in general the critique of the committee was accepted as being balanced and up to the point. In a series of cases governments concerned have taken measures in order to cope with certain deficiencies in implementation raised in the reports and to improve the standard of implementation.¹⁴⁷ States by and large have accepted the criticism contained in the reports of the committee of experts and have undertaken serious efforts to cope with the structural impediments that hinder effective implementation in certain situations.

VI. Concluding Remarks

Instead of a conclusion, the paper will end with some personal remarks summing up some of my own experiences in more than ten years of belonging to the Committee of Experts. Monitoring the implementation of the ECRML often is a frustrating experience – you struggle with the ignorance of majorities, having no clue of what it means to be put in a minority situation as a community of speakers, with lacking political will to move things and to achieve some progress in the protection and promotion of minority languages, but often also with mere bureaucratic inertia – nothing seems to change in a number of cases although it is obvious from a neutral observer

¹⁴⁶ See also OETER (FN 18), 187/188.

¹⁴⁷ See CRNIĆ-GROTIĆ (FN 91), 38 et seqq.

perspective that a lot should happen and a lot of arrangements should be improved. Sometimes, however, the engagement in such a monitoring exercise is really rewarding – you feel the Charter makes a difference, moves things to the better. When you look behind the curtain, such improvements usually are the result of a new awareness that taking the Charter serious makes sense, that new measures have to be taken if the linguistic heritage shall not be lost forever. Effectiveness of the Charter thus depends upon the awareness of the public (and of politicians and bureaucrats) that regional and minority languages are an important part of our cultural heritage that needs to be preserved – a heritage that is seriously endangered, a heritage that accordingly needs decided action if it is to be preserved. Fortunately, there is a growing awareness of that kind, although growing with rather different pace – it is to be admitted – in different societies (and different segments of societies) in Europe. In the spirit of the words of the Secretary-General of the Council of Europe cited at the beginning of this contribution, there should be an understanding throughout Europe that the protection of regional and minority languages is an important segment of the overall protection of cultural diversity of. If this understanding is spreading wide enough, we could be optimistic for the prospects of the Charter – and for the objectives served by the Charter, namely the protection and promotion of minority languages, as well as for the effectiveness of its concrete undertakings trying to establish and secure a sensible policy of diversity management. But a lot still needs to be done, as the preceding remarks have tried to demonstrate.

The Council of Europe Framework Convention for the Protection of National Minorities – Minority Rights, Diversity and Participation

Alan Phillips

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I. Personal Introduction

It is a delight to be in Switzerland once again. I know personally how seriously you take minority issues and how supportive the Swiss government has been on the Framework Convention and in promoting minority rights not only in Switzerland but throughout Europe. I was impressed by the way in which the Swiss Foreign Minister in their public presentation transformed the problem emerging from the recent referendum on the minarets into an opportunity for reforms.

The Swiss Ambassador to the Council of Europe, Ambassador Widmer, convened a meeting of Presidents of Monitoring Bodies in Strasbourg on

19 March 2010. It was a valuable meeting ensuring that the Presidents were well informed of the new direction that the Council of Europe is taking under its new Secretary General. The Ambassador's opening remarks were particularly welcome as he stated that, in the Council of Europe, the Monitoring Bodies gave the greatest added value. It is not for me to disagree with this assessment.

Ambassador Widmer's emphasised the need for us to consider the relevance and impact of our work. Our work is not an academic exercise, we work at the cutting edge of human rights in Europe, although we benefit from academics on our Advisory Committee alongside practitioners and past policy makers. Consequently I shall focus on the relevance of minority protection and diversity and the impact on our work, noting that much more work needs to be done here.

II. Critique of the title

The title that has been given for this conference "From Minority Protection to Managing Diversity" is an interesting one, possibly a too interesting one, allowing this agenda from many directions.

The whole of this conference could focus on what is meant by minorities, therefore this presentation will take a pragmatic approach and concentrate on those protected by the Framework Convention for the Protection of National Minorities (hereinafter FCNM) in practice.

The "Protection of National minorities" is at the heart of the Framework Convention¹. Even this legally binding instrument, that many regard as weak², goes much further; it is designed to "create appropriate conditions to

¹ FCNM: wide ranging documentation on the FCNM can be found at <http://www.coe.int/t/dghl/monitoring/minorities/default_en.asp>.

² ALFREDSSON GUDMUNDUR, A frame with an incomplete painting: comparisons of the FCNM with international standards and monitoring procedures – *International Journal on Minority and Group Rights*, 7/2000, 4. In the article the author noted that this article is to a large extent based on a presentation to a Council of Europe minority rights seminar in Strasbourg in October 1998.

enable national minorities to express, preserve *and develop* their identity”. The Framework Convention is also designed to promote other aspects of minority rights to which this presentation will return to later.

The word “*From*” implies that there is a need to move on and that minority protection has already been achieved. This is strongly contested later in this presentation drawing on the work of the Advisory Committee.

Similarly the word “*To*” implies that this is an alternative, a new place to be. This is the direction of travel as if managing diversity is “the promised land flowing with milk and honey!”

Diversity has a wide variety of meanings, overt and covert that will be touched upon, while *Managing* can imply a top down, controlling authority that is result driven, where process is perceived as a “challenge”.

Furthermore the title does not have a question mark, consequently it could be inferred that has a decision been taken to go along this route.

Exploring the title “From minority protection to managing diversity”, with the application of a margin of appreciation and a flexible, inclusive approach, which members of the Advisory Committee know well, there are valuable opportunities for analysis. This presentation on *Minority Rights, Diversity and Participation* focuses on these elements of minority protection in the work of the Advisory Committee (A.C.) of the FCNM.

The relevance and impact of the A.C. work is achieved in a diversity of ways. It responds to the different circumstance in States that are as far apart geographically as Portugal and Russia or Norway and Cyprus, recognising that States can be equally far apart in the way they implement human rights and promote genuine democratic participation.

This is evident from the study of the Opinions, for example those on Austria³ and Azerbaijan⁴.

The detail of the A.C. work can be seen in a succession of State Reports, Advisory Committee Opinions, the State Comments on the Opinions and the

³ FCNM (FN 1).

⁴ Ibid.

Resolutions of the Committee of Ministers. Soon we will be publishing, Article by Article case law, and dossiers of information around each article, which should be a rich and easily accessible source of information. Already the Advisory Committee has Commentaries on Education and Effective Participation⁵, while the new Commentary on Language rights is already progressing well.

The processes of monitoring the implementation of the FCNM, with the visits to countries that have become custom and practice, are crucial. The A.C. consults governments on its visits, often visiting places where officials rarely go in the periphery of a country or into impoverished Roma Settlements. Officials sometimes ask if they can join the A.C. to learn about the situation of minorities, but since these are not training visits for officials, the A.C. refuses although subsequently it does have a dialogue with government officials on what it saw and heard.

Sometimes, more disturbingly, the A.C. has been followed during monitoring visits and attempts are made to tightly control whom it sees. On some occasions secret messages are passed to the A.C. and its contacts are victimised. In one state that is close to EU membership, a member of parliament warned off Roma NGOs from speaking to the A.C., while officials criticised UNHCR for allegedly introducing the Advisory Committee to groups of unregistered Roma. In another State, not Austria, an academic was convicted of terrorism and given a 10 year prison sentence – primarily for assisting the Council of Europe promote the Framework Convention. He later died in prison, despite representations by the Council of Europe's Secretary General.

III. Preamble to the FCNM and the Explanatory Report

The Framework Convention has sixteen articles under section 2 the main

The Preamble sets out the reasons for drawing up this framework Convention and explains certain basic concerns of its drafters.

⁵ The Commentaries are published in many languages at <http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/Thematic_Intro_en.asp>.

The penultimate paragraph in the Preamble sets out the main aim of the framework Convention: to ensure the effective protection of national minorities and of the rights of persons belonging to those minorities.

The FCNM was drawn up speedily in 1994 and most States ratified the Convention over a decade ago, nevertheless the need to protect national minorities and their rights remains highly relevant today. The realisation of minority rights is a highly complex process involving their economic, social and cultural rights as well as the civil and political rights of individuals alongside their enjoyment in community with others. These are require complex, long term processes that even the most supportive of states cannot readily achieve.

IV. Minorities

It is not appropriate here to to develop a long conversation on who or what is a minority and the nature of the protection that they require. The Council of Europe decided to adopt a pragmatic approach, knowing the challenges that CAPOTORTI⁶ had found in striving for agreement on the definition of a minority, recognising that it was impossible to arrive at a definition capable of mustering general support of all its member States.

There is a wide diversity of approaches ranging from the UK position that accepts that the Framework Convention covers all those protected under its race relations act, to Denmark that has declared that “the Framework Convention shall apply to the German minority in South Jutland”⁷.

Interestingly although the majority of States recognise Roma and Travellers as national minorities, a number of States, including Portugal and the Netherlands, do not.

⁶ CAPOTORTI F., Study of the rights of persons belonging to Ethnic, Religious and Linguistic minorities, 1977, UN Doc E/CN 4/sub.2/384 Add. 1-6, republished in the UN Centre for Human Rights, New York 1991, para 561.

⁷ FCNM (FN 1).

A number of states include the so called “new minorities”. This appellation is problematic; it includes those whose families may have been living in a country for two or three generations as well as those living in a country for two or three years. Some differentiation is needed here on what legal rights are appropriate for which communities, applying the margin of appreciation that the FCNM offers.

V. Protection also implies promotion

The protection of national minorities, under the legally binding Framework Convention, includes legislation and policies to promote:

- The individual right to self-identification; (article 3)
- The Development of culture; (article 5)
- Non Discrimination, (article 4) and positive measures
- Full and effective equality; (article 4)
- Tolerance and inter-cultural dialogue; (article 6)
- Freedom of association; (article 7)
- Right to religious belief and practice; (article 8)
- Access to themedia; (article 9)
- Use of minority languages; (article 10)
- Use of minority names; (article 11)
- Inter-cultural education; (article 12)
- Minority education establishments; (article 13)
- Learning of and in minority languages; (article 14)
- Effective participation in economic, social and cultural life; (article 15)
- Effective participation in public affairs; (article 15)
- Prohibition against altering proportions of population; (article 16)
- Cross-frontier contacts; (article 17)

Bilateral treaties (article 18).

The Advisory Committee in its 76 Opinions⁸ in both the first and second cycle of monitoring have shown that members of many national minorities need protection. The second cycle Opinions that demonstrate that even longstanding democracies in the heart of Europe, including Switzerland and all its neighbours, have some outstanding issues. It is a challenge anyone to cite a State in which all minorities are effectively protected and their rights are promoted.

It is crucial to ensure that the A.C. is not complacent. Most of Europe has not been free of frontier changes in the last century, unlike the United Kingdom or Switzerland. One of the members of the Advisory Committee spoke of his elderly mother that had lived her life in the same city, Zagreb, but had also lived her life in 6 different countries.

It is less less than two decades away from the wars that took place in the Southern Caucasus and Yugoslavia, while there have been recent violent conflicts in Kosovo, Macedonia, Georgia and even Moldova. It can take generations for the bitterness of inter-ethnic conflicts to dissipate.

Less dramatically but poignantly, many States hold strong views about their kin community, often in neighbouring states (e.g. Hungary or Russia). It is no coincidence that at the Committee of Ministers, when States respond to the President of the Advisory Committee's introduction of Advisory Committee Opinions, many States are deeply concerned about the direct criticisms they will face from other states with "kin communities" in their states.

In 2008, at the 10th Anniversary Conference on the Impact of the FCNM⁹ some of the challenges were discussed by the author describing where there was a need to make an impact. This included:

- The humiliation of elderly minorities, seen as aliens in their homeland.
- Communities denied their culture, their language and their dignity.

⁸ FCNM (FN 1).

⁹ <http://www.coe.int/t/dghl/monitoring/minorities/6_Resources/PDF_10th_Anniv_Speech_APhillips_en.pdf>

- Children born without citizenship and denied basic human rights.
- Institutional discrimination in education and in employment.
- The victims of wars and conflicts in all communities.
- The situation of Roma in Central and Southern Europe a community that is always addressed in A.C. Opinions.

The Council of Europe Commissioner for Human Rights has spoken out sharply on the rise of race hatred and killings of Roma in several countries, including Hungary and Italy. The European Court of Human Rights and its Grand Chamber, as well as and the Advisory Committee, addressed issues of geographic separation of communities and segregation in schooling for Roma children in a range of states including the Czech Republic¹⁰, Slovakia and Croatia. Even more concerning is the deep Poverty and illiteracy among some Roma, especially among Roma women, which may require many decades of redial action¹¹.

There is much work that remains to be done to protect minorities.

VI. Diversity

Issues of diversity, as well as minority rights are always considered carefully by the Advisory Committee.

Article 5 of the Framework Convention contains an obligation to promote the necessary conditions for the maintenance and development of cultures of national minorities. It lists four essential elements of the identity of a national minority; their religion, language, traditions and cultural heritage. It also protects persons belonging to national minorities from assimilation against their will.

¹⁰ European Court of Human Rights: CASE OF D.H. AND OTHERS v. THE CZECH REPUBLIC <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83256>>.

¹¹ UNDP has published a set of Roma Inclusion working papers on Education, Health, civil society, the labour market, Housing inter alia at <<http://europeandcis.undp.org/data/show/D69F01FE-F203-1EE9-B45121B12A557E1B>>.

A delicate balance has to be drawn as State Parties may take measures to pursue their general integration policy, recognising the importance of social cohesion. Nevertheless the Preamble of the Framework Convention is explicit here stating that cultural diversity should be a source and a factor, not of division, but of enrichment to each society.

The same philosophy continues in Article 6 whose aim is to strengthen social cohesion and to promote tolerance and intercultural dialogue. It is explicit that barriers should be eliminated between persons belonging to ethnic, cultural, linguistic and religious groups. There should be the encouragement of intercultural organisations and movements which seek to promote mutual respect and understanding, and to integrate these persons into society whilst preserving their identity.

The author recalls being at a conference in Carinthia in the 1991 where one academic spoke of the need to create areas of linguistic and cultural purity. This is not what the Framework Convention supports, nor does it permit the building of walls around Roma Ghettos, nor does it support the de facto housing separation in Northern Ireland, or the separation of mono linguistic communities by language that is all too apparent in parts of the former “Soviet Union”, where the State language used to communicate with minorities in Russian. Today many members of minority communities still do not communicate effectively in the main state language. This ranges from Moldova to Latvia, from Georgia to Estonia. In some places, like Macedonia or Kosovo, there is no attempt by the majority to speak the substantial minority language or to enjoy and celebrate its culture.

VII. Effective Participation

Certainly these issues of mono-lingualism and mono-culturalism need to be addressed. However the suggestion of “managing diversity” may imply a top down approach, of control with the hidden agenda of assimilation, sometimes taking advantage of the current economic crisis to reduce disproportionately the funding of the cultural organisations of minorities. This has been reinforced by the confidence in some states given by their new European Union membership. There is an absence of any external incentive to ensure that effective institutions, legislation and policies were in place to pro-

tect national minorities as demanded by the Copenhagen Accession criteria¹² and the Framework Convention.

The conversation needs to be on celebrating diversity and the realisation of rights rather than managing diversity; managing diversity may become a bureaucratic control mechanism that is self-defeating.

Article 15 is a central provision of the Framework Convention¹³. The degree of participation of national minorities in all spheres of life can be considered as one of the indicators of the level of pluralism and democracy of a society. Creating the conditions for the effective participation of national minorities should, therefore, be considered by the State Parties as forming an integral part of the implementation of the principles of good governance in a pluralistic society.

The effective participation of national minorities is also crucial for enhancing social cohesion, as keeping national minorities on the periphery of society can lead to social exclusion and tensions among groups. Furthermore marginalising persons belonging to national minorities in socio-economic life also has implications for the country as a whole, risking the loss of their contribution to wider society.

Additionally it is clear that when designing and implementing cultural policies that affect national minorities, it is essential that the authorities adequately consult those national minorities and engage them in the decision-making process to meet their needs effectively. This applies equally in the allocation of public support for minority cultures.

VIII. Conclusions

In the spirit of the Preamble of the FCNM, Protection needs to be considered alongside promoting rights, celebrating diversity and enjoying common cause on many issues.

¹² <http://europa.eu/legislation_summaries/glossary/accession_criteria_copenhagen_en.htm>.

¹³ Commentaries (FN 5).

The psychology of minorities needs to be understood, the resentment of being marginalised and excluded removed, and encouragement given to becoming full, equal citizens. The discourse should focus on minority rights and all its reciprocal implications for minorities respecting the rights of others and celebrating their cultures.

The conversation needs to concentrate on effective processes, not efficient management ensuring that members of minorities effectively participate in decision making and can feel an ownership of their community but also of the wider community. In this way the human rights of minorities can be protected through integration policies that do not separate or assimilate communities. It should be in the spirit of the preamble of the Framework Convention promoting Minority Rights, cooperation between communities, and cultural diversity as a source of enrichment of each society.

Russia's Experience in Governing the Ethnocultural Diversity and Protecting the Rights of National Minorities

Alexander Zhuravsky

I would like to express appreciation to the sponsors of the conference for its excellent organization, for bringing up an issue particularly topical for all European countries and for making a very good choice of the conference's venue. We gathered together in an ancient city where the memories of the Roman history, of the Fraumünster Abbey and of Huldrych Zwingli, the leader of the Reformation in Switzerland, are still alive. The Universities of Zurich have fostered many Nobel Prize winners including Albert Einstein. Finally, it's a city where there, along with the churches, the first mosque in Switzerland is located.

“From Protection of Ethnic Minorities' Rights to Governing the Diversity”... The theme of the conference evidences to the readiness of its organizers to consider issues within a far wider context than the existing set of Europe's instruments with regard to the ethnic minorities.

During the last decades Europe has witnessed the ever-growing complexities with the integration and adaptation of the newly arriving ethnic and religious groups. France, Italy, Germany, Switzerland, Great Britain, Denmark and many other European countries try to resolve the problems they face applying the existing all-European legal mechanisms, national legislations and other instruments.

However, the present-day challenges in the field of migration and protection of rights of ethnic minorities while safeguarding the religious rights of migrants and the naturalized representatives of ethnic minorities lead to hard-to-answer questions. And an important question arises: how can the interests of the ethnic and religious majority be combined with the interests of ethnic

and religious minorities? What are the reasons for conflicts and problems while integrating the ethnic minorities? Are there any models of success to be applied in other European countries? What is the role of the society and possibility of integration within the modern world of religious organizations? What is the reason for the double loyalty of many of migrants admitted to citizenship and representatives of ethnic minorities? Is it possible at all to reconcile the religious values and the civic identity?

Finally, a question arises: isn't it about time to make a step forward to the elaboration of legal instruments that exist, for example, within the framework of the Council of Europe? For a lack consensus on terminology, since we haven't so far determined the notions of "a national minority", "a language of a minority minority", etc., results in a situation when a party to a discussion on all of these issues would adhere to understanding them in their own way.

At the same time, a number of countries which ratified the Conventions on Protection of Rights of the Ethnic Minorities and Languages of the Ethnic Minorities face the situation when these conceptual mechanisms do not take account of certain realities of the present-day world in the course of implementation and sometimes are excessively declarative and often may not be adapted to the specifics of multinational and federative states.

When we fail to resolve these problems and hesitate even to state a problem, it turns out that we do not govern the diversity but only flaccidly observe the aggravation of situation with interethnic relations and migration. Being comfortable and assured of the perfection of the existing all-European mechanisms is insufficient for finding an efficient response to the ever-growing challenges.

Let me give you an example of Russia. Very often the historically determined and traditional interpretation of the term "national minority" is based upon the recognition of the fact that the national minority representatives are limited in number and legal status. The situation in Russia is more complex and is explained by a centuries-long process of a polyethnic state formation. Let me note that both the Russian Empire and the Soviet Union were polyethnic. The present-day Russian Federation also recognizes itself as polyethnic, although formally Russia could be called a monoethnic state, since according to the National General Census of 2002, Russians made up about

79,8% of the total population. Yet Russia consciously makes its choice in favor of a multiethnic society evolution, since our historic experience allows a coexistence of those ethnic and religious traditions that under different historic and social conditions would be in conflict.

At the same time, many nationalities in Russia (e.g. the Tatars, the Mordovi-ans, the Bashkirs, etc.) which have contributed to the formation of the Rus-sian statesmanship, do not recognize themselves as a national minority since their culture and traditions were honored in the course of the whole historical development of the country, thus they are indigenous peoples. The indige-nous small peoples of the North, Siberia and the Far East adhere to the same standpoint of not being recognized as a national minority.

By virtue of being initially a multinational state, Russia has gained an enor-mous experience of interethnic cooperation. Representatives of national mi-norities were involved in the process of building of a state. There was not any oppression of any ethnic group. Rather, in the Russian Empire there was a system of certain preferences for minorities, such as self-administration, independent tax collection, local courts, military service exemption, etc. The dominating Russian population of the empire was abridged of such prefer-ences. The colonization in the European sense of the word never existed in the Russian Empire. There was assimilation and in most of the cases the peoples voluntarily joined Russia (e.g. the Mordovians, the Kazakhs, the Georgians, the Tuvini-ans and others). There were significant preferences to the ethnic communities in the USSR such as quotas within the system of education, assignment of quotas within the system of state administration etc.

Thus, with regard to the very many peoples in Russia, the population size is not a qualifying feature of the "condition of a national minority". And al-though Russia hasn't specified such a condition while ratifying the Frame-work Convention for the Protection of National Minorities, the problem of a different approach to the interpretation of the notion "national minority" still remains. Linking the provisions of the Convention with the real situation in a country is a complex issue which exists in the majority of countries, having ratified the Convention.

I would like to illustrate the necessity of a further serious work on revising the existing all-European instruments by an example of a hidden contradicto-

ry character of various instruments aimed to protect the national minorities. The majority of experts on ratifying and implementing the Convention for the Protection of National Minorities claim that the Convention determines national minorities not as the indigenous peoples but as the naturalized migrants. The experts on ratifying the European Charter for Regional or Minority Languages claim that the Charter does not apply to the languages of migrants including those naturalized, and suggest distinguishing between languages and ethnicity, thus expanding the application of the Charter first and foremost to the languages of the indigenous peoples of a particular country. Therefore, one document of the Council of Europe indirectly determines the national minorities as the naturalized migrants while the other one determines them as the indigenous peoples.

Starting from 2009, our Ministry together with the Council of Europe and the European Commission assisted by the authoritative international and national experts has been implementing a joint three-year project aimed at protecting the rights of the national minorities including a feasibility for Russia to consider the ratification of the European Charter for Regional or Minority Languages.

Russia applies a very well-developed law on national languages; we call them “native languages”. And by virtue of the fact that Russia is a federative state and the primary authority on preserving and developing the national languages is vested in the regional governments, the regional laws operate excellently along with the federal laws. This refers to several thousands of legislative and statutory acts at the regional level. Experts admit that the Russian legislation to a great degree conforms to the Charter’s provisions. Furthermore, Russia maintains a very high standard of protection of language rights of national minorities and the so-called regional languages, i.e. the official languages of the republics within the Russian Federation.

Despite the fact that 239 languages and dialects in Russia exist in the old-written form, the new-written and some even in the non-literate form (for small ethnic groups totaling to a few hundreds of people), the permanent work on the further development of languages carries on. Certain non-literate form languages acquire the status of the new-written form languages. At the same time, the state system of education in the Russian Federation implies the functioning of 78 languages of the Russian peoples both as a

language of the education system and as a separate subject. No European country has such language diversity and such level of protection with regard to such number of languages. Actually, the Charter itself does not imply the protection of a great number of languages and does not take account of the real multilingualism.

In Russia, the ratification of the Charter is complicated by the political uncertainty and conflict of laws related to the differential approach to the protection of languages in Russia. Although, this exactly approach seems to be logical and rational. However, within the framework of the joint program we faced, on numerous occasions, the protest by the national communities and organizations against the differential approach to the protection of various languages. This approach may cause accusations of regional authorities on behalf of the ethnic communities in granting the ill-founded preferences based on the principle of ethnic identity and result in the growth of inter-ethnic tensions in the regions. The Constitution of the Russian Federation guarantees the equality of rights of citizens irrespective of their ethnic, lingual, religious, and racial identity which also complicates the differential approach. However, the European experts agree that nothing in Russia can prevent the country from ratifying the Charter, and that Russia even prior to the emergence of the Charter had assured the high standards of protection of lingual rights and maintains those standards at the highest level possible currently; sometimes that level even exceeds the one stipulated in the Part III of the Charter.

Thus, there are so many questions in the present-day Europe, Russia included, answers to which should be found in a joint effort. And I'm confident that in this field Russia possesses such historical and relevant experience that will be helpful for many other European countries.

Russia is a country of real multiculturalism and a high-level protection of rights of ethnocultural communities including the national minorities. Traditionally, Russia views the ethnocultural diversity as a potential for development and a factor of the country's competitiveness. With this in mind and according to the Conception of the Russian Federation's State National Policy, the majority of the country's peoples are the indigenous peoples of Russia.

Speaking on June 28, 2008 at the Opening Ceremony of the V World Congress of Finno-Ugric Peoples in Khanty-Mansiysk with Presidents of Finland, Hungary and Estonia present, D.A. Medvedev, President of the Russian Federation, noted that “the historic development of the Russian nation itself was significantly based upon the riches and preservation of the ethnocultural and polyconfessional community. It was based upon the centuries-long experience of a peaceful cohabitation of over one hundred and sixty peoples on the territory of one country. Owing to this experience, the unity of the Russian nation withstood many an ordeal and remains currently an important factor for overcoming extremism, nationalism and religious intolerance.”

Indeed, as René van der Linden, the former Chairman of the Parliamentary Assembly of the Council of Europe (PACE), justly noted in September 2006 at the Volga Forum: “Russia is Europe’s richest ethnocultural mosaic.” It suffice to say that according to the statistics of the National General Census of 2002, there are 182 peoples and ethnic groups speaking 239 languages and dialects in Russia. The number of these peoples fluctuates within the limits of a few dozens or hundreds of people (e.g. the Oroks, 390 people) to several million people (the Ukrainians, 2,9 million).

Such diversity requires special attention of the state to the implementation of the ethnocultural policy. Therefore, protection of rights of national minorities and indigenous peoples is guaranteed by the Constitution of the Russian Federation Articles 69, 71, 72). The Russian Federation has been implementing the Framework Convention for the Protection of National Minorities (ratified on June 18, 1998). Effective are the laws “On Non-Governmental Organizations,” “On National and Cultural Autonomy,” “On Languages of the Peoples of the RF,” several special laws related to the indigenous small peoples of the North and many others.

The elaboration of policies and normative legal regulation with regard to national minorities is under the federal jurisdiction. Within the federal Government it is the Ministry for Regional Development which is responsible for this elaboration, whereas at the Ministry itself there is the Department for Interethnic Relations. At the same time, protection of rights of the national minorities is the joint authority of the federal center and the regions. Therefore, the significant part of authority, funds and normative legal regulation is concentrated in the constituent entities of the Russian Federation.

The indigenous small peoples of the North, Siberia and the Far East hold a specific place within the entire population of Russia (hereinafter – the small peoples), whose status is determined in the Constitution of the Russian Federation, in the Federal Law of 1999 “On the Guarantees of Rights to the Indigenous Small Peoples of the Russian Federation” and other federal statutory acts.

In the Russian Federation, the indigenous small peoples densely inhabit 28 constituent entities. There are 40 ethnic communities with the total number of 244 thousand people. The number of ethnoses within this group fluctuates from 41 000 people (the Nenets) to 240 people (the Enets). The vulnerability of the traditional pattern of life and a small number of each of these small peoples make the systematic government-level activities on preserving their culture and the traditional pattern of life especially important.

In February 2009, the Government of the Russian Federation approved the Conception of the Steadfast Development of the Indigenous Small Peoples of the North, Siberia and the Far East of the Russian Federation. This is an ambitious and a very detailed document, a unique strategy of the state through the year of 2025. The objective of this strategy is the creation in Russia of necessary conditions and incentives for a steadfast development of the small peoples of the North by strengthening their socio-economic potential, preserving the primordial living environment, the traditional pattern of life and the system of cultural values based upon both the relevant support by the state and mobilization of the local internal resources of the peoples themselves. The Conception specifies the financial and economic, cultural and educational instruments for achieving the goals and objectives of steadfast development. To meet these goals and objectives, the state allocates substantial funds. Only on behalf of the Ministry of Regional Development alone 680 million Rubles was allocated for the support of the indigenous small peoples in 2009, specifically, for the construction of educational and cultural facilities, development of the engineering infrastructure in locations where the indigenous small communities traditionally live, for holding the ethnocultural activities and conducting the sociological research, etc.

Recently, James Anaya, the UN Special Rapporteur on Rights of Indigenous People visited Russia with a monitoring mission. Along with the meetings in Moscow, he visited another three Russian regions, – the Khanty-Mansi

Autonomous Area, the Krasnoyarsk and Khabarovsk Territories. The UN Special Rapporteur expressed his very high opinion of the Russian initiative on the elaboration of the Conception of Steadfast Development as well as of the level of assurance of rights of indigenous small peoples in Russia. At that time, New-York hosted the UN Permanent Forum on Indigenous Issues, where J. Anaya delivered a report on the results of his monitoring visit to Russia.

Last week, as a member of the delegation of the Ministry I participated in the meeting with the management team of the World Intellectual Property Organization (WIPO) in Geneva. We agreed with the WIPO to hold a joint symposium this October with the participation of representatives of about 30 countries including representatives of the NGO of the indigenous peoples. In the course of this symposium we shall discuss and try to considerably move forward in harmonizing the text of a new document aimed to protect the folklore and other intellectual property of the indigenous peoples of the world.

The European countries have to deal with the integration problem. It's a shared problem and a challenge to the democratic states. I'd like to share Russia's approaches to dealing with this issue. And I shall not specify the peculiarities of the migration policy of the Russian Federation which is one of the world's most liberal. It suffice to say that in 2009 about 13 million of labor migrants entered Russia.

Russia traditionally declares and consistently implements an approach that is defined as integration without assimilation. The integrated ethnocultural communities must not lose their ethnocultural identity, language, culture, religion, traditions. However, in case of obtaining citizenship, they should acquire the civic identity and perceive Russia as a country of their own. They, as well as the people traditionally inhabiting Russia, form the Russian civic nation. Since it is the civic identity that equally guarantees the unity of the state where people of differing ethnic and religious traditions live, and tolerance of the Russian society, and the civic engagement. The fresh citizens should be fluent in the Russian language. To support the efficiency of integration, I would like to give but one figure: about 98% of the population of Russia speaks the official Russian language.

The fresh citizens should respect and be aware of the traditions of a receiving community. At the same time, schoolchildren should be introduced to other peoples and confessions. Subject to a careful development must be horizontal individual contacts and that is the essential condition for a conflict-free coexistence of differing traditions and cultures within the Russian society. Those horizontal contacts of a like nature aim to form the neighborhood culture, the culture of a community life. For example, a Moslem neighbor would congratulate an orthodox neighbor with the Easter and an orthodox neighbor would offer congratulations to a Moslem neighbor upon Eid al-Adha (Uraza Bayram). This was the situation in the times of the USSR, and in most situations it happens so today. Furthermore, this sort of contact development is supported at the higher governmental level. The President of Russia always congratulates representatives of the traditional confessions in Russia (Orthodox Christians, Moslems, Buddhists, Jews) with their major feasts.

Incidentally, Russia enjoys a well-developed system of public representation of interests of religious and ethnic communities. There are about sixteen thousand of officially registered religious organizations alone in our country. Not to mention unregistered religious groups that act on a notification basis. There are thousands of such groups out there. In this regard the Russia's legislation is one of the most liberal in Europe.

There are the Advisory Councils under the President of Russia, under the Plenipotentiaries of the President in the Federal Districts, under the majority of Heads of the Regions that include representatives of various religious organizations. There is the Commission on Cooperation with Religious Associations under the Government of the Russian Federation which deals with the issues of relationships between the state and the confessions. In other words, the religious communities participate in elaboration of proposals covering a wide range of issues related to the interaction of the state with the religious organizations and the civil society.

Currently, there is a pilot project under implementation in the country's 19 regions. The gist of the project is teaching the schoolchildren the basics of religion. The teaching is carried out based upon the choice of schoolchildren and their parents who select one of the six subjects, namely, the basics of the Orthodox, Moslem, Jewish or Buddhist culture, the basics of the secular

ethics, history of the world's principal religions. Since 2011, all schools in all Russia's regions will teach the basics of religion. Notably, the religious organizations were involved in elaborating the textbooks on the above subjects at the earliest stage.

The religious organizations in Russia are very dynamic. And an important point here is that the Russian religious organizations are not just involved in the intercultural or in the inter-faith dialogue. Their cooperation is real. They are involved in joint projects and have common interests. They share apprehension for social stability in the country and solidarity in the issues related to human rights guarantees.

It is indicative that during the international scandal as a result of publishing the cartoons depicting the Islamic prophet Muhammad in a Danish newspaper 'Jyllands-Posten', the traditional religious organizations in Russia voiced their support to the Russian Moslems in their protests against the insult of their religious sentiments in mass media. This consolidation of Christians, Moslems, Jews, Buddhists in Europe is extremely important given the growth of Islamophobia. Certainly, various religious organizations pursue different interests and have different views but they have an experience to act jointly and participate in shared social projects. I'm confident that this experience would be of interest and helpful for other European states.

Incidentally, when one Russian printed source published the above cartoons, the state issued a warning which meant that in case of repeated publications, offending the national or religious sentiments of believers, this source could be banned. In other words, both the civil society and the state reached a consensus that xenophobia and insult of the believers' sentiments are unacceptable and would be subject to public reprimand and administrative or criminal penalty.

In most of the Russia's mass-media such negative phenomena as terrorism and criminality are not consciously associated with ethnicity or confession of terrorists or criminals. The leaders of the state, the professional associations of journalists and many politicians appeal for such civil approach during their public appearances. In recent years, the politicians as well as the majority of the Russian mass-media refrain from using certain religious terms (e.g. shakhid) being applied to terrorists. Such standpoint is being approved by

the Moslem ummah of Russia which opposes terrorism with ever increasing frequency.

The traditional religious organizations of Russia offer the social partnership and joint activities as an alternative to extremism and religious strife. Thus, many public and religious initiatives originate from the Inter-Faith Council of Russia and the Inter-Faith Council of the CIS (The Commonwealth of Independent States), comprising the leaders of the four major religious traditions of Russia and the former Soviet Union, – Orthodoxy, Islam, Judaism and Buddhism. Such inter-faith format allows the religious organizations not only to effectively protect the interests of believers but also to speak with authority of the opportunities for fraternal cooperation of Christians, Jews, Moslems and Buddhists for a good cause of conflict-free and steady development of the contemporary society. Thus, a specific situation in Russia is not only in having a well-developed system of coordinating the interests of religious organizations, the society and the state but also in having a functioning system of harmonizing the interests of differing religious traditions. Russia enjoys not only an inter-faith dialogue but also an inter-faith cooperation and partnership.

The top priority of the state is to ensure representation and coordination of ethnocultural interests of peoples living in Russia. This task is being fulfilled via the institutions specified by the Russian law, namely, the different level public organizations.

The public activity in the field of interethnic relations in Russia is pretty high. The public associations, representing the interests of the people living in the Russian Federation, make up a wide spectrum of the civil society institutions. In Russia, there are about 1200 ethnocultural organizations including the federal ones and the regional and local national and cultural autonomies being the forms of exterritorial cultural self-government of peoples. These organizations are active in protecting the rights and interests as well as in preserving the culture and languages of the national minorities.

In order to guarantee a consistent and efficient interaction of the bodies of state power with the ethnic organizations, the Advisory Council on the National and Cultural Autonomies and the Interdepartmental Commission on Interaction with the National Public Associations with the participation of 14 Federal Ministries was established under the Ministry of Regional Devel-

opment of Russia. Recently, the Forum of the National and Cultural Autonomies with the financial support of our Ministry was held in Kazan on November 29 – December 1, 2009.

The Public Advisory Councils were also established and are functioning actively in all of the seven Federal Districts under the Plenipotentiaries of the President of the Russian Federation. These bodies are normally of a comprehensive nature and include representatives of various public organizations, the national public associations included.

Given an active support of the President and the Government of the Russian Federation, the advisory and expert bodies, comprising the representatives of the non-governmental organizations, function in 67 constituent entities of the Russian Federation. The advisory bodies in the constituent entities of the Russian Federation carry out examinations and elaborate the drafts of the statutory acts, put forward proposals on addressing the issues of importance related to the development of national minorities, participate in elaborating the programs on preventing the extremism among the younger generation.

In the beginning of 2006, the Civic Chamber of the Russian Federation was established, thus having created a powerful platform and a rostrum for the public organizations to ensure a dialogue and interaction of the civil society institutions with the bodies of the state power. The members of the Civic Chamber are entitled to submit requests to the bodies of the state power and also to demand the submission of elaborated draft laws and programs. From the moment of its establishment, the Civic Chamber greatly attends to the issues of interethnic relations, protection of rights of national minorities, counteraction to extremism. Within the organizational structure of the Civic Chamber, a Special Commission on Interethnic Relations and Freedom of Conscience was established. Besides, the Commission on Culture and Commission on Preservation of the Cultural and Spiritual Heritage are partially involved in dealing with the issues of the ethnocultural development. The Civic Chamber is composed of the leaders of the religious and the national and cultural organizations.

On an annual basis, the Civic Chamber of the RF holds the grant tenders among the nonprofit organizations. The total amount of funds allocated by the President of Russia for grants to the nonprofit organizations made up

0,5 billion Rubles in 2006, 1,2 billion Rubles in 2007, 1,5 billion Rubles in 2008 and 1,2 billion Rubles in 2009.

As far as the protection of rights of the national minorities is concerned, the issue of the state support to their public associations remains one of the most important ones.

According to the Federal Law "On the National and Cultural Autonomy", the federal bodies of power may extend financial support to the federal national and cultural autonomies (NCA) from the funds of the federal budget while the regional bodies of power may extend relevant support to the regional and local NCAs from the funds of the regional budget. At the same time, the bodies of self-government are entitled to extend financial support to the local NCAs from the local funds.

The support is extended from the funds allocated for the implementation of the state national policy, support to the economic and social development of the indigenous small peoples in the North, Siberia and the Far East of the Russian Federation. The support is also extended within the framework of the federal special-purpose programs. The Ministry of Regional Development of Russia alone allocated about 1,1 billion Rubles in 2009 to complete the above tasks.

The vast experience of Russia in building the intercultural dialogue and cooperation determined Russia's initiative to hold the Volga Forum in 2006 with the major theme being "Dialogue of Cultures and Inter-Faith Cooperation" within the framework of Russia's chairmanship in the Committee of Ministers of the Council of Europe. The Forum was held in Nizhniy Novgorod and was organized by the Ministry for Regional Development of Russia jointly with the Council of Europe and the Inter-Faith Council of Russia. The Forum adopted the Volga Forum Declaration, the first all-European document originated by Russia.

The process had its continuation when the Ministry for Regional Development jointly with the Council of Europe and various religious organizations of Russia, Europe and the Islamic world held the International Youth Forum "Intercultural Dialogue and Its Religious Dimension" (30 November – 4 December, 2009, Kazan), which adopted the Kazan Action Plan on Intercultural Dialogue.

These two Forums revealed the importance of Russia's experience for other European countries and raised a question of the role of religious organizations in solving all-European problems and forming the all-European identity. They revealed the necessity to analyze the existing all-European approaches, within the Council of Europe first and foremost, as well as legal mechanics taking account of the real diversity of situations and new challenges.

Currently, the Russian party holds consultations with a number of interested countries as well as with the a number of Directorates of the Council of Europe on the feasibility to establish the all-European platform, the permanent Forum on the intercultural dialogue and cooperation in Europe where the existing problems and new approaches to the governing of diversity could be discussed and the best practices shared. I'm assuming that the vast experience of Russia, certain aspects of which were set forward in this report, as well as a unique experience of Switzerland, would be very useful in view of initiating the discussion on the subject and making the new decisions.

Records for speech at International conference in Zurich

Vladimir Zorin

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Aside from vast spaces, rich history and culture Russia also differs with ethnic and religious diversity of its population. Representatives of more than 150 nationalities and all world religions constitute multiethnic Russian nation. Multethnicity of Russia has always been its treasure. Its rational and careful implementation is a great potential for unity and prosperity of the country. Traditions and customs, languages and folklore are being preserved in the Russian Federation due to historical experience of co-existence and peaceful co-operation of the peoples of different nationalities and religious beliefs as well as the result of the state policy for protection and support of the unique Russian mosaic of cultures. At all stages of our state's history there have been two processes related one to each other: ethnocultural development and integration into united Russian nation of all the inhabitants of the country on the basis of civic consciousness, Russian patriotism and common historical, cultural and spiritual values.

Our large country encountered many difficulties and ordeals. Some of non-Russian nations of the Russian Empire had backward state. Along with the process of voluntary reunion with Russia there were wars of conquest. In the USSR Stalin's regime resettled by force a number of nations and practices

discrimination against some nationalities. However at large in Soviet time massive modernisation of ethnic periphery of our state has been performed, self-determination in the form of ethnic-territorial units of different level has been provided; minority's and majority's languages and cultures have been protected. In the course of the USSR disintegration and establishing of our new national identity there were radical nationalistic movements including separatism in Chechnya which resulted to heavy human and economic losses.

However in XX in Russia not a singly minority was extinguished. Against countrywide assimilation in other regions of the world, including forced assimilation, practice of our country might be considered as an achievement with epochal meaning.

In the last few years Russian society increased its interest to historical roots and traditions of the different groups of population, there were important changes in territorial settlement, ethnic and civic identification of Russian peoples, there were deep return of religion to the moral life of the society. Today religion plays important social role. At the same time apart from traditional religions, other religious ideas and sects have been expanded. It is essential to know all these phenomena of our life and to forward them in useful and peaceful direction.

Great contribution into preservation of ethnocultural diversity is made by representatives of the nations, representatives of culture, education and information and state authorities and NGOs. National scientists of Humanity Studies, in the first place historians and ethnologists, staff of museums, ethnoparks and enthusiasts of regional movements do a lot as well. Fundamental Russian science has an old tradition in research of Russia's peoples history and the role of cults and other institutions as well as languages and material and immaterial culture in their life. As early as before revolution and in Soviet time Russian scientists studied routine life and culture in different regions of the country, including remote districts of Siberia and the North. It was they who developed first ethnographic maps and atlases of Russia's population, helped to collect museum's collections, published fundamental scientific descriptions. This outstanding tradition is kept today at the Russian Academy of Sciences. Its head institution in this field the Institute of Ethnology and Anthropology named after N.N. Miklukho-Muklay in

cooperation with the Ministry for Regional Development of the Russian Federation and publishers produced important publication “Nations of Russia. Atlas of cultures and religions”.

I. Ethnic dimension of Russia

According to all-Russian census of 2002 number of Russia’s population was 145,2 ml. Between censuses of 1989 and 2002 number of the country’s population decreased by 1,8 ml.

The 2002 census clearly showed the failure of talks about committing ethnocide, alleged in the 1990s, as well as radical changes in ethnic composition of the population of Russia¹. It is sufficient to look at the table which has data on 23 most numerous nationalities and they represent 96% of population of the country.

Table 1. Ethnic structure of population of the Russian Federation in 2002

	2002		1989		growth 2002 to 1989, in %
	thousands	% to total	thousands	% to total	
All population	145164,3	100,00	147021,9	100,00	98,74
Russians	115868,5	79,82	119865,9	81,54	96,67
Tatars	5558,0	3,83	5522,1	3,76	100,65
Ukrainians	2943,5	2,03	4362,9	2,97	67,47
Bashkirs	1673,8	1,15	1345,3	0,92	124,42
Chuvashs	1637,2	1,13	1773,6	1,21	92,31
Chechens	1361,0	0,94	899,0	0,61	151,39
Armenians	1130,2	0,78	532,4	0,36	212,28

¹ STEPANOV V.V., Ethnic portrait of Russia has not changed considerably //Population of Russia 2003-2004. Eleventh-twelfth yearly demographic report (ed. Vishnevskiy A.G.). – M. “Nauka” 2006.

Mordva	844,5	0,58	1072,9	0,73	78,71
Byelorussians	814,7	0,56	1206,2	0,82	67,54
Avars	757,1*	0,52	544,0**	0,37	139,17
Kazakhs	655,1	0,45	635,9	0,43	103,02
Udmurts	636,9	0,44	714,8	0,49	89,10
Azerbaijanis	621,5	0,43	335,9	0,23	185,03
Maries	604,8	0,42	643,7	0,44	93,96
Germans	597,1	0,41	842,3	0,57	70,89
Kabardians	520,1	0,36	386,1	0,26	134,71
Ossetians	514,9	0,35	402,3	0,27	127,99
Dargineans	510,2*	0,35	353,3**	0,24	144,41
Buryats	445,3	0,31	417,4	0,28	106,68
Yakuts	444,0	0,31	380,2	0,26	116,78
Kumyks	422,5	0,29	277,2	0,19	152,42
Ingushs	411,8	0,28	215,1	0,15	191,45
Lezgins	411,6	0,28	257,3	0,18	159,97
Others who did not mentioned	5780,0	3,98	4036,1	2,70	143,21

* For the category “avars” the figure is quoted excluding the quantity of andotsezs groups and archins, and for the category “dargins” excluding kaytags and kubachintss.

** In 1989 г. in avars ando-tsezs and archins are considered; in dargins – kaytags and kubachintss.

By decrease of population census of 2002 recorded much more ethnic groups rather than before. It is not connected to migration and other demographic processes; approach to calculation of the results has been changed. In 1989 in all USSR there were 128 “nationalities”. Today there are much more in Russia solely. The question is in methods². By summing results of the census

² On this, see: Sokoloskiy S.V. Instrumentalisation of theoretic knowledge in development of records of all-Russian census 2002 //Ethnology to society. Applies researches in ethnology (Ed. Cheshko S.V.). – M.: Orgservise 2006.

2002 182 titles have been grouped and more than sixty as if new ethnic categories appeared.

Table 2. New ethnic categories in the census 2002

	Tracking option in census	
	Tracked extra	Extra and in structure of other categories
Adzhars		v
Alutors*		
Andiyts		v
Arabs of Cetral Asia	v	
Archins		v
Astrakhan tatars		v
Akhvakhs		v
Bagulals		v
Bezhtintss		v
Bengals*		
Besermyans	v	
Botlikhtss		v
Vod	v	
Ginukhtss		v
Godoberintss		v
Mountain Mari		v
Greeks-urums		v
Gunzibtss		v
Didoytss		v
Jews of Central Asia	v	
Ezids	v	
Ingiloys		v
Indians Hidi speaking	v	
Kazaks		v
Kaytags		v
Kamchdals	v	
Karatins		v
Kereks	v	
Komi-imzhems		v
Kryashens		v
Kubachins		v
Kumandins	v	

Lazs		v
Latgals		v
Meadow-eastern Mari		v
Megrels		v
Mongols**	v	
Mordva-Moksha		v
Mordva-Erzya		v
Nagaybaks	v	
Ossetains-digors		v
Ossetians-irons		v
Pomors		v
Pashtuns**	v	
Portuguese*	v	
Rusins	v	
Rushans*	v	
Saams**	v	
Svans		v
Soyots	v	
Tazs	v	
Siberian Tatars		v
Telegits	v	
Teleuts	v	
Tindals		v
Tubalars		v
Tuvins-todzhins		v
Meskhethian Turks	v	
Ula (Oroks)**	v	
Finns-ingermanlands		v
Khvarshins		v
Khemshils	v	
Gypsy of Central Asia	v	
Chamalals		v
Chelkans	v	
Montenegrins*	v	
Chechens-akkins		v
Chulyms	v	
Shapsugs	v	
Shugnans*	v	
Swedes*	v	

Estonian-setu		v
Ugs		v

Despite of remarkable demographic changes happened in Russia after last Soviet census in 1989, all-Russian census 2002 has not revealed substantial ethnic metamorphosis all over the country.

According to the census, percentage of Russians in the country slightly reduced from 82% (1989) to 80%. Decrease is specifies also for Mari, Udmurts, Chuvashs, Mordva, Khakas, Komi and many others. Others, on the contrary, increased, e.g. Avars, Dargins, Kumyks, Yakuts, Buryats. However, it has not changed ethnic maps of Russia significantly.

Regarding regional variants, among all subjects of the Russian Federation in less than twenty (fifth part) significant ethnic changes happened in the interval between censuses. Chechnya is an absolute leader. In this Republic situation significantly changed: population used to be multiethnic, nowadays – virtually monoethnic. Chechnya is followed by Ingushetia where ethnocultural diversity as well decreased. Among rest of the regions which partly changed their ethnic image there are Tuva, Chukotskiy and Koryakskiy districts, Yakutia, Tyumen region, from Caucasus – North Ossetia, Karachay-Cherkessia, Kabardino-Balkaria. Dynamics of ethnic structure in Dagestan is not high, below average level in the country, though cultural mosaic strengthened in the high populated districts of the Republic. Insignificant changes happened in Moscow, lower fixed in St.Petersburg.

Enlarged picture of the country is as following: major changes of the ethnic structure happened in the Russian part of Caucasus, situation on the Far East and Eastern Siberia were changing with further less intensity. Insignificant changes touched Western Siberia and European North. Processes in Volga region and Ural are even less noticeable. Extremely small changes are in the North-West of the country, in capital Center and Central Black earth Region. Volgo-Vyatka region has almost no ethnic changes.

Census demonstrated groundlessness of the fears on catastrophic decrease of the number of Russians.³ According to the estimates published before the census number of Russians fell by 15-19 ml peoples, almost 15 percents, comparing to the last Soviet census. True decrease was by far less amount of 3,3%, and part in structure of the country's population decreased by 1,7%. The reason is demographic aging of the population, considerable part of which is city inhabitants. It is connected to low birth rate and high death rate. Second factor is migration outflow. At large migration played positive role compensating decrease of population number. At large there is numeric stagnation of the number of Russians with a tendency to decrease by reason of demographic aging. Additional source of recruitment is assimilation in favor of Russian language and ethnic identity, it is not new process, it were hundred and three hundreds years ago.

As for the largest ethnic categories, estimating *more than million of people*, census revealed following trends. There are some ethnic groups with remarkably increased amount. First of all it is Armenians, whose number doubled (212% to their amount in Russia in 1989). Previously they were as 532 thousands, nowadays – 1,1 ml peoples. Reasons of the increase are evident; it is intensive migration from the end of 1980-ies from Armenia (earthquake) and Azerbaijan (Karabakh conflict). Second reason is a positive demographic growth, particularly among migrants from rural areas.

On the second place on gain of population level are Chechens.

Data demonstrates 50 per cent decrease (there were 899 thousands, became 1,3 ml). Media told a lot about number of Chechens overestimated by census, there are also scientific articles devoted to this issue⁴. Demographic analyses shows that by rather high level of natural reproduction there were significant number increase. Death rate caused by military actions must have been lower than generally thought.

³ TISHKOV V.A./STEPANOV V.V., Ethnic structure of Russia's population (first results of census 2002) //Report of the network of ethnologic monitoring and early warning of conflicts. Privolzhskiy Federal district 2003, N 64.

⁴ MAKSUDOV S., Population of Cherya; if the census is right? //Population & Society. Information report of the Center for demography and ecology of a human being of the Institute of national economy forecasting of the Russian Academy of Sciences, No. 96, 2005.

Among major nations census showed numeric growth of Bashkirs which is explained by demographic and migration reasons as well as by political factors. Number of Tatars has not changed virtually. There were 5,52 ml, became 5,53 ml. Demographic aging is not the only reason of slowing growth. The problem is partly concerned with the assimilation processes and partly with inaccuracy in tracking ethnic identity.

With regard to the outrunning growth of Bashkirs against Tatars it is not the result of “demographic games” of Bashkiria’s politics. When comparing results of two censuses following results: in 1989 number of those who were called Tatars increase by 110,3% to the number of 1979 and number of called Bashkirs increased barely by 104,2%. Results seem to be strange without taking into consideration the phenomena of identity change. It is known that among Bashkirs there is more rural population and birth rate is more significant. Present census takes revenge: scanty growth by Tatars – mere 0,6%, and remarkable by Bashkirs – 24,4%. True situation is somewhere in between.

Insignificantly reduced number of Chuvashs: there were 1,77 ml, became 1,64 ml. Demographic aging is in evidence but basic factor is a change of ethnic identity. Second reason of the decreased number specifies Ukrainians as well. It is known that in the first years after the USSR collapse significant amount of Ukrainians specifically from the Far East region moved to Ukraine. However soon back migration tendency from Ukraine to Russia outlined particularly in late 1990-ies. Until present time Ukraine is a prime source of Russian migration increase. Before publication of the first results of the census Media estimated much increased number of Ukrainians⁵. Nevertheless census recorded strong and unforeseen decrease of number of Ukrainians from 4,3 ml to 2,9 ml, e.g. near one third. Presence of changed identity factor is evident by this fluctuation.

Among other large ethnic categories *numbering less million but not less than 500 thousands* decrease is specific for the Caucasus groups only. Azerbaijanis are most remarkable. Current census numbered 622 thousands against 336 thousands in 1989, i.e. increase by 85 per cents. Increase rate of Azer-

⁵ In the newspaper “Novye Izvestia” (05.09.2003) 700 thousand was written about more than 700-thousand increase of Ukrainians.

Armenians fell behind a little increase of Armenians in Russia. Factors of the fast growth are of migration character as well. Herewith census dispelled a myth on huge migration of Azerbaijanis to Russia.

Level of population command of state language of the Russian Federation is high and equals to 98%. It is much higher than in the majority of large countries of the world with polytechnic population structure and comparable with the developed country of Western and eastern Europe only.

High level of Russian language command indicates cultural homogeneity of Russian nation and important component of national unity and its consolidation at the level of language communication system. The same data confirms high level of rusification of non-Russian population of the country as a tool of social and cultural modernisation performed primary by free choice of citizens.

Among large nations the highest level of non-Russian speaking (from 10 to 17%) belong to a number of North Caucasus peoples (Avars, Dargins, Chechens, Ingushs) and Yakuts. Ossetians have the largest part of Russian speakers among North Caucasus peoples, it is nevertheless lower than by East Slavic nations (Ukrainians and Byelorussians), Finno-Ugric peoples and among peoples dispersive settled (Germans, Kazakhs, Greeks, Jews). In fact, latter three groups switched to Russian language entirely.

Most of people in the country speak Tatar (5.3 ml) and Bashkir (1.4 ml). Dissemination of Ukrainian language in Russia is logic; 1,8 ml peoples declared command of Ukrainian in the census. Next, the amount of native languages follow Chechen, Chuvash, Armenian and Avar, etc.

II. Use of languages

Protection and development of languages in Russia is a basis of our cultural diversity. More than 30% of all financed publications belong to newspapers and journals in languages of Russia's nations. 400 newspapers and journals are published in 59 national languages; television and radio broadcast in 56 and 69 languages.

Recently interest to the problem has risen and number of persons interested in studying national languages increased respectively. Today schools of Russia instruct in 38 national languages. It allows covering basic need of population in communication in native language irrespectively to the place of residence. Key value have financing amount of respective programmes as well as studying by authorities accurate information for more effective protection and development of national languages in all the subjects of the Federation.

It is essential to point out a tendency of increased number of national state schools with native language as a language of instruction or a subject in areas of dense residency of ethnic minorities. Thus, in the territory of Russia there are 47 Armenian schools, 85 Kazakh, 66 Azerbaijani, 19 Turkmenian, etc. In the Republic of Tatarstan there are 56 Chuvash, 18 Udmurt and 9 Mari preschool institutions. 140 Chuvash, Chuvash-Russian and Chuvash-Tatar schools where more than 8374 Chuvash children study native language.

In schools of the Republic of Bashkortostan Russian, Bashkir, Tatar, Chuvash, Mari and Udmurt are languages of instructions. 6 more languages are learnt as subjects: Ukrainian, Byelorussian, German, Hebrew, Greek, and Mordovian. Institutions of higher education train teacher for the mentioned schools.

In 664 secondary schools of the North, Siberia and the Far East 103729 children learn 23 languages of indigenous minorities of the North as subject; 3 languages are languages of instructions.

Surely there are problems as well, such as lack of material resources, low level of instruction of national languages and in some cases unwillingness of diaspora groups to organise studying of native languages.

I suppose that many representatives of such groups would only “theoretically” approve policy on extension of their language rights. From practical side, do they have real ambition to expand “home” use of native language? I remember in the beginning of 1990-ies Tatar intellectuals in Tobolsk stood for instruction in native language and for the organisation of “Tatar” kindergartens. After administration performed questionnairing of students and parents in the school with Tatar children it was revealed that few persons willed to study in native language. Besides implementation of language policy in some regions encounters with problems related to numerous dialects which

differ from each other essentially. Thus, there are around ten dialects in Khanty language. In the schools of Khanty-Mansi district native language is instructed in three languages, which rouses censure from students and parents who do not want to study a dialect of the other group of Khanty. It provokes “technical” as well as financial difficulties by publishing textbooks, teacher training, etc. It does not cancel necessity to protect language rights of minorities but mechanism of its implementation is not to be forgotten.

Data on ethnic map of Russia and language competency is to be updated in course of all-Russian census forthcoming in 2010

III. Interethnic situation in Siberia and in the North of the Russian federation (indigenous peoples)

Indigenous peoples are specific feature of the North of the Russian Federation. Indigenous peoples have been a part of this ecosystem for thousands of years. Consuming local resources they often become a final stage of polluting substances movement of local origin as well as transported on long distances. Culture and traditions of the indigenous peoples are unique. The majority keeps applying natural recourses in a traditional manner maintaining their cultural heritage and protecting their right for traditional way of living.

Almost all nations living in Russia at large live in Siberia and on the North of Russia. There are few indigenous peoples originating from this vast territory. There are Karels, Komi, Buryats, Yakuts, Tuvins, Tatars of West Siberia, Khakas, Altays numbering from 70 thousand to half of million peoples and so called “indigenous minority peoples of the North whose number varies from a few people to forty and more thousands (according to Russian legislation it “shall not” exceed upper ceiling adjusted at level of 50 thousands peoples).

Saams and part of Nents inhabit the North of the European part of Russia (saams in Kolskiy peninsula), the rest in Siberia. Mansi inhabit Ural and behind Ural; Nents, Khanty, Sulkups, Chulyms, Tatars of West Siberia are in Western Siberia and Ob river basin. In the North of Eastern Siberia are territories of Kets (Enisey), Nganasan, Ents, Dolgans and Nents (Taimyr), to the East and South are Ukagirs (Kolyma), Yakuts (Lena), Evens (coast of

Okhotskoe sea), Chuvans, Chukchi, Koryaks, Kereks, Eskimos (Chukotskiy peninsula) inhabit North-East, on Kamchatka peninsula there are Itelmens and Kamchadals, Aleuts on Comandor Islands. Nivkhs, Ulchi, Nanayts, Orochi, Oroki (Ulta), Negidals, Udegeys inhabit the Far East (Amur river, Primorskiy kray, Sakhalin). Nations numbering more peoples inhabit basically south part of Siberia: Tatars of West Siberia are on the south of the West Siberia, Altays and Khakas in South Siberia, on Altay and in Sayany mountains, to the east from them are Tuvins; Yakuts inhabit basin of Lena river and have advanced to the far North; Buryats live on the of the South Siberia (Zabaykalye).

Ten indigenous minority peoples referred to Arctic peoples inhabit continental part of Russian Arctic. They are Saams, Ents, Nents, Nganasans, Dalgans, Evens, Evenks, Eskimos (Yupik) and Yukagirs. Besides them, significant groups of Khanty and Selkups officially referred to as indigenous minority peoples of the North, Komi and Yakuts – reindeer-breeders and particular groups of Russians who in some cases arrived to high latitudes prior to predecessors of non-Russian population: Kanin Pomors, Enisey Seldyuks, Kolyanchans, Russko-Ustyintsy and others and having life style similar to the indigenous minority peoples of the North mentioned above inhabit the same Arctic zone. The largest groups of indigenous peoples of Arctic inhabit territory of six subjects of the Russian Federation: in Murmansk region (Saams – 1769 peoples as per census of 2002 and 2177 of Komi), in Arkhangelsk region (Nents – 8326 and Komi – 5745; including 7754 Nents and 4510 Komi in Nenetskiy autonomous district), in Yamalo-Nenetskiy (Nents – 26435, Komi – 6177; Khanty – 8760 and Selkups – 1797), Taimyrskiy (Dolgan-Nenets) (Dalgans – 5517, Nents 3054, Nganasans – 766, Ents – 197) and Chukotskiy autonomous (Chukchi – 12622, Eskimos – 1534, Evens – 1407), and in the Republic of Sakha (Yakutia) (Dolgans – 1272, Evenks – 18232, Evens – 11657, Yukagirs -1097).

Peoples of the North and Siberia being completely bilingual or multilingual save to some extent their unique ethnic languages referred to Uralo-Ukagir (Finno-Ugrs and Samodiys), Altay (Turks and Tunguso-Manchzhurs), Chukotsko-Koruaks, Esko-Aleuts linguistic families; a part of indigenous languages are considered to be isolated languages which do not have direct compliance to some languages known in the world (Kets and Nivkh languages). Indigenous peoples of the North have a high level of language as-

similation. Russian language is considered to be “native” even by rural population of 20 till 70% of some ethnic groups. Cultural assimilation is equal to language assimilation.

Along with language assimilation cultural assimilation and genetic mixture which change anthropologic appearance of indigenous minorities are enhanced by high level of outmarriages with Russians, Yakuts and representatives of other nations running up to a half and more of all married couples or by birth of children as a result of temporary relations of indigenous women with representatives of other nationalities.

According to the results of random monitoring of indigenous peoples’ of the North and Siberia of the RF regions interethnic relations considerably depend on economic welfare of the regions and legislative support and ability to implement the rights of related groups of population. Situation in Khanty-Mansi autonomous district and in the Republic of Sakza (Yakutia) is the most successful. Having very high level of tolerance at large, dissensions as well as latent mutual hostility at nationalistic level exist to some extent in all the subjects of the Russian Federation and are expressed in domestic conflicts as a rule.

IV. Number of nationalities in Russia. Few words on the background of the theme.

Few words on the background of the theme. Official lists of nationalities implied in censuses as a codifying and estimating instrument for various groups of population has never complied with the variety of original names. The point is that not only a part of original names considered to be “wrong” due to various reasons (it has not been considered as an ethnic name; considered to be offensive or disharmonious, etc.), but in the rule of uniqueness of ethnic identity and inability to identify officially multiple forms of ethnic identity (hierarchical, double, etc.) as well.

Approaches to official identification of “nationalities” and rules of the identification changed from one census to another and this is the factor, not extinction of nations as the result of integration and consolidation was the basic factor of progressive decrease of census categories. It is known that accord-

ing to the census of 1926 190 nations inhabited the territory of the country (excluding Western Ukraine and the Baltic states); materials have been developed for 178 nations; data on 12 nations has not been mentioned as a result of a small number of the referred nations⁶. Historians remember that it was the census of 1926 the most ideological independent and even having compromises it kept certain scientific logic and gave reasons for the choice of and validation of conclusions. Census of 1939 includes solely 62 nations (99 nations are registered in total)⁷ and even tacking in account that first post Stalin census was supposed to demonstrate more objective and ideology free data, nevertheless number of categories hardly exceeded one hundred (109 nations). Extinction of 69 nations within 33 years from 1926 till 1959 has been interpreted by intra- and interethnic consolidation, natural assimilation and correction of mistakes which resulted in definition of “subethnic groups” as “independent ethnos”. Manipulations with the lists of nations used for classification of population in censuses on numerous occasions were interpreted as achievement of socialistic development. *“Socialism enhances process of interethnic integration due to improvement of economic and cultural connections and absence of national and class antagonisms”*⁸

Comparing number of nations recorded in census of 1926, 1959 and 1979 Y.V. Bromley concludes that if the period from 1929 till 1959 had a tendency to decrease of population diversity, then today (end of 1970-ies) *“time of maximum activity of interethnic and intraethnic consolidation is over”*⁹. Apparently following this logic more than 160 basic definitions of nationalities (in first versions of the List of nationalities there were around 200) should confirm new increase of ethnic differentiation in the country. However here we should mention not so much the process of ethnic consolidation

⁶ Incl. *Zhmud* (35 persons classified as Lithuanians), *Ubikhs* (9 persons registered as Circassians); *Barabins* (39 persons in census 2002 barabins are considered as a subgroup of the *Tatars of Siberia*, the latter are represented as subgroup of Tatars) and *Kizils* (22 persons are referred to Khakas in following censuses) are referred to Tatars; *Khazara* (12 persons) and *Kryzs* (5 persons) are referred to Dzheks; *Vakhans* (6 persons) are referred to Tajiks.

⁷ In census of 1937 168 peoples and above 900 ethnonims registered

⁸ BROMLEY U.V., Modern problems of ethnography. M, 1981. C.

⁹ BROMLEY (FN 8), 330-331.

and division as change of classification and extent of liberality of political regime which guarantees the right for free ethnic identification of citizens or prohibits this right.

However, reason of reduction of the number of official ethnic categories is not entirely political involvement of the authors of the lists of nationalities or their submission to the Party policy. The “material” which encountered authors of dictionaries and nationalities to codify the results of census (language of ethnic self-identification of citizens recorded in census questionnaires according to respondents) required special procedures of regulation, sorting and grouping which reduced initial diversity. According to the *table 2.1* it is seen that number of ethnonims (ethnic self-definitions) included into dictionaries of nationalities has always exceeded the number of official definitions appeared in censuses. Yet this number has always been smaller than initial diversity of the answers on a nationality. In order to understand the reason of such reduction “of the number of nations inhabiting the country” it is required to know technology of censuses.

Table 3 Number of ethnic categories (“nationalities“) in Soviet and Russian censuses¹⁰

Year of census	Number of categories (nationalities)	
1926	190	(530 ethnonims)
1937	168	(769 ethnonims)
1939	62	(99 in unpublished data)
1959	109	
1970	122	
1979	123	
1989	128	
1994	176	
2002	192*	(879 ethnonims)

* excl. subgroups – 164 categories.

¹⁰ Подготовлено сотрудником ИЭА РАН С.В. Соколовским.

Popular opinion expressed by the leaders of national movements and journalists on census takers taking records according to the list developed by scientists does not have anything to do with real census procedures. All Soviet and Russian censuses both selective of 1994 and overall of 2002 recorded answers according to oral information provided by the respondents. Methodic and instructive materials of the majority of censuses prohibited application of documents (passports and other identity cards) to fill in the questionnaires and to put any follow-up questions (as in the latest census of 2002), which could be considered as pressuring. Lists of languages and nationalities have always been use only at the stage of codifying of filled in questionnaires required for mechanical calculation of the census results. These lists normally included all *expected* answers at the question “What is your nationality?” (considered as ethnic original names, ethnonims). Special systematic dictionary represented *system of classifications* of all variety of expected answers according to the shortest list of official names and it included an official numerical code given to each official name as well¹¹.

After census of 2002 famous Soviet slogan on 100 of nations has been changed by new cliché on 160 nations and ethnic groups inhabiting Russia. This cliché is used by political leaders and even in academic sphere. For the first time this phrase appeared in preliminary results published in a few months after All-Russian census. Just on year later when results processing was completed it was found out that the list included 182 names, not “160+”. However by that time the phrase from the official report has been disseminated in Media and even the laws and per se acquired political meaning.

Final list published after the census *is not* the list of national or ethnic groups who it would have been developed by and any idea it would have. Persons answered the question on nationality and thus, the list sums up nothing more than the answers. As for the interpretation of collected data it is a concern of scientists, politicians and other “users”.

¹¹ Census of 2002 is an exception: each version of original name not only the official ones was given an individual code. Nearly all original names excluding minor phonetic variations of the same names) are given in one of the tables with the results of this census “List of options of self-identity given at question “What is your nationality?” encountered in census questionnaires (<<http://www.perepis2002.ru>>). The tables contains 778 answers from 879 preliminary codified.

It should be said particularly on step-by-step version of nationalities recording. This is an innovation of the census 2002. In Soviet censuses step-by-step method of ethnic categories recording was hardly applied. It is a great achievement of the census 2002. On the other hand, future of this list is unclear. Whether its two-stage structure is further kept in all publications of the census materials or the so called second level disappears from further statistic reports depends on the attitude to the “second level” of policy makers, researchers and public figures. Following publishing of the census results leaders of some public organisations (e.g. Cossacks) addressed to the authorities and Federal Service of State Statistics complains that their nationality has not been recorded “adequately” and statistic authorities would break constitution norms.

However drawing up of consistent (fulfilling expectations of the science and society) final list of answers on the question on nationality turned out to be a very difficult task. In the course of the census an effort to demonstrate variety of Russia’s population as well as reality of cultural integration and assimilation processes has been made. Dagestan situation is typical.

According to linguistics, from the earliest time in Dagestan exist 26 various languages and 100 of dialects; two of them are very specific and might be defined as languages. Ethnography states on around thirty ethnic groups inhabiting this mountain republic. Some include many thousands of peoples (Avars, Lezgins, Dargins), others are minor and even live on one aul. From 1937 in USSR language and ethnic diversity considered to be unacceptable. Soviet censuses ignored diversity and provide imitated reduced list of nationalities. Yet at the dawn of socialism by enough fair census official list of “Dagestan nationalities” included less than a half of really existing ethnic names, the rest are recorded under other names according to established practice. Thus, different groups of population, speakers of 14 unique languages are defined as “Avars”, therefore, Avars who are largest nation in Dagestan are statistically represented as even more numerous.

New Russian census broke the “tradition”. Impersonal category “nations of Dagestan” does not exist any more and along with numerous Avars there are *Andiys, Akhvakhs, Bagulals, Bezhtshigs* and many others. Unfortunately, politicians and public persons are still arguing on what is hidden under these names – particular nations or Avars. On the one hand, there are arguments

proving that these groups have absolutely different own languages. Others claim these Dagestans sometime speak better Avar than their “home” languages and under in some occasions identify themselves as Avars. In either event let the debaters solve this problem. In this case census statistics seems to be wiser. “Controversial” groups of Dagestans are calculated twice: first time as Avars and the second time as more than ten particular ethnic names.

In order to avoid eventual ethnic tensions in access to the power Dagestan’s government requested Federal Service of State Statistics to represent these groups of Dagestans both as particular categories and to add them to the total number of Avars in the final results of the census. Working commission on preparation of the census results took a decision to satisfy this request. It resulted in reduction of names in the list of nationalities of the first level and increased the number of names of the second level. Though total number of ethnic categories and accuracy of statistic data did not reduced, society and some scientists referred it to be “a wanton regulation of nations’s number in order to please the politicians”... Due to similar reasons census 2002 does not have statistically “independent” categories of “Kryashens” and “Siberian Tatars”. They are indicated as subgroups of Tatars. It also provoked socio-political emotions.

In cases when republics did not put political pressure new ethnic categories emerged smoothly. E.g. *Besermyans* estimating 3,2 thousands persons. Udmurt authorities did not raise objections against their “statistical independence”. The same factor influenced *Kumandins*, *Telengits*, *Teleuts* and others, recorded apart from Altays. Census distinguished *Shapsugs* from Adygeys, *Rusins* from Ukrainians, *Soyots* from Tuvins.

V. Co-operation between authorities and NGOs

National NGOs which exist for a long time represent NGOs standing for protection of nations’ identity based on self governance and free development of culture, languages and traditions. They definitely have a structural role in the development of interethnic relations.

Particular NGOs in the Russian Federation have a status of all-Russian organisation and it demands extension of their functions and objectives. They

progressively take coordinating role and become methodic centers in social movement on regulating of interethnic relations, co-operation with executive and legislative authorities, take much effort in order to achieve cohesion in relation between nations and to eliminate contradictions in these relations, to prevent them in germ.

According to law authorities, over 900 national NGOs are registered, including such all-Russian organisations as Assembly of the Peoples of Russia, Azerbaijani “Dostlug” (Tula), NGO of Koreans (Moscow), International Organisation of Meskhetian Turks “Vatan” (Moscow), Russian Jewish Congress, Public Union of All-Russian and Intergovernmental organisations of national diasporas – Congress of National Organisations of Russia, which effectively co-operates with authorities, etc.

Currently Moscow numbers around 80 NGOs, above 100 in St. Petersburg, more than 50 in Samara region, over 30 in Novosibirsk region, etc.

One of key objectives of national NGOs is to provide highest deconflictogenity of ethnocultural sphere. Evidently, cultural and ethnic diversity enrich personality, society and state. Ethnic factor has always existed, however problems appear only if ethnicity is being politicised and xenophobia, isolationism and destructive actions might be provoked on it. The reason is that in extreme situations loyalty to its own ethnic group predominates other obligations and affections. Science states that within last ten years of XX century number of conflicts decreased and majority of them developed in a state, not between states. These conflicts began under any slogans, nevertheless ethnicity and religious factor came to the fore and they shall not be underestimated.

Assembly of the Peoples of Russia plays special part in provision of ethnocultural cohesion in the Russian society. At present stage of its development Assembly could actively take part in legislation activities in the sphere of national relations. Furthermore, members of the Assembly are members of the State Duma of the Russian Federation, Assembly has good relations both with the State Duma and Council of the Federation, R.G. Abdulatipov is a chairman of the Assembly and member of the Council of the Federation.

Assembly of the Peoples of Russia can be actively involved into development of framework of interethnic communication. Centers of the Nations Friendship will pay here great role. It is reasonable to organise an all-

Russian contest between the Centers of the Nations Friendship of Russia with a view to accumulate their best practices.

Address to activities of NGOs acting at all-Russian level enables to identify approaches and forms of solutions of ethnocultural issues by this institution, to identify their role and position in the development of national identity of diverse categories of the Russian Federation citizens.

Law “On national-cultural autonomy“ of is the most important in our subject and it has been based on “form of self-identification of nations, national and ethnic groups secured by the state ... it is a form of national self-organisation which follows all-Russian tradition and leads to renewal and development of nations’ culture”.¹²

National-cultural autonomies aimed solely at decision of national-cultural development of ethnic minorities, “implementing self-organisation and social initiatives of involved citizens”.

According to law authorities of the Russian Federation: 743 national-cultural autonomies registered, including 17 federal national-cultural autonomies. It might be considered as an entirely new sociocultural phenomenon in multi-ethnic Russia. Totally 59 nationalities applied this law¹³. Maximum number of national-cultural autonomies is organised by Germans, 68% Tatars (63), Jews (29), Armenians (18), Ukrainians and by other ethnic groups living out of their national states or which do not have it at all.

Analyses of development of national-cultural process in Russia allows to admit that autonomies and other public organisations might be interpreted as a sustainable form of social existence which seeks to shape its own institutional forms and to extend a dialogue between citizens and state.

Being completely new democratic social institute in Russia national-cultural autonomies co-operate with state authorities at all levels and with other institutions including federal, regional, international, religious, etc. Relating to

¹² National associations of modern Russia, p. 2.

¹³ MUKABENOVA A.B., Function and position of national-cultural autonomies in the system of interethnic relations.// Information report. Government of Moscow. Committee of public and regional relations. Moscow Center of Nationalities. M., 2001. C. 61.; Current archive of Ministry of Justice of the RF 2010.

the Russian Federation co-operation with federal state authorities has a priority, followed by co-operation with Secretariats of Authorised Representatives of the President of the Russian Federation in new federal districts and with regional authorities.

Researches on background of development of national-cultural autonomies in Russia indicate such form of co-operation as “relations with Embassies of the countries accredited in the Russian Federation (Poland, Republic of Korea, Democratic People’s Republic of Korea (DPRK), Italy, Germany, Greece, Turkey, Finland and others) and with the Embassies of CIS countries¹⁴.

Thus, overall and specific task of the state national policy in the Russian Federation is protection of the Russian society and its diversity of cultures and languages and creating of conditions for further development of multiculturalism. Education and human rights provide background for genuine self-identity and independent development of nations in the Russian Federation. In order these aims to be achieved it is essential to develop and improve legal framework based on practice and responsibility of authorities at all levels. State national policy in the Russian Federation complies with accepted approaches and norms of international law and creates new support mechanisms for cohesion of ethnocultural development.

Forthcoming all-Russian census will allow specifying and solving this task and therefore it is anticipated by authorities, scientists and society.

¹⁴ Information report, No. 2. Government of Moscow. Committee of public and regional relations. Moscow Center of Nationalities M., 2001 C. 4., and others.

General Contributions

Minorities in International Law – Issues, Cases, and Principles

Daniel Thürer/Corsin Bisaz

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The protection of minorities has many different fascinating and difficult dimensions, which contain legal, social, psychological, and political aspects. We will focus on the international law perspective of the protection of minorities. Thereby, our aim is to provide a general introduction to the various legal approaches to a highly complex set of problems, which is at the centre of a large number of virulent conflicts all over the world. In this first section, key issues will be discussed on a general level, the second section will give important historical examples of minority protection, and the third and final section will discuss an outlook as to the essential principles of law on which

an adequate minority protection is being built today, or should be built in the future.¹

I. Some Key Issues

1. The Concept and Problems

To begin, there is no legally binding definition of what a ‘minority’ is. Both, states and minorities seem to live with this. For states, the reason is that they hope to be able to decide themselves who is a minority, whereas for minorities, the openness of the notion may be more inclusive and adaptive than a rigid definition. Nevertheless, the elements of a ‘minority’ are broadly accepted.² Generally, ‘minorities’ are groups of people with a common ethnicity, culture, language and/or religion which differ from the numerical majori-

¹ For short introductions see MCCORQUODALE ROBERT, *Rights of Peoples and Minorities*, in: MÖCKLI DANIEL/SHAH SANGEETA/SIVAKUMARAN SANDESH (eds.), *International Human Rights Law*, Oxford/New York 2010; THÜRER DANIEL/BURRI THOMAS, *Introduction: Minorities, Law, and Conflict Resolution*, in: THÜRER DANIEL/KEDZIA ZDZISLAW, *Managing Diversity: Protection of Minorities in International Law*, Zurich/Basel/Geneva 2009, 1 ff.; WILDHABER LUZIUS, *Le droit à l’auto-détermination et les droits des minorités linguistiques en droit international*, in: ID., *Wechselspiel zwischen Innen und Aussen: Schweizer Landesrecht Rechtsvergleichung, Völkerrecht*, Basel 1996, 73 ff.; and WOLFRAM KARL, *Minderheiten*, in: SEIDL-HOHENVELDERN IGNAZ (ed.), *Völkerrecht*, 3rd edn, Neuwied 2001, 280 ff.; for a more extensive discussion see e.g. KYMLICKA WILL, *Multicultural Odysseys – Navigating the New International Politics of Diversity*, Oxford 2007); KYMLICKA WILL, *Multicultural Citizenship*, Oxford 1995; THORNBERRY PATRICK, *International Law and the Rights of Minorities*, Oxford 1992; HILPOLD PETER, *Moderne Minderheitenrecht*, Wien 2001; PENTASSUGLIA GAETANO, *Minorities in International Law*, Strasbourg 2002; Council of Europe, *Mechanism for Implementation of Minorities Rights*, Strasbourg 2004; MONCHEBOEUF ALCIDIA, *Minority Rights Jurisprudence*, Strasbourg 2006.

² See generally ALFREDSSON GUDMUNDUR, *Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law*, in: GHANEA NAZILA/XANTHAKI ALEXANDRA (eds.), *Minorities, Peoples, and Self-Determination. Essays in Honour of Patrick Thornberry*, Leiden 2005, 163 ff.; further also JOHN PACKER, *Problems in Defining Minorities*, in: FOTTRELL DEIRDRE/BOWRING (eds.), *Minority and Group Rights in the New Millennium*, The Hague, Boston 1999, 223 ff.

ty of the population within a state and which are considered relevant for their identity. All in all, ‘minorities’ are quite stable and have a historical existence in a state. In consequence, immigrants, fugitives and migrant workers do not fall into this category; nevertheless, such ‘new minorities’ may become ‘minorities’ over time and be subjected to minority protection. However, the timeframe to become a minority has not been established.

A special category of groups which can take advantage of minority rights as well as having more far-reaching additional rights are the ‘indigenous peoples’. As with ‘minorities’, there is no legal definition of ‘indigenous peoples’ either. Generally, they are thought of as having closer ties to their traditional lands and being more vulnerable to ‘civilization’ than ‘minorities’, and also the numerical inferiority may play a minor role.

The way in which ‘the minority issue’ is looked at is part of the problem and the cause of much of its theoretical complexity. In fact, topics addressed with reference to ‘minorities’ can be very different; nearly every single case where a societal group is seen as a ‘minority’ rather than a ‘majority’ has its own characteristics and is only partly comparable with other cases. The commonality of all ‘minority problems’ is that they are understood as such by members of minorities, by the members of the majority, or by both. In fact, such problems could easily be understood outside the majority-minority division. Historically, this division has only gained importance with the prevalence of democratic systems in the 19th century with their majority rule combined with the nationalist ideal of “one nation, one state”, which was new at the time. This ideal has never had much in common with reality and, in light of globalisation, loses further credibility and desirability. Nonetheless, this remains the background when labelling conflicts between societal groups as conflicts between majorities and minorities.

Minorities can face problems because of integration or because of a lack of integration. Similarly, where minorities are predominant in parts of the territory of a state, ‘centrifugal’ and ‘centripetal’ forces can be at work.³ Nevertheless, some typical problems arise in constellations where societal groups

³ See THÜRER DANIEL/BURRI THOMAS, Introduction: Minorities, Law, and Conflict Resolution, in: THÜRER DANIEL/KEDZIA ZDZISLAW, *Managing Diversity: Protection of Minorities in International Law*, Zurich/Basel/Geneva 2009, 9 ff.

are permanently trapped in a minority position and, thus, some general guidelines can be and are in fact currently being provided by international law as will be discussed in the following section.

2. The International Legal Approach

Generally, minority protection is considered part of human rights protection in the larger sense and is most strongly realized at the national level, namely in constitutional law. Historically, minority protection has been of some importance in international law since Article 1(2) of the Vienna Congress Act provided the Polish minorities in Prussia, Austria and Russia with a number of minority rights in 1815.⁴ The most far-reaching minority protection system in international law was built following World War I with the Paris Peace Conference in 1919 where certain minorities (solely located within new states!) were provided with a degree of autonomy.⁵ This system could not prevent minority issues from becoming increasingly politicized in a time where nationalism was growing stronger and states were being destabilised by economic crises. As a result, this system ultimately failed and was replaced after World War II by the strongly individualist human rights protection system of the UN. Nevertheless, the cases in front of the Permanent Court of International Justice are still an especially important point of reference for international lawyers in the field of minority protection and, arguably, international law is once again moving towards stronger minority protection. Indeed, since many states are confronted with ethnic conflicts and secession claims, the topic has regained awareness.

⁴ Note that since the Reformation there existed namely many agreements between states in favour of their respective religious minorities; however, these legal agreements did not follow the majority-minority logic, yet it was more an agreement between kings to tolerate the religious group to which the other belonged within their territory. Cf. MULDOON JAMES B., *The Development of Group Rights*, in: SIGLER JAY ADRIAN (ed.), *Minority Rights: A Comparative Analysis*, Westport 1983, 31 ff.

⁵ BUERGENTHAL THOMAS/THÜRER DANIEL, *Menschenrechte – Ideale, Instrumente, Institutionen*, Zürich/Baden-Baden 2010, 19 f.; MACKLEM PATRICK, *Minority Rights in International Law*, 6 *International Journal of Constitutional Law* (2008), 531 ff.; BERMAN NATHANIEL, *But the Alternative Is Despair*: European Nationalism and the Modernist Renewal of International Law, 106 *Harvard Law Review* (1993), 1792 ff.

The most important minority protection clause on the universal level is Article 27 of the International Covenant on Civil and Political Rights (CCPR):

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.

The formulation of this Article is very open-ended and although its terminology is clearly individualistic, some minimal protection of the minority group as such, and not only of its members, seems to be presumed.⁶ Some guidance on its interpretation can be found in the case law of the Human Rights Committee within the Individual Communication Procedure through the Optional Protocol to the Covenant and in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which was adopted by the UN General Assembly in 1992.⁷

It remains an open question if (some) minorities can claim to be ‘peoples’ in the meaning of Common Article 1(2) of the CCPR and the International Covenant on Economic, Social and Cultural Rights (CESCR), and whether they can have the right to self-determination.⁸ Generally, it is broadly agreed upon that minorities cannot claim external self-determination as long as they are represented as part of the people of a state and are not systematically

⁶ At least the existence of the group must logically be presumed. However, groups are excluded from the complaint mechanism as provided by Article 2 of the OP of the CCPR and, hence, this theoretical right cannot be enforced legally. See BISAZ CORSIN, *The Concept of Group Rights in International Law: Groups as Contested Right-Holders, Subjects and Legal Persons*, Leiden/Boston 2012, 107 ff.

⁷ A/RES/47/135/Annex (18 December 1993).

⁸ See, from a general point of view, ALSTON PHILIP (ed.), *Peoples’ Rights*, Oxford 2005, 7 ff., 259 ff. THÜRER DANIEL/BURRI THOMAS, *Self-Determination*, in: WOLFRUM RÜDIGER (ed.), *Encyclopedia of Public International Law*, Volume IX, Oxford 2012, 113 ff.⁹ Cf. the section below on Quebec; THÜRER DANIEL, *National Minorities: A Global, European and Swiss Perspective*, 19 *The Fletcher Forum of World Affairs* (1995), 53 ff.; THÜRER DANIEL, *Das Selbstbestimmungsrecht der Völker und die Anerkennung neuer Staaten*, in: NEUHOLD HANSPETER/SIMMA BRUNO (eds.), *Neues Europäisches Völkerrecht nach dem Ende des Ost-West-Konflikts*, Baden-Baden 1996, 43 ff.

discriminated against.⁹ However, whether or not they could claim the right of self-determination in its internal meaning is controversial. In light of the ever increasing separation of the right to self-determination discussion in its external meaning under the heading of a 'right to secession' and in its internal meaning, scholars seem to have become more willing to consider minorities as possible bearers of the right to (internal) self-determination.¹⁰ Additionally, there are a few treaties which also include minority provisions¹¹ and/or protect minorities indirectly.¹² Besides these treaties, there are different soft law documents of considerable importance for international minority protection, of which the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities is the most prominent and important.¹³

On the regional level, two European treaties on minority protection exist: the 1992 European Charter for Regional and Minority Languages and the 1995 Framework Convention for the Protection of National Minorities. In addition to these conventions, the OSCE has established a range of recommendations on minority protection. Furthermore, it has created a High Commissioner on National Minorities whose quiet diplomacy in this field is considered a very effective and important contribution, i.e. to prevent the outbreak of minority conflicts.¹⁴ Also, the EU requires some minimal standards of minority pro-

⁹ Cf. the section below on Quebec; THÜRER DANIEL, National Minorities: A Global, European and Swiss Perspective, 19 *The Fletcher Forum of World Affairs* (1995), 53 ff.; THÜRER DANIEL, Das Selbstbestimmungsrecht der Völker und die Anerkennung neuer Staaten, in: NEUHOLD HANSPETER/SIMMA BRUNO (eds.), *Neues Europäisches Völkerrecht nach dem Ende des Ost-West-Konflikts*, Baden-Baden 1996, 43 ff.

¹⁰ E.g. MCCORQUODALE ROBERT, Rights of Peoples and Minorities, in: MÖCKLI DANIEL/SHAH SANGEETA/SIVAKUMARAN SANDESH (eds.), *International Human Rights Law*, Oxford/New York 2010.

¹¹ E.g. the Convention on the Rights of the Child (Arts. 17 and 30).

¹² E.g. the Convention on the Prevention and Punishment of the Crime of Genocide, or the International Convention on the Elimination of All Forms of Racial Discrimination.

¹³ Others are e.g. the UNESCO Universal Declaration on Cultural Diversity.

¹⁴ See e.g. KEMP WALTER A. (ed.), *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities*, The Hague 2001; see also DRZEWICKI

tection from membership candidates as well as from new states as a requirement for their recognition.¹⁵

Connected with the issue of minority protection is the protection of indigenous peoples. Yet early on, international law developed along separate tracks with regard to ‘minorities’ and ‘indigenous peoples’, which had substantively different legal approaches.¹⁶ In fact, whereas minorities are largely protected by granting rights to ‘persons belonging to’ minorities through individual rights, indigenous rights include group rights as such. Think for example of a right to be consulted as groups through their representative institutions in legal matters which concern them, or the right as groups to retain their own customs and institutions and, probably most importantly, the group right to ownership over their traditional lands which includes the natural resources pertaining to these lands.¹⁷ The international treaties protecting the rights of indigenous peoples are ILO Convention 107 and its replacement, ILO Convention 169.¹⁸ Additionally, the UN Declaration on the Rights

KRZYSZTOF, *Minority Protection within the OSCE*, in: THÜRER DANIEL/KEDZIA ZDZISLAW, *Managing Diversity: Protection of Minorities in International Law*, Zurich/Basel/Geneva 2009, 121 ff.; and FARAHAT ANUSCHEH, *Regulating Minority Issues through Standard-Setting and Mediation: The Case of the High Commissioner on National Minorities*, 9 *German Law Journal* (2008), 1453 ff.

¹⁵ “[T]he respect for and the protection of minorities” is namely demanded in the Copenhagen Criteria for Membership in the European Union, see the Conclusions of the Presidency, European Council in Copenhagen, 21-22 June 1993, SN 180/1/93 Rev 1 (<ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/72921.pdf>, visited on 10 April 2013).

¹⁶ For a critical discussion of this see e.g. KYMLICKA WILL, *The Internationalization of Minority Rights*, 6 *International Journal of Constitutional Law* (2007), 1 ff.

¹⁷ See BISAZ CORSIN, *The Concept of Group Rights in International Law: Groups as Contested Right-Holders, Subjects and Legal Persons*, Leiden/Boston 2012, 120 ff.

¹⁸ For the few states who did not sign the new ILO Convention 169 but only the older ILO Convention 107, that one remains binding law. In light of the significant change of philosophy from the older, assimilationist, to the newer, more multiculturalist ILO Convention this is regrettable. For a discussion of the two conventions see e.g. XANTHAKI ALEXANDRA, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, Cambridge 2007, 49 ff.

of Indigenous Peoples must be mentioned as an important soft law document, which was finally adopted in 2007 after two decades of negotiations.¹⁹

Overall, rules on minority protection are scarce in international law and it cannot be plausibly argued that there is an international minority protection regime at all. Indeed, there are only a few scattered provisions on the universal level, and the content of which is subject to ongoing disputes.²⁰ Similar conclusions can be drawn even for the more ambitious legal framework on the European level where minority protection still largely depends on the willingness of participating states to take the issue seriously. Generally, the implementation of existing laws is unsatisfactory: there are but a few (weak) proceedings, courts, and supervisory bodies, which are only rarely used by minorities.²¹

II. Case Studies

Following these introductory and quite general remarks on international minority protection, it is now time to take a closer look at concrete cases where minority protection has been at stake and how they have been dealt with on different levels. All the cases exhibit distinct features, which illustrates the complexity and diversity of the topic as well as different approaches to it.

¹⁹ For a discussion of this declaration, see GILBERT GEOFF, *Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples*, 14 *International Journal on Minority and Group Rights* (2007), 207 ff.

²⁰ See THÜRER DANIEL/BURRI THOMAS, *Introduction: Minorities, Law, and Conflict Resolution*, in: THÜRER DANIEL/KEDZIA ZDZISLAW, *Managing Diversity: Protection of Minorities in International Law*, Zurich/Basel/Geneva 2009, 6 ff.

²¹ For a critical discussion of this issue on the universal level, cf. ALFREDSSON GUDMUNDUR, *Minority Rights at the United Nations*, in: THÜRER DANIEL/KEDZIA ZDZISLAW, *Managing Diversity: Protection of Minorities in International Law*, Zurich/Basel/Geneva 2009, 19 ff.

1. South Tyrol – Province of Bolzano-Bozen

South Tyrol is an autonomous province in the North of Italy, which, together with the province of Trento, forms the autonomous region of Trentino-South Tyrol. It is comprised of 116 municipalities, has a population of over 487'000 people, is spread out over 7'400 square kilometres, and the capital of which is Bolzano-Bozen. As of the last census, 69.15 per cent of the South Tyrolian population declared themselves to belong to the German-speaking group, 26.47 per cent to the Italian-speaking group, and 4.37 per cent to the Ladin-speaking group.²²

South Tyrol is a classic example of how autonomy arrangements can successfully help build a well-functioning consociational democracy, and it has often been referred to as a model of minority protection. This could not have been predicted from the beginning: it is the result of a turbulent but, in the end, successful process. In fact, so successful that it has recently lost much of the scholarly attention previously given to it. Yet, in our view, there are good reasons to keep this case in mind.

a) Historical evolution

The region's modern history as 'Südtirol' began in 1919 when the part of Tyrol south of the Brenner Pass was taken away from Austria and annexed by Italy. This new border subsequently divided a formerly united province, which had been part of Austria for five centuries.

After World War II, South Tyrol remained with Italy and Austria, the kin-state of the German-speaking community, ceded all territorial claims to the province in exchange for promises by the Italian government of substantive autonomy in the so-called Gruber-De Gasperi Agreement annexed to the Paris Peace Treaty of 1946.²³ In 1948, the first autonomy statute was enacted

²² See HILPOLD PETER, South Tyrol, in: the Max Planck Encyclopedia of International Law, <www.mpepil.com>, visited on 15 June 2011.

²³ On the protecting role of the kin-state for its minorities see generally HILPOLD PETER/PERATHONER CHRISTOPH, *Die Schutzfunktion des Mutterstaats im Minderheitenrecht (The "kin-state"): Eine völkerrechtliche und europarechtliche Untersuchung unter besonderer Berücksichtigung der Schutzfunktion Österreichs gegen-*

for the entire region comprising the provinces of Bolzano (South Tyrol) and Trentino. The neighbouring province was included in order to ensure an Italian majority in the region as a whole and consequently in the regional parliament. This arrangement rendered the South Tyroleans practically powerless. Likewise, in 1948, the question relating to the South Tyroleans who had opted to emigrate in 1939 was resolved and they were allowed to return and become Italian citizens.

In 1959, Austria brought the South Tyrol question before the UN General Assembly. The negotiating partners, the Austrian and Italian foreign ministers, were to table a resolution. In 1961, the South Tyrol question was once again brought before the UN General Assembly and, as a result, the first ‘Autonomy Package’ was agreed upon by Austria and Italy. The South Tyrolean Regional Government was granted jurisdiction over many spheres of government normally reserved for state regulation, such as transport, public works, social affairs, etc. Over the following decades, the Italian government devolved ever increasing powers to the South Tyrolean government. The German and Ladin language groups received extensive protection, including the right to be taught in their own languages in education, while the public administration is bilingual or trilingual.

In 1972, a second autonomy statute entered into force, placing further spheres of government under the control of the South Tyrolean Regional Government, such as public health and safety, commerce, trade, and road building. In addition, the South Tyrolean Legislative Assembly (Landtag) was given wide-reaching legislative powers.²⁴

b) Minority Protection

The South Tyrol conflict between Austria and Italy was formally settled in 1992. From the mid-1990s onwards, the provincial government was granted

über der deutsch- und ladinischsprachigen Volksgruppe in Südtirol sowie der Diskussion um das ungarische Statusgesetz, Berlin/Bern/Bozen/Wien 2006.

²⁴ An early work on the topic from an international law perspective is MIEHLER HERBERT, *Südtirol als Völkerrechtsproblem*, Graz 1962; for a recent short overview see HILPOLD PETER, *South Tyrol*, in: the Max Planck Encyclopedia of International Law, <www.mpepil.com>, visited on 15 June 2011.

an extension of its powers in, among others, the sectors of education, employment, transport, finance, privatisation of state-owned properties, energy and European integration. As part of these significant changes, a revised autonomy statute went into effect on 16 February 2001. The following new regulations have increased the degree of South Tyrol's autonomy (and in particular its effects on minority protection):

The internationally guaranteed nature of South Tyrol's autonomy is explicitly recognized. Additionally, all legislation in relation to elections is now in the competence of the provinces. Respective legislation no longer requires the approval of the government commissioner. Furthermore, if the Italian parliament intends to change or amend the current statute, representatives of the province have now to be consulted.

Representation of the Ladins in the presidency of the regional and provincial assemblies and in the regional government is now part of the power-sharing arrangement, and members of the Ladin ethnic group can be co-opted into the South Tyrol provincial government.

The German version of the term 'South Tyrol' has been officially incorporated into the Italian constitution as part of the Constitutional Law on Federalism, which was adopted in March 2001.

With regard to the Ladins, they are often overlooked because they are the smallest group of the three groups living in South Tyrol.²⁵ They have no mention in the Paris agreement of 1946. At that time, their recognition was vehemently opposed by the Italian government: the Italian representatives perceived 'Ladins' as another term for 'Latins', which in turn meant 'Italian'. It took several decades for the view to arise that this group constitutes a separate linguistic and cultural group. Afterwards, when the first statute regarding the autonomy of South Tyrol was implemented in 1948, some provisions also recognised Ladins as a group, but only with the second statute of 1972 was this group given any sufficient consideration. Today, the Ladins have their own schools and their own education model, they can use their language before public authorities, and their great advantage was that they

²⁵ See generally HILPOLD PETER/PERATHONER CHRISTOPH (eds.), *Die Ladinler – eine Minderheit in der Minderheit*, Wien/Bozen/Zürich 2005.

were economically very successful. They settled in the Gardena valley and are generally considered one of the richest groups in the region since it enjoys high tourism and the Ladins own most local hotels. They have also managed to preserve their identity and thus the need to emigrate has never arisen. The Ladins have remained in this valley thus preserving their language and while there are on-going efforts to establish a written language, such a language has not been agreed upon. However, these are minor problems which can be resolved.

With regard to protection by virtue of the Italian constitution, Article 6 of the Italian constitution, where such protection is found, has not been implemented for decades. It was not until 1999 that a general law was issued (law 482) on the general protection of national minorities, which recognised many different groups and a variety of languages, previously ignored or merely perceived as dialects. Initially, the Roma were also mentioned but during the very last stage of negotiations in the Parliament, the reference to Romas had to be deleted because there was not sufficient political support for recognition of this group. New minorities are certainly a political problem in Italy since the concept of a 'new minority' is perhaps even less defined than that of a 'traditional minority'. Some claim that the Roma constitute a traditional minority, but there is a strong support in literature to also consider the Roma as a new minority. On the other hand, some have said that there are 'new minorities' but also 'migrant workers', although there is a consensus that migratory groups must be considered new minorities. It is certainly arguable that these groups constitute the greatest challenge to further development of minority law. Nevertheless, minority protection provisions can also be found in the statutes of the border regions, such as Sicily and Sardinia in the south and especially Aosta, Friuli, Venezia Giulia and South Tyrol.

As to the development of the South Tyrolean autonomy statute, from a conflict perspective there was a paradigmatic shift in the autonomy regime such that in South Tyrol one now speaks of a dynamic autonomy, and thus the paradigmatic shift was simply that the sharp distinction between German speakers and Italian speakers was overcome. It is very important to note that the development and success of the autonomy regime have not stalled. There is a new challenge now in that, within the process of European integration, the question of cross-border cooperation and regionalism has been raised,

and how this autonomy statute can fit into the developing systems of European regions.

c) Evolution: Lessons to be learned

The South Tyrolean minority problem has been one of the most intensely discussed minority situations in Europe for a long time, but astonishingly it is gradually disappearing from the scene of international debate. Indeed, there is the impression that with its success, the general interest in this subject vanished since it was no longer a contentious issue. In a certain sense, it can be said that the South Tyrolean minority issue as an academic subject has become a victim of its success.²⁶ This phenomenon can be criticised for two reasons: first of all, a minority issue is never definitively solved, but is rather a subject that needs continuous consideration. Secondly, it is perhaps the case that in international minority law, too much interest is paid to problems and too little to solutions. As there is no dearth of minority problems on the global level, the minority situations which have been regulated in a successful way should be examined from the perspective of whether they present elements for generalisation and whether the solutions found there can be successfully applied elsewhere. Of course, care must be taken not to over-generalise but a detailed study of the autonomy of South Tyrol can surely reveal some elements capable of being useful outside this specific context. It can be said that highly sophisticated autonomous orders, such as the South Tyrolean example, are very much context-dependent in their functional ability, yet some elements might be suitable for generalisation nonetheless. We have to see that the autonomy of South Tyrol did not result from spontaneous development and a general insight in the merits of minority protection taking place at the international level, but was the consequence of a well-structured process founded in international law.

Let us take a brief look at the wording of the minority-related regulations of the autonomy statute. As previously mentioned, the South Tyrolean autonomy statute is based on the Paris Agreement of 5 September 1946, the so-

²⁶ See e.g. HILPOLD PETER, *South Tyrol: Arrangements in International and Constitutional Law*, in: THÜRER DANIEL/KEDZIA ZDZISLAW, *Managing Diversity: Protection of Minorities in International Law*, Zurich/Basel/Geneva 2009, 133.

called Gruber-De Gasperi Agreement. This agreement initially met with dissatisfaction and criticism. Over the years, however, it proved to be a very valuable instrument for the protection of minorities. What initially seemed to be a defect of the agreement – its vague formulations – later proved to be an advantage. This agreement revealed itself as having enormous flexibility and laid the basis for the protective role of Austria towards the minorities in the South Tyrol, a role it exercised with great dedication. The major steps in this process were Austria's referral of the issue to the UN General Assembly and, as a consequence, the General Assembly passed two resolutions, in 1960 and 1961 respectively, urging Italy and Austria to sort out their dispute about the implementation of the Paris agreement with peaceful means. This involvement of the international community – possible only because of the existence of the international agreement of 1946 – was decisive for the further development of the autonomy of South Tyrol. Negotiations took place throughout most of the 1960s on both the international and national levels resulting in a very sophisticated system of protective measures, which entered into force in 1972 with a new statute of autonomy. Italy initially refused to consider the package of 1969 as legally binding. In 1992, however, Austria issued a declaration that the controversy of 1960 and 1961 had been terminated – a declaration that was directed towards the General Assembly. A procedure had been found that would provide sufficient guarantee for the whole package and therefore for the new autonomy statute to be taken into consideration by the International Court of Justice should it become necessary one day to refer this issue to this body. Therefore, it can be said that the long discussed question whether or not the current autonomy of South Tyrol is guaranteed by international law can now be answered in the affirmative.²⁷ In the meantime, the European Union and the Council of Europe have also made important contributions for the further development of the autonomy of South Tyrol.

²⁷ PETER HILPOLD concludes that “it can be assumed that Austria could sue Italy in case the latter State should withdraw, totally or in part, the concessions made”. See HILPOLD PETER, South Tyrol, in: the Max Planck Encyclopedia of International Law, <www.mpepil.com>, visited on 15 June 2011, margin no. 17.

As it has been said, our goal is to determine whether there is something that can be useful to other minority situations.²⁸ Two aspects of this goal must be mentioned: first, we might ask ourselves whether the *autonomy of South Tyrol* constitutes an example for solving other minority controversies in Europe and beyond. It is unlikely that this system can be transferred as a whole to other regions. However, some schemes, rules and provisions are without a doubt suitable for generalisation. The autonomy of South Tyrol is characterised by a long list of competences which have been attributed either exclusively or concurrently with those of the central power of the province of Bolzano. In describing the competences, we distinguish between primary competences where the South Tyrolean province is competent exclusively and secondary, or concurrent, competences where they are shared with the central power. With regard to the primary competences, we have agriculture and forestry, tourism, transport of provincial interest, nursery schools, school buildings and school welfare, public works and vocational training. Among the secondary competences are teaching in primary and secondary schools – a very important issue in the minority context – trade and commerce, apprenticeship, promotion of industrial production, sport and leisure, as well as several other competences. Clearly, not all of these competences are necessary for the survival of minorities, but on the whole they constitute a body of norms that provide a solid basis for a strong local government that, in combination with extensive financial autonomy, lends particular resilience to this form of territorial autonomy. In fact, the local government is the largest employer of the province, providing well-paid posts to people of all qualifications. It employs people from all linguistic groups according to their proportional strength and requires employees to be bilingual, thereby emphasising the value of multilingualism and at the same time permitting local inhabitants to coordinate with the local administration in their own language.

Secondly, it can be said that the success of the South Tyrolean model demonstrates the *importance of specific international law provisions* that should, on the one hand, be strong enough to survive over a longer period and, at the same time, be flexible enough to adapt to new needs. On the basis of this

²⁸ See generally HILPOLD PETER, *South Tyrol: Arrangements in International and Constitutional Law*, in: THÜRER DANIEL/KEDZIA ZDZISLAW, *Managing Diversity: Protection of Minorities in International Law*, Zurich/Basel/Geneva 2009, 144 ff.

consensus already existing in 1946, a rich autonomous order was created that now stands in the forefront and the international law foundations of which are now often overlooked. The most important prerequisites for success were probably, as a third element, *confidence building* between Italy and Austria and between the minority and the central government. The negotiation process briefly mentioned above is rich in ingenious instruments of this kind and, for the present autonomous order, these instruments and regulations are arguably the most characteristic elements and much more important than the rich financial endowment of the province so often seen as the primary factor for success. It is obvious here that beyond the material values, it is the institutionalised process of bringing together previously diffident groups in successive steps that actually constitutes the most important lesson to be learnt from this situation. This does not mean that everyday cooperation between these groups is without problems. Differentness is considered an enrichment that constitutes also a source of misunderstanding and distrust, but the main instruments of communication and cooperation created over time have permitted any problems that have arisen thus far to be sorted out and the impression is that, alongside the original national identity strongly defended by each group, a second identity of belonging to a multilinguistic and multicultural region is arising.

2. Quebec

The case of Quebec has been a topic of much discussion in literature. For several decades, there have been strong movements to secede from Canada, which have also triggered popular votes on secession. More recently, the decision of the Supreme Court of Canada on the legality of a possible unilateral secession of Quebec from Canada has attracted much attention internationally.²⁹

Quebec is a *province* in *east-central Canada*, and it is the only Canadian province with a predominantly *French-speaking* population and the only one whose sole *official language* is *French*. Quebec is Canada's largest province by area and its second largest *administrative division*; only the territory of

²⁹ Reference re Secession of Quebec, 20 August 1998, Supreme Court of Canada, [1998] 2 S.C.R. 217.

Nunavut is larger. Quebec is the second most populous province after Ontario. Most inhabitants live in urban areas near the *Saint Lawrence River* between *Montreal* and the capital of *Quebec City*. *English-speaking communities* and English-language institutions are concentrated in the west of the *island of Montreal* but also have significant presence in the *Outaouais*, the *Eastern Townships*, and *Gaspé* regions. The *Nord-du-Québec* region, occupying the northern half of the province, is sparsely populated and inhabited primarily by *Aboriginal peoples*. Quebec is the second most economically influential province, second only to *Ontario*.

a) *Historical evolution*

Quebec was part of the territory of New France, the name for the North American territory of France up until 1763. The Francophone population of Quebec can be traced back to the colony of New France, founded in 1608. In 1867, the British Parliament passed the British North America Act. In 1931, the Statute of Westminster formally removed any legislating power of Britain over the Dominion of Canada.³⁰

In 1965, the report of the Laurendeau-Dunton royal commission recommended making French an official language in the parliaments of Canada, Ontario and New Brunswick, in federal tribunals and in all federal government administrations of Canada. During an official visit to Quebec as a guest of the Government of Canada, the President of France, General Charles de Gaulle, declared from the balcony of the Montreal city hall in front of a huge crowd: “Vive le Québec libre!”

In October 1970, a crisis erupted when Front de libération du Québec members kidnapped a British Trade Commissioner and the Quebec Minister of Labour, Pierre Laporte. Then Prime Minister Pierre Trudeau used the War Measures Act, which allowed anyone suspected of being involved with the terrorists to be held temporarily without charge.

On 20 May 1980, the first referendum was held on sovereignty-association but was rejected by a majority of 60 per cent margin (59.56 per cent to

³⁰ See Quebec, *The Oxford Companion to the Politics of the World*, Oxford Reference Online.

40.44 percent).³¹ On 30 October 1995, in a second referendum, Quebec sovereignty was rejected by a slim margin (50.58 per cent to 49.42 per cent).³² On 26 November 2006, the Québécois (as a sociological group) were officially recognized as a nation within “a united Canada”.³³

b) *Legality of Quebec Secession*

In August 1998, the Supreme Court of Canada delivered one of its most important decisions on the Canadian Constitution.³⁴ The Government of Canada had sent a reference case about the legality of Quebec secession, posing three questions to the Court:

1. Under the Constitution of Canada, can the National Assembly, legislature, or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature, or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature, or government of Quebec to

³¹ See Centre for Research on Direct Democracy (c2d), Mandate to the Government of Quebec to negotiate the sovereignty agreement between Quebec and Canada, <www.c2d.ch/detailed_display.php?lname=votes&table=votes&page=1&parent_id=&sublinkname=results&id=39152>, visited on 9 April 2013.

³² See Centre for Research on Direct Democracy (c2d), Sovereignty of Quebec, <www.c2d.ch/detailed_display.php?lname=votes&table=votes&page=1&parent_id=&sublinkname=results&id=39218>, visited on 9 April 2013.

³³ See CBC News of Monday, 27.11.2006: House passes motion recognizing Québécois as nation, <www.cbc.ca/news/canada/story/2006/11/27/nation-vote.html>, visited on 9 April 2013.

³⁴ See generally BAYEFISKY ANNE F., *Self-Determination in International Law: Quebec and Lessons Learned*. Legal Opinions Selected and Introduced by Anne F. Bayefsky, The Hague/Boston 2000.

effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

In its decision, the Court declared that neither the Quebec government nor legislature have a legal right under Canadian constitutional law or under international law to unilaterally secede from Canada. However, the court also emphasized that the rest of Canada would have a political obligation to negotiate Quebec's separation if a clear majority of that province's population voted in favour of it.

James Crawford, Whelwell Professor of International Law at the University of Cambridge, was retained by the Department of Justice of Canada to advise on certain issues of international law arising in the Reference by the Governor-in-Council concerning certain questions relating to the unilateral secession of Quebec from Canada. Specifically, he was asked to advise on modern state practice in respect of unilateral secession and the right of self-determination. His report contained the summarized following findings:³⁵

(a) In international practice, there is no recognition of a unilateral right to secede based on a majority vote of the population of a sub-division or territory, whether or not that population constitutes one or more "peoples" in the ordinary sense of the word. In international law, self-determination for peoples or groups within an independent state is achieved by participation in the political system of the state, on the basis of respect for its territorial integrity.

(b) Even where there is a strong and sustained call for independence (measured, for example, by referenda results showing substantial support for independence), it is a matter for the government of the state concerned to consider how to respond. It is not required to concede independence in such a case, but may take into account the national interest and the interests of all those concerned.

(c) Even in the context of separate colonial territories, unilateral secession was the exception. Self-determination was in the first instance a matter for the colonial government to implement; only if it was

³⁵ See CRAWFORD JAMES, *State Practice and International Law in Relation to Unilateral Secession*. Report for the Attorney General of Canada (19 February 1997), 2. Reprinted in: BAYEFKY ANNE F., *Self-Determination in International Law: Quebec and Lessons Learned*. Legal Opinions Selected and Introduced by Anne F. Bayefsky, The Hague/Boston 2000, 31 ff.

blocked by that government did the United Nations support unilateral secession. Outside the colonial context, the United Nations is extremely reluctant to admit a seceding entity to membership against the wishes of the government of the state from which it has purported to secede. In fact, there is no case since 1945 where it has done so. Where the parent state agrees to allow a territory to separate and become independent, the terms on which separation is agreed between the parties concerned will be respected, and if independence is achieved under such an agreement, rapid admission to the United Nations will follow. But where the government of the state concerned has maintained its opposition to unilateral secession, such secession has attracted virtually no international support or recognition.

(d) This pattern is reflected in the so-called “safeguard” clause in the United Nations General Assembly Resolution 2625 (XXV), the Friendly Relations Declaration of 1970, which holds that “[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above *and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.*” In accordance with this formula, a state whose government represents the whole people of its territory without distinction of any kind, that is to say, on a basis of equality, and in particular without discrimination on grounds of race, creed or colour, complies, with the principle of self-determination in respect of all of its people. A state which is governed democratically and respects the human rights of all its people is entitled to respect for its territorial integrity. The people of such a state exercise the right of self-determination through their participation in the government of the state on a basis of equality.

There is an additional issue of internal self-determination in the sense of recognition of cultural identity and internal self-government for different groups or peoples within the state, as Crawford argues elsewhere:³⁶ traditionally, international law essentially treated such issues as matters of domestic jurisdiction, as reflected in the very reserved formulation of Article 27 of the CCPR, the minority rights clause. Developments in respect of

³⁶ CRAWFORD JAMES, *The Creation of States in International Law*, 2nd edn, Oxford 2006, 120 ff.

the idea of internal self-determination and self-government are however occurring, and they are accompanied by an extension of minority rights, including the rights of national minorities, and increased recognition of the rights of indigenous peoples. Consistent with these developments, the term ‘peoples’ is being seen as more inclusive and not limited to the people of the state as a whole. But these developments are still tentative (*de lege ferenda*), and they do not affect the established rules and practices with respect to (external) self-determination and the territorial integrity of states.³⁷ They lend no support to the view that peoples within independent states have a unilateral right to secede.

c) *Minority Protection*

Under current Canadian law the following safeguards are provided for the protection of the French language:

In 1867, the *British Parliament* passed the *British North America Act* which became the supreme law of the Dominion of Canada (although it was modified several times, it is still part of the *Constitution of Canada*). This act contained only one section (section 133) dealing with language. It read:

“Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.”

“The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.”

³⁷ However, territorial integrity is a weak argument in this regard as it is only protected in relations between states and does not apply to claims from within states. This was set out very clearly by the ICJ in its Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, of 22 July 2010, at para. 80, see <www.icj-cij.org/docket/files/141/15987.pdf>, visited on 5 April 2013.

The *patriation* of the Canadian Constitution occurred as the British Parliament passed the *Canada Act 1982*. This Act enacted the *Constitution Act, 1982* for Canada, *section 23* of which introduced the notion of “minority language education rights”. This novelty opened another door to a constitutional dispute of Quebec’s Charter of the French Language.

Alliance Quebec, an Anglophone rights lobby group, was founded in May 1982. It is through this civil association that various Anglophone lawyers challenged the constitutionality of Quebec’s territorial language policy.

In 1984, the Supreme Court invalidated Chapter VIII of the Quebec Charter of the French Language on the basis of its incompatibility with section 23 of the Canadian Charter of Rights and Freedoms. Section 23 of the Canadian Charter reads:

(1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

Section 73 of the Charter of the French language recognized the right to English language instruction for Quebec residents only. Canadian citizens from outside Quebec had to send their children to French primary and secondary schools like all other Quebecers.

On 26 July 1984, the Supreme Court invalidated Section 73. Judged retroactively unconstitutional, the section had to be modified so that it no longer clashed with the Canadian Charter’s definition of a linguistic minority. The current Section 73 of the Charter of the French language reads:

The following children, at the request of one of their parents, may receive instruction in English:

1) a child whose father or mother is a Canadian citizen and received elementary instruction in English in Canada, provided that that in-

struction constitutes the major part of the elementary instruction he or she received in Canada;

2) a child whose father or mother is a Canadian citizen and who has received or is receiving elementary or secondary instruction in English in Canada, and the brothers and sisters of that child, provided that that instruction constitutes the major part of the elementary or secondary instruction received by the child in Canada;

3) a child whose father and mother are not Canadian citizens, but whose father or mother received elementary instruction in English in Québec, provided that that instruction constitutes the major part of the elementary instruction he or she received in Québec;

4) a child who, in his last year in school in Québec before 26 August 1977, was receiving instruction in English in a public kindergarten class or in an elementary or secondary school, and the brothers and sisters of that child;

5) a child whose father or mother was residing in Québec on 26 August 1977 and had received elementary instruction in English outside Québec, provided that that instruction constitutes the major part of the elementary instruction he or she received outside Québec.

The Supreme Court stated: there is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a ‘people’ to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.³⁸

But the Court went on to discuss the positive aspect of the safeguard clause, i.e. the issue whether external self-determination may sometimes be justified as the only method of preventing systematic oppression of a distinct people within a State:

The right of colonial peoples to exercise their right to self-determination by breaking away from the ‘imperial’ power is now un-

³⁸ See Reference re Secession of Quebec, 20 August 1998, Supreme Court of Canada, [1998] 2 S.C.R. 217, para 130.

disputed ... The other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context. This recognition finds its roots in the Declaration on Friendly Relations ... A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance ... [T]he underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The Vienna Declaration requirement that governments represent 'the whole people belonging to the territory without distinction of any kind' adds credence to the assertion that such a complete blockage may potentially give rise to right of secession. Clearly, such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated. While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination. Even assuming that the third circumstance is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold.³⁹

3. Canton of Jura

In contrast to the cases discussed above, the case of the Canton of Jura is the only one which is primarily a national issue. Nevertheless, besides many parallels with international cases, it is an example of how the secessionist aspirations of part of a political entity can be taken seriously and secession claims can be resolved in a relatively peaceful and democratic manner. As such, it could provide us with some insight for cases where internal autonomy arrangements are not possible.⁴⁰

³⁹ *IBID.*, paras. 131-34, citing CASSESE ANTONIO, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge 1995, 334.

⁴⁰ See MALINVERNI GIORGIO, *Switzerland as Model for the Protection of Minorities?*, in: THÜRER DANIEL/KEDZIA ZDZISLAW (eds.), *Managing Diversity – Protection of Minorities in International Law*, Zürich 2009, 207 ff.; and generally THÜRER DANIEL, *Das Selbstbestimmungsrecht der Völker – Mit einem Exkurs zur Jurafrage*, Bern 1976.

a) *Facts and Figures*

Created in 1979, the Republic and Canton of the Jura,⁴¹ also known as the Canton of Jura or Canton Jura, is the newest of the 26 Swiss Cantons. It is located in the north-western part of *Switzerland*, and its *capital* is *Delémont*. It shares borders with the Canton of *Basel-Landschaft*, the *Canton of Bern*, and the *French* département of *Jura*.

It consists of parts of the *Jura Mountains* in the south and the Jura plateau in the north. The Jura plateau is hilly and almost entirely *limestone*. The term '*Jurassic*' is derived from the Jura Alps, the strata of which date to that era. To the north and the west of the Canton lies *France*. The Cantons of *Solothurn* and *Basel-Landschaft* are to the east of the Canton, while the Canton of *Bern* bounds the Jura to the south.

b) *History*

The land that makes up Canton Jura today belonged to the Bishop of *Basel* since the early Middle Ages, but had close ties with the *Swiss Confederation*. At the *Congress of Vienna* in 1815, the Jura was given to the Canton of *Bern* as compensation for the loss of other territories. The act of incorporation of the Jura into the Canton of *Bern* was the cause of continuous dissensions: the Jura was *French-speaking* and *catholic*, whereas the Canton of *Bern* was mostly *German-speaking* and *protestant*. After a long struggle, which will be looked at more closely in our following considerations, the constitution was accepted in 1977. In 1979, the Jura joined the *Swiss Confederation* as a full member. However, the southern part of the Jura region, which is also predominantly *French-speaking* but has a *protestant* majority, opted not to join the newly-formed canton, and instead remained part of *Bern*. This area is now known as *Bernese Jura*. The word *Jura*, therefore, may refer either to Canton *Jura* or to the combined territory of Canton *Jura* and *Bernese Jura*.

Given the aforementioned differences in language and religion, within the Canton of *Bern*, there was a linguistic and a religious minority and for many years the population of the Jura wanted to secede from the rest of the canton.

⁴¹ Its official name in French is *République et Canton du Jura*.

There were many separatist movements, public order offences, and even some bomb explosions, which occur very seldom in Switzerland. So there was a kind of internal territorial conflict. Finally, at the beginning of the 1970s, a procedure was established to give more autonomy to the six districts, which would later form the Canton of Jura. The process was achieved by the separation of three of the six districts of the Jura from the rest of the Canton of Bern and the creation of a new canton, which entered in the Swiss Confederation as the 26th canton on 1 January 1979.

Let us take a closer look at the procedure that was followed. The procedure is characterised by a series of referendums. The first step was the amendment of the constitution of the Canton of Bern on 1 March 1970. By this constitutional amendment, the people of the canton as a whole, comprising the six districts of the Jura, accepted by referendum that the francophone and catholic districts of the Jura, which are located in the north of the canton on the French border, could secede from the Canton of Bern if they so wished. This was the first step in a positive direction. The Canton of Bern accepted that part of its territory could secede. This first referendum was followed by a series of other referendums. During the second, held in June 1974, the people of Jura, but not Bern, and only the people of these six districts, were asked if they were in favour of or against the creation of the new canton. Who was asked to answer this question? There was dispute surrounding this issue since it was only the people who lived in Jura, on the territory of Jura, and not the ones who lived outside yet still originated from Jura. And the answer was yes but only by a slight majority (36'000 to 34'000). Among the six districts, the three in the north answered 'yes' and the three in the south, which are close to the Canton of Bern, had voted 'no' to the creation of the new canton because they wanted to remain with the Canton of Bern. In March 1975, another referendum took place in the three districts of the south to check if they really wanted to remain with the Canton of Bern since the majority of the people within the six districts had expressed its desire to secede from the Canton of Bern. During this referendum, the three southern districts confirmed their decision to remain with the Canton of Bern. Then, during a fourth referendum which took place in 1975, the municipalities located on the border of the northern districts and which opted for the secession, as well as the southern districts, were called to decide on which side they wanted to join. Eight municipalities opted to join the future canton, the

others decided to remain with the Canton of Bern. Finally, after this fourth referendum, the borders of the new canton were fixed and established. Three districts were for the separation from the canton and three decided to remain with the Canton of Bern. Then, in conformity with the procedure established by the Bernese cantonal constitution, the citizens of the Jura adopted a constituent assembly. This assembly adopted the constitution of the Canton of Jura in 1977 and, during a referendum held in the same year, the citizens of the Canton of Jura accepted the new constitution. So far, only the procedure at the cantonal level was involved.

Subsequently, the procedure at the federal level was initiated. All cantonal constitutions in Switzerland must be approved by the federal parliament to check that they are in conformity with federal law and this was done in 1977. Then, one had to amend the Federal Constitution because there was a new canton which wanted to enter the confederation, so there was a need to amend Article 1 of the Federal Constitution, which gives a list of the cantons as well as Article 80, which determines the number of deputies in the senate, thus two deputies has to be added to the senate. During this last referendum, held in 1978, the majority of the people and the cantons accepted the creation of the new canton. The new canton elected its own parliament and the cantonal government, and exists officially since 1 January 1979.

c) Underlying principles of minority protection

The creation of this new canton has respected two principles and in this respect the model may be exported abroad. The first respected principle was democracy. This unfolded through a series of referendums, the first of which was the most important because if the Canton of Bern had said ‘no’ at the beginning, the whole procedure would have been stopped. At that time, there was a discussion whether the process should start at the federal level or at the cantonal level of the Canton of Bern. To start at the cantonal level turned out to be a wise decision, because the Bernese population had a very progressive attitude in the sense that they accepted the eventuality of losing part of their territory.

The second respected principle was the principle of federalism because the people and the cantons accepted a newcomer, a new canton. What is interesting is that the whole operation lasted less than ten years. It started in 1970

and ended in 1978; in light of the fact that the procedure was not written down in the older constitution then in force but was designed for the creation of the Canton of Jura,⁴² this is a surprisingly short period of time. As a result, we now have a new canton consisting of a former minority within another canton.

In Switzerland, the key to the solution of the problem of minorities rests primarily on the fact that Switzerland is more of a political entity than a cultural one. This is apparent if we make a comparison with other countries, for instance, Bosnia-Herzegovina where the entities are mainly cultural. And Switzerland rests upon common political values such as federalism, direct democracy and rule of law, and minority groups will be respected as long as they do not challenge these values. When, contrary to what happened in Switzerland, a state defines itself not through common political values but primarily through its linguistic, cultural or ethnic characteristics, like in Bosnia for instance, minorities will encounter more difficulties in being accepted. The second factor contributing to the success story of Switzerland is that Switzerland is made up of political entities, the cantons, which already existed before the creation of the federal state. The cantons are also political entities which cannot always be defined either in relation to their linguistic or religious characteristics as mentioned before. In fact, four cantons are bilingual and one, the Grisons, is even trilingual. So the main reason why the Swiss federalism worked and was a success is not only because of its institutions, but also because of its long tradition of respect for others, the respect of minorities, that is, to view minorities as enrichment for the society, more so than something which disturbs the majority.

III. Outlook: A Principled Approach

From the discussion of the cases above one thing became clear: it is unrealistic to expect readymade solutions in international law for all kinds of minority-majority conflicts. Instead, what international law can provide are principled guidelines and a general legal framework for viable and dynamic

⁴² In the new Federal Constitution of 18 April 1999, the procedure has been written down in article 53, para. 2.

solutions. Furthermore, it has been shown that for reconciliation, the willingness to participate in interethnic cooperation of the concerned people is a prerequisite. This prerequisite existed in the case of the Jura, whereas in the case of South Tyrol it grew over time and led to a viable and flexible solution. But, as the case of Kosovo shows, where national sovereignty is contested, this willingness is often lacking and thus solutions are difficult to find.⁴³ So, to use the proverb “you can lead a horse to water, but you can’t make it drink”: is the problem in these cases that the horse is not willing to drink? Of course, such proverbs can never fully explain a situation, but they can help to visualise some of the difficulties connected with an approach.

To start with, is minority protection for a state like water for a horse? At the least, this is doubtful. After all, water is thought to exist and to be drinkable without requiring any purification measures, as tacitly assumed in the proverb. Instead, minority protection can vary considerably and needs to be carefully adapted to the needs of the different communities of a state. As such, it seems to be more of a medicine than just ordinary water.

Additionally, are states generally to be thought of as in need of water/medicine? This is also open to discussion. Indeed, if, as examined above, the willingness to participate in interethnic cooperation is considered crucial, should the horse’s willingness not be at the centre of any useful approach instead of merely showing where the water is? As practice shows, states seem more and more willing to even accept the secession of part of a state if the willingness to protect minority groups will grow in the new entity and high minority protection provisions are being incorporated.

However, here we arrive at an even more crucial point: is it in any way appropriate to discuss political entities as presumably thirsty horses? To put it another way, who should decide on such issues as the distribution of political power among societal groups or on state structures? What is the role of the international community, and what role should international law play thereby? What are the main reasons on which to decide this? The catalogue of

⁴³ Think of e.g. the Serb minority in Kosovo, see LANTSCHNER EMMA, Protection of Minority Communities in Kosovo: Legally Ahead of European Standards – Practically Still a Long Way to Go, 33 *Review of Central and East European Law* (2008), 295 ff.

questions could be enlarged extensively and most of the questions cannot be answered exhaustively. What can be said is that there are some basic legal principles also rooted in international law that provide guidelines for answers to such questions. As minority protection is not about constructing the ‘right’ solution, but mainly about an on-going process of finding solutions, such principles play an extraordinarily important role in this field. In the following, we will present legal principles which have proven important in the field of minority protection.

An important, though ambivalent, legal principle is that of self-determination of peoples.⁴⁴ This principle can be understood both in a democratic and in a nationalistic way. Coming back to the proverb again, the principle demands to not to look at the ‘self’ of ‘self-determination’ as a horse in need of leadership, but as an independent person, capable of reasonable problem-solving. However, it is a problem immanent to this right that the ‘self’ of ‘self-determination’ is not objectively defined and definable, but socially constructed. Such social constructs can be quite solid and largely undisputed; however, when disputed, they typically lack convincing objective arguments. As a result, self-determination disputes arise where groups agree on the application of this legal right, but disagree on who the ‘self’ is, the holder of this right.

As objective criteria and definitions will not solve such problems, more pragmatic approaches are needed to weigh diverging interests of societal groups. Typically, such approaches include the question of how power shall be distributed within the state and involves some kind of autonomy provisions. Autonomy is a very broad notion and includes its personal, cultural, functional, administrative, or legislative dimensions⁴⁵ and is closely interrelated with federalism, which typically includes a combination of functional, administrative, and legislative autonomies. What matters is not so much the terminology, but the fact that power, being allocated in a decentralised manner, has proved in different historical examples to be useful to minimize

⁴⁴ For a general discussion, see also BISAZ CORSIN, *The Concept of Group Rights in International Law: Groups as Contested Right-Holders, Subjects and Legal Persons*, Leiden/Boston 2012, 45 ff., 182 ff.

⁴⁵ This typology is based on TKACIK MICHAEL, *Characteristics of Forms of Autonomy*, 15 *International Journal on Minority and Group Rights* (2008), 369 ff.

tensions between societal groups which feel distant from the centre and excluded from the political life of their state of residence. This is not surprising because, forced assimilation excluded, groups demanding some autonomy will probably become more of a problem as long as the state is withholding it. South Tyrol is one such example as discussed above and which shows how a minority can become a majority within a smaller administrative and legal entity, having the power to decide on certain issues which are of importance to it. As such, the minority is able to leave the status as a persisting minority and participate in the administration of the state as a constituting partner of it. Yet such inclusion is not always possible. Sometimes, tensions and historical grievances are simply too strong. In other words, the willingness of the involved to participate in interethnic cooperation can be inexistent. Autonomy cannot substitute for such a minimal willingness of the involved.

The question of how to delimit territorially the entities to become autonomous is still open. Sometimes, traditional boundaries are generally acknowledged; for example, think of the Åland Islands or South Tyrol. In other situations, they are disputed and have to be determined anew, such as Bosnia and arguably also Kosovo where the belonging of the Northern municipalities might be challenged. The importance of existing boundaries has been emphasized by the international legal principle of *uti possidetis*, which is committed to the status quo and was also applied to former internal boundaries by the Badinter Commission in the dissolution case of Yugoslavia.⁴⁶ Although the stability of the international system might benefit from this principle, simple and clear as it is, it has rightly been criticized for, *inter alia*, not taking the functional differences of administrative boundaries and political boundaries into account, as well as having questionable normative value and not being a universally acknowledged legal principle.⁴⁷ If democracy is in fact a value, the stability argument is not a weighty one in favour of existing

⁴⁶ For a critical analysis of the Arbitration Commission's Opinions in this regard, see HANNUM HURST, *Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?*, 3 *Transnational Law and Contemporary Problems* (1993), 57 ff.

⁴⁷ E.g. RATNER STEVEN R., *Ethnic Conflict and Territorial Claims: Where Do We Draw a Line?*, in: WIPPMAN DAVID (ed.), *International Law and Ethnic Conflict*, Ithaca NY 1998, 112 ff.

boundaries; instead, the will of the affected should be taken into account. A classical criticism of this point is again that it is open for anyone to decide who is affected and thus who should decide. That this problem is solvable in practice has been demonstrated by the Jura case where several referendums established the new entities with its new boundaries; no abstract definition of the ‘self’ in ‘self-determination’ was needed. With regard to the allocation of powers, there is again another principle to be mentioned here: the principle of subsidiarity.⁴⁸ Simply put, subsidiarity demands that power is allocated at the lowest reasonable level best serving the individual.⁴⁹ Living up to this principle would automatically mean all kinds of autonomies as it does not seem convincing to argue that the national level is the according lowest reasonable level to allocate power with regard to all issues. In consequence, the principle is pluralist and as such opposed to the nationalist logic. Indeed, the subsidiarity principle would arguably demand that many cultural, linguistic and religious issues be delegated to the individual level or at least to the municipal or regional level. In many regards, this was the case in Switzerland with the consequence that these issues play a marginal role on the national level and are generally depoliticized. The ‘self’ of ‘self-determination’ according to this principle becomes relative: it is functionally differentiated as connected to the respective issue at stake and as such multi-layered.

With regard to secession, only a few remarks shall be made. To start with, secession is first and foremost a factual rather than a legal phenomenon. Again, international law does not include a right to secession; however, there is a tendency among international law scholars to view gross and systematic human rights violations against the population of part of a state as excep-

⁴⁸ Originally derived from Church law, it has recently gained a lot of importance especially in the European Union, see e.g. CAROZZA PAOLO G., *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 *American Journal of International Law* (2003), 38 ff. However, many federalists and democrats have taken positions which could be seen as based on this principle and the history of Switzerland could also be read as an example for an old and on-going application of this principle.

⁴⁹ Cf. also HÖFFE OTFRIED, *Subsidiarität als Gesellschafts- und Staatsprinzip*, 3 *Swiss Political Science Review* (1997), 4 ff., 12; and GOSEPATH STEFAN, *The Principle of Subsidiarity*, in: FØLLESDAL ANDREAS/POGGE THOMAS (eds.), *Real World Justice: Grounds, Principles, Human Rights, and Social Institutions*, Dordrecht 2005, 157 ff.

tional circumstances which may justify a ‘remedial secession’. This seems reasonable to some extent as it cannot be demanded from a victim group to accept the political lead by their perpetrators. However, there are many drawbacks of such a right. Protecting minorities by decentralizing power as much as possible, so that independence would not substantially advance the position of an entity, combined with economic interdependence may be a recipe for the prevention of such developments.

In conclusion, international law has developed and is still developing principles which are at the centre of any approach to manage diversity within states, while many states have developed sophisticated and ‘living’ legal approaches to tackle minority issues on an ad hoc-basis. Thus, minority protection is a very broad and on-going project which takes place at different levels, of which the international is only a small one; it includes legal provisions but is by far not limited to law only. It is also important to note that the principles presented here all presuppose a willingness to cooperate by all involved parties.

International Standards and New Challenges for the Protection of Minority Rights – A few proposals on the example of language rights

Francesco Palermo

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I. Introduction

Language rights are perhaps the most articulated category of minority rights. They can pose extraordinary practical and theoretical difficulties and show more than other rights the contradictions and the challenges faced in the development of international minority rights¹.

The aim of this paper is to reflect upon the major present and future challenges for international minority rights as well as on the role of the international community in this regard. To do so, this study first summarizes the quick developments of the 1990ies (part II.), then it focuses on the profound changes occurred during the past decade, as well as on the practical problems associated with them (part III.). Finally, it looks at current and future challenges for international organizations and law dealing with minority rights and protection, critically highlighting what should and could be done (part IV.), using language rights as examples, where relevant.

It is argued that the decrease of influence by international actors on minority protection especially in Europe is due on one hand to natural developments and to some extent to the own success of international instruments. On the other hand, however, such a reduction of influence is depending on an obso-

¹ This is exemplified by the fact that all relevant international standard-setting bodies have extensively dealt with language rights of persons belonging to minorities. It is not by chance that one of the first and most relevant instruments is the Council of Europe's European Charter for Regional or Minority Languages, adopted in 1992 and also the most recent thematic commentary of the Advisory Committee of the Framework Convention ("The Language Rights of Persons Belonging to National Minorities under the Framework Convention", adopted in May 2012) deals with language rights. Among other documents, special relevance in this field have the Oslo Recommendations regarding the Linguistic Rights of National Minorities, published by the OSCE High Commissioner on National Minorities in 1998, as well as the linguistic dimension of his other recommendations such as The Hague Recommendations Regarding the Education Rights of National Minorities (1996). At UN level, the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (1992), as well as the Commentary of the Working Group on Minorities to the Declaration (2005), the Declaration on the Rights of Indigenous Peoples (2007) and relevant recommendations from the UN Minority Forum, in particular related to education and participation are of particular importance.

lete approach to some key issues, such as integration, territorial autonomy and overall to the very concept of minorities underpinned in most documents, which leads to some degree of marginalization of the contribution offered by the international community and to a potentially excessive margin of discretion in the hands of States. Some modest proposals will be advanced, both at the theoretical and at the practical level.

The point of departure is the observation of the developments in this field over the past two decades, when international law on minorities has witnessed extraordinary changes and developments. It has rapidly evolved from a domain nearly insignificant to this matter into an extremely powerful conditionality tool in the course of just a few years, from the early 1990ies onwards. Then, it has gradually stabilized, working towards deepening the standards and making them more effective. Finally, in more recent times, an overall fatigue seems to be emerging, and a sort of step back is to be noticed, linked to the difficulties in implementation of some of the standards and to the emergence of more pressing issues on the international scene. If this analysis is correct, it is essential to provide some answers as to the possible way forward.

II. The 1990ies: internationalization of constitutional law and constitutionalization of international law of minorities

After 1989, ethnic conflicts have erupted throughout the former Communist bloc and elsewhere. The international community not only was taken by surprise when these quick developments occurred, but it realized that it lacked effective instruments to deal with collective claims of groups. The almost exclusive attention to individual rights paid since the end of the Second World War in the international arena, which proved successful under the cold war regime, failed in addressing the ethnic turmoil followed the end of that regime, asking for the recognition of the collective dimension of minority rights. The mass violations of human and minority rights and even more the immediate threats for State security and integrity associated with the post-1989 revolutions pushed the international community to work quickly towards new and more effective instruments aimed at balancing the individ-

ual human rights dimension with rights of minorities and groups bearing therefore an (albeit indirect) collective dimension.

The UN set up a permanent Working Group on minorities within the Sub-Commission on the Promotion and the Protection of Human Rights (1992)², and the General Assembly adopted in 1992 a landmark Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities³. In 1993, the General Assembly created the post of the High Commissioner on Human Rights, and in 2005 the then Commission on Human Rights (subsequently replaced by the Human Rights Council, within which in 2008 a Forum on Minority Issues was established)⁴ tasked the High Commissioner to appoint an Independent Expert on minority issues⁵.

In Europe, first action was taken by the then Conference on Security and Cooperation in Europe (CSCE, since 1994 Organization for Security and Cooperation in Europe, OSCE), due to its prevailing security mandate. In particular, the CSCE adopted in 1990 the Charter of Paris for a new Europe, a politically extremely significant document issued just in the aftermath of the 1989 revolutions, which placed the minority issue within the framework of both the human rights but also of the security debate. In 1991, the CSCE Group of Experts on National Minorities in its Geneva document stated that “issues concerning national minorities, as well as compliance with international obligations and commitments concerning the rights of persons belonging to them, are matters of legitimate international concern and consequently do not constitute exclusively an internal affair of the respective State”⁶. Above all, in 1992 the High Commissioner on National Minorities (HCNM) was established and tasked to monitor legal and political developments in

² Report of the working group: A/HRC/Sub.1/58/19.

³ Resolution no. 47/135, 18 December 1992.

⁴ Human Rights Council resolution no. 6/15 of 28 September 2007.

⁵ Resolution 2005/79.

⁶ Report of the CSCE Meeting of Experts on National Minorities, Sec. II, para. 3. Text in OSCE, Council of Europe, National Minority Standards. A Compilation of OSCE and Council of Europe Texts, Council of Europe Publishing, Strasbourg, 2007, 18 ff.

participating States and to intervene diplomatically in order to prevent minority-related conflicts in the OSCE area⁷.

Parallel to the action taken by the OSCE, the Council of Europe also developed important tools aimed at addressing minority issues in particular⁸. The first of these tools, while not directly protecting the rights of minorities but rather their cultural heritage, was the European Charter for Regional or Minority Languages (1992)⁹. The second, the Framework Convention for the Protection of National Minorities (1995), is to date the only multilateral treaty worldwide specifically devoted to the rights of persons belonging to minorities¹⁰. An important role has been played also by the Council of Europe's Commission for Democracy through Law (so called Venice Commission), an advisory body on constitutional issues which assists in particular the processes of transition and democratization, producing studies and opinions on various aspects of legislation including very often on minority (or minority-related) issues. Also the Central European Initiative's (CEI) Instrument for the Protection of Minority Rights (1994) is worth mentioning as an important regional soft-law tool which was indicative of the importance of minority issues on the European agenda in the 1990ies.

Finally, while on a later stage, also the European Union has played a role in developing the law on minorities. In fact, the EU included respect for and protection of minorities in the political criteria for accession as of 1993 (so called Copenhagen criteria)¹¹, which created an enormous pressure on acced-

⁷ On the mandate of the HCNM see KEMP W., *Quiet Diplomacy in Action*. The OSCE High Commissioner on National Minorities, Kluwer Law International, The Hague 2001.

⁸ The European Convention on Human Rights does not contain specific provisions on minorities. In 2000, the Protocol no. 12 to the Convention was adopted (it is however not yet in force), where the belonging to a national minority is listed as an explicitly prohibited factor of discrimination.

⁹ See WOEHLING J.-M., *The European Charter for Regional or Minority Languages*. A critical commentary, Strasbourg, Council of Europe Publishing 2006.

¹⁰ See below.

¹¹ See TOGGENBURG G., *Minority Protection and the enlarged European Union: the way forward*, OSI, Budapest, 2004. For a critical appraisal, defining the EU approach towards minorities "a product for export", see DE WITTE B., *Politics vs. Law*

ing countries and was key in pushing for the adoption of generous domestic laws in such countries¹². Moreover, as of the Amsterdam Treaty (1997), the EU provides for a general legal base against discrimination including on race, ethnic origin and religion¹³. The Charter of Fundamental Rights of the EU¹⁴ provides for a long list of non-discrimination factors (including colour of the skin, ethnic or social origin, language, religion, belonging to a national minority, article 21) and obliges the Union to “respect cultural, religious and linguistic diversity” (article 22). Finally, the Lisbon Treaty declared in article 2 TEU the “respect for human rights, including the rights of persons belonging to minorities”, as one of the values on which the Union is based. An important role has been played also by the Court of Justice of the European Union, especially in determining that domestic measures protecting national minorities are to be considered a legitimate aim and as such do not necessarily conflict with the enjoyment of the traditional EU freedoms¹⁵.

In short, especially during the 1990ies, international law has acknowledged that minority rights are an issue of international concern and do not fall exclusively in the domain of the States. Against this background, it has produced a tremendous amount of (soft and hard) law aimed at directly or indirectly protecting minority rights, and by this means preserving States’ security¹⁶. The effect of these developments produced a phenomenon which

in the EU’s Approach to Ethnic Minorities, EUI working paper/Robert Schumann Center 2000, no. 4.

¹² See inter alia PINELLI C., Conditionality and Enlargement in Light of EU Constitutional Developments, *European Law Journal*, vol. 10, no. 3, 2004, 354 ff.

¹³ This prohibition is now contained in article 19 TFEU and is implemented by directive no. 43/2000.

¹⁴ Adopted in 2000, it has become integral part of primary EU law with the entry into force of the Lisbon Treaty in 2009 (article 6 TEU).

¹⁵ PALERMO F., The Use of Minority Languages: Recent Developments in EC Law and Judgments of the ECJ, in: *Maastricht Journal of European and Comparative Law*, 2001, vol. 8, n. 3, 299 ff. See in particular the cases *Mutsch* (1984), *Groener* (1988), *Bickel and Franz* (1998), *Angonese* (2000) and *Kamberaj* (2012).

¹⁶ On the link between minority issues and security see, with critical accents, ROE P., *Securitization and Minority Rights: Conditions of Desecuritization*, *Security Dialogue*, vol. 35, no. 3, 2004, 279 ff. and KYMLICKA W., *Multicultural Odysseys: Navigating the New International Politics of Diversity*, Oxford Univ. Press, Oxford 2007.

can be defined the internationalization of constitutional law and constitutionalization of international law, especially with regard to minority issues¹⁷. In fact, on the one hand, international law has developed a body of law which, while not entirely prescriptive and very rarely justiceable¹⁸, has become specific, legally or politically binding and is monitored by several bodies including some quasi-judicial ones such as the committees of experts under the FCNM and the ECRML¹⁹. On the other hand, the increasingly binding nature of international law has had an enormous influence on constitutional transitions and constitutional developments in various countries, deeply conditioning the constitutional choices with regard to the protection of minority rights²⁰.

This interplay between internationalization of constitutions and constitutionalization of international norms, combined with the link between minority protection and security, the political and financial assistance for minority protection and the unique political climate in the 1990ies, proved very effective in order to overcome the emergency phase and to quickly develop an impressive body of international and domestic law on the protection of minority rights.

¹⁷ PALERMO F., The Protection of Minorities in International Law. Recent Developments and Trends, in: *Les minorités: un défi pour les États. Actes du colloque international (22 et 23 mai 2011)*, Bruxelles, Académie Royale de Belgique 2012, 165-185.

¹⁸ Important achievements have been reached however by some international courts in developing a consistent body of jurisprudence on relevant minority issues. This goes above all for the European Court of Human Rights. See inter alia GILBERT G., *The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights*, *Human Rights Quarterly*, Vol. 24, No. 3, August 2002, 736-780.

¹⁹ The activity of these bodies has effectively been labeled as “soft jurisprudence” by PACKER J., *Situating the Framework Convention in a Wider Context: Achievements and Challenges*, in: *Filling the Frame. Five years of monitoring the Framework Convention for the Protection of National Minorities*, Council of Europe Publishing, Strasbourg 2004, 45.

²⁰ See MAZIAU N., *Les Constitutions internationalisées. Aspects théoriques et essai de typologie*, <http://www.unisi.it/ricersa/dip/dir_eco/COMPARATTO/maziau.doc>.

III. The new millennium: from emergency to consolidation

The success of the measures taken during the 1990ies by the international community brought (overall) peace throughout the wider European continent. But in some way, in the subsequent era of consolidation, the international instruments fell victims of their own success: after proving effective in order to stop violence and to improve the international and domestic legal guarantees for minority rights to an extraordinary degree, they showed less effectiveness in coping with the more subtle challenges of effective implementation of minority rights.

This was primarily due to changed external circumstances. One should consider, in particular, the overall and quick re-emergence of the role of the States on the international and European scene. This phenomenon was linked to factors such as the terrorist threat after the attacks of September 11th, 2001 and the subsequent bombings in Europe and elsewhere, as well as, more recently, to the global financial crisis. The so labelled “war on terror” not only channelled the security issue back in the hands of States, but it also created a much less favourable environment for minority groups, seen as potentially disloyal groups and thus as a permanent potential threat for national security. Moreover, it shifted the overall attention from autochthonous national minorities to the new security priorities, including in particular the “new” minorities with immigration background and religious diversity. Thus, overall the States became much less inclined to leave a broad leverage to international organizations in dealing with minority issues. Moreover, also the recent financial crisis shifted a considerable amount of power back in the hands of the States, which have been the only actors capable to invest enormous amounts of money to bail out banks and financial institutions and on which the international organizations ultimately depend. As a consequence, minorities were negatively affected in a twofold way: on the one hand, because economic crises always hit in first place the most vulnerable segments of the population, among which often persons belonging to minorities²¹; on the other hand, because the growth of public deficits and the following dra-

²¹ For some data see <<http://www.eurofound.europa.eu/ewco/2011/04/BG1104011I.htm>>.

matic cuts in public expenditure severely involved also the funds dedicated to effectively implement minority rights²².

1. States are Back, Back to States

The combined outcome of these phenomena between 2000 and 2010 was the emergence of a new “statism”, which considerably reduced the role of the international community in this field, brought the minority issue primarily back into the domestic arena, limited the impact of conditionality and overall put the minority question much lower on the priority scale of both States and international community as compared to the previous decade.

At the level of the EU, the enlargements of 2004 and 2007 brought a large number of new minority issues into the Union (and so will next prospected enlargements do, starting with the accession of Croatia in 2013). Nearly all new Member States have been subject to strong European conditionality on the treatment of their minorities prior to their membership in the EU. After their accession, and due to the fact that EU minority policy is still largely a “product for export”²³, the leverage of the Union in conditioning the treatment of minorities in these States has dramatically decreased. Countries that have been admitted to the European Union after a long and hard negotiation (especially on minorities) somehow felt that they had “passed the exam”, including and especially on the treatment of minorities, and became much less responsive to European pressure in this regard²⁴. As a consequence, many of the countries that had adopted progressive and far-reaching legisla-

²² In no European country funds earmarked for minority protection have been increased since 2007 and in most of them they have been reduced.

²³ DE WITTE B., *Politics vs. Law* (FN 11).

²⁴ The most recent case of Croatia shows that such an effect can take place even before the accession is complete. Notwithstanding some not resolved issues such as the full implementation of the Croatian constitutional law on the rights of persons belonging to national minorities (2002), especially with regard to its art. 22 on “equitable representation” of minorities in all sectors of the administration, as acknowledged by the Commission in the last accession reports, the chapter has been closed and the accession treaty signed. This seems to be due to the combined effect of the states’ feeling to “have passed the exam” and of the EU not placing minority issues at the heart of accession criteria (anymore).

tion on minorities during the 1990ies, inaugurated much less generous policies in this field after becoming full members of the EU, especially by not implementing or mis-implementing the international and constitutional standards on minority protection. In some case this was coupled with the rise of nationalistic political movements, which strongly influenced the political agendas in their respective countries.

At the level of the OSCE, the security dimension of minority rights lost much of its appeal in the course of the first decade of the new millennium. Apart from a few (albeit not irrelevant) violent episodes in Macedonia, Kosovo, Georgia, Kyrgyzstan and a few other places (including the outskirts of some major Western European city that witnessed clashes between “locals” and second and third generation migrants as well as Roma), stability was undoubtedly achieved in the European continent and the link between minority protection and national security became less of an issue. Furthermore, the re-emergence of (nation-)State sovereignty on the international scene led to a new and opposite form of “securitization” of minority rights²⁵: accordingly, minorities are increasingly seen as a threat to the territorial integrity of the State and are often associated with terrorism. One can say that in some way States have inverted the burden of proof: in the new perspective, no longer must the State prove to comply with its obligations with regard to minorities, but minorities must prove their loyalty vis-à-vis the State. Several examples of this can be found in recent legislation, such as the recent State language laws adopted in countries like Slovakia and Tajikistan, or in the 2011 Hungarian constitution. An overall mild reaction by the international actors has not discouraged such an approach by the States, sometimes favouring the

²⁵ KYMLICKA W., *Multicultural odysseys: navigating the new international politics of diversity*, Oxford 2007, 182 ff., and P. ROE, *Securitization and Minority Rights: Conditions of Desecuritization*, in *Security Dialogue*, vol. 35 no. 3 (2004), 279-294. These authors refer in particular to examples of the 1990ies, arguing that violent minorities have been rewarded more than those that have been more open to negotiation. This phenomenon, to the extent it holds (see for a critical argument SABANADZE N./DE GRAAF V., *Are Some States and Minorities More Equal than Others? Double Standards and the Work of the OSCE High Commissioner on National Minorities*, in: HENRARD K. (ed.), *Double Standards Pertaining to Minority Protection*, Leiden/Boston 2010, 117-144) continued also in the 2000s.

more vocal and in some occasion even violent minorities at the detriment of the law-abiding ones²⁶.

At the level of the standard-setting body, the Council of Europe, the new role of the States had a strong and overall negative impact on the effectiveness of the to date still most relevant international norms on minority protection: in the last seven years no new country ratified the Framework Convention²⁷, very few the European Charter for Regional or Minority Languages²⁸ and it seems unlikely that new ratifications will come in the near future. The link between new statism and reluctance in accepting international monitoring on minority issues is exemplified by Russia, which at the time of joining the Council of Europe in the 1990ies committed to ratify both instruments, reluctantly ratified the Framework Convention in 1998, signed the Charter in 2001 and so far refused to ratify it. As a consequence to this approach, the monitoring bodies under both the Charter and the Framework Convention find themselves in the difficult situation of highlighting deficits and shortcomings in the implementation of the respective treaty for the third time in a row²⁹, without having at their disposal instruments to enforce effective measures to address the most problematic situations.

²⁶ KYMLICKA W., Rights to Culture, Autonomy and Participation: The Evolving Basis of International Norms of Minority Rights, in: MCGARRY J./KEATING M. (eds.), Nations, Minorities and European Integration, Routledge, London 2006, 35-63.

²⁷ The last ratification of the Framework Convention so far was the one by Georgia in 2005.

²⁸ Bosnia and Herzegovina ratified the Charter in 2010, due to strong international pressure. Poland ratified it in 2009 after completing a rather uncontroversial but yet technically complex process (signature was done in 2003). Italy announced ratification of the Charter in March 2012, although as “a mere formal reception of its contents”, since the country considers to have implemented its obligations adopting a national minority law in 1999. Many countries never signed the Charter and so far only 25 have ratified it. Even more interestingly, 8 countries have signed it during the 1990ies up to 2001 but not yet ratified it.

²⁹ Both the Framework Convention and the Charter are currently undergoing their third monitoring cycle.

2. Monitoring fatigue. What's next?

Parallel to this phenomenon, a sort of “monitoring fatigue” is to be noticed. Not only times have changed in international relations since the 1990ies, but effective implementation of minority rights proved more complex and difficult than drafting valuable legislation: some structural problems have not been resolved, States do not put the necessary effort in implementing minority rights³⁰, funds are cut and full and effective implementation of minority rights becomes more difficult rather than easier.

The awareness of such a drop in terms of effectiveness of the international instruments has called for some changes in approach. However such changes, while commendable, are for the time being still quite limited and not capable to counter the phenomenon.

One of the valuable new approaches taken by most international actors has been the widening and deepening of the standard-setting activity. While standard setting has naturally slowed down after the turbulence of the 1990ies, the more recent standards take a more sophisticated approach as compared to the older ones. Being the challenge no longer just producing minority rights but implementing them and effectively balancing them against other rights and changed societies, the new attitude to some extent looks not only at the mere dimension of the rights of (persons belonging to) minorities but also at their obligations, and a more nuanced approach to complex issues is to be noticed, especially by looking at the society as a whole instead of at minorities only.

As to the more inclusive elaboration of the standards, examples can be found, *inter alia*, in the more participatory procedure for drafting authoritative commentaries on international standards by the very international organizations involved, sharing the drafts with civil society organizations, academics and other stakeholders, thus improving not only the quality but even more the overall acceptance of such documents by those who are most di-

³⁰ For an example in the field of minority representation in administration and judiciary in a comparative perspective see PALERMO F., *At the Heart of Participation and of its Dilemmas. Minorities in the executive structures*, in: WELLER M. (ed.), *Political Participation of Minorities. A Commentary of International Standards and Practice*, Oxford 2010, 434-452.

rectly targeted by them³¹. With regard to a more balanced attention to rights and duties of minorities and to the overall balance of society as a whole, one may think of some of the most recent documents underlining that, while in principle international law clearly provides for rights for minorities and respective duties for States, the protection and safeguard of other fundamental principles such as social cohesion, good neighbourly relations, effective integration and participation in societies require that minority protection be a two-way process, in which both minorities and majorities have rights and duties³².

³¹ See for instance the UN Recommendations drafted within the framework of the Forum on Minority Issues on “Minorities and the Right to Effective Political Participation” (2009) as well as on “Minorities and the Right to Education” (2008). See KLÍMOVÁ-ALEXANDER I., *Effective Participation of Minorities*. United Nations standards and practice, in: WELLER M., *Political Participation of Minorities* (FN 30), 286-307. Other extremely relevant examples are the Second and the Third Thematic Commentaries of the Advisory Committee on the Framework Convention for the Protection of National Minorities on, respectively, “The Effective Participation of Persons Belonging to National Minorities in Cultural, Social and economic Life and in Public Affairs” (2008) (on which see PALERMO F., *The Dual Meaning of Participation: The Advisory Committee’s Commentary to Article 15 of the FCNM*, *European Yearbook of Minority Issues*, vol. 7 [2008], Leiden/Boston 2010, 409-424) and “The Language Rights of Persons Belonging to National Minorities under the Framework Convention” (2012). On the overall link between civil society and the work of international organizations as well as the development of international minority law see the special issue of the *International Journal of Minority and Group Rights*, vol. 18, no. 2 (2011).

³² While these elements have clearly been present including in the documents dating back to the 1990ies (one may think of the rather disappointing provision of article 21 of the Framework Convention, which highlights in the context of minorities a principle that would have been considered as implicit with regard to majorities: that “nothing in the present Framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States”), the more recent standards reflect a more balanced approach. One may think of the OSCE High Commissioner on National Minorities’, *Bolzano/Bozen Recommendations on “National Minorities in Inter-State Relations”* (2008), where on the one hand the aspect of integration of societies comes to the fore (see Recommendation no. 7: “Integration can only be achieved if persons belonging to national minorities, in turn, participate in all aspects of public life and respect the rules and regulations of the country they reside in”) and on the other hand the limits of States’ action with regard to support kin-

These commendable efforts are however not sufficient to tackle the overall decrease in effectiveness and persuasive power the international organizations and their law (hard and soft) have been facing over the last decade.

IV. How to tackle future challenges? Analysis and proposals

Against this background, it remains to look at what could be expected with regard to the influence of international minority law and to its possible developments in the near future, taking into account the changed reality as compared to the 1990ies but also challenging some of the traditional conceptual deficits of the international approach.

1. What are Minority Rights? Sterile vs. Useful Debates. From the Individual-Collective Cleavage to Tackling the Homogeneity Paradigm

As it is well known, the advancement of international minority rights in the 1990ies was possible due to a somewhat hypocritical but yet quite successful compromise. Minority rights were recognized and developed as individual rights, although their exercise is in most cases only possible “in community with others”³³. One may think of language rights: they are and cannot but be individual rights (groups do not speak), but speaking a language only makes sense if a group of people understands it and can interact in such language.

The tension between most states’ obsession against collective rights (whose negation in the pre-1989 era has been one of the reasons why the minority issue erupted in dramatic conflicts) on the one hand, and the inevitably collective dimension of minority rights on the other, has negatively affected international documents. Such documents still suffer from a largely artificial

minorities abroad are analyzed in the perspective of multilateral security. See further PALERMO F./SABANADZE N. (eds.), *National Minorities in Inter-State Relations*, Leiden/Boston 2011. Even more decidedly such approach is followed in the HCNM Ljubljana Guidelines on Integration of Multiethnic Societies (2012).

³³ See article 3.2. FCNM. One may think of language.

and sterile (scholarly but also political) debate between minority rights as individual or collective rights, decidedly taking the side of so called liberals and rejecting the recognition of collective rights. As a consequence, the most relevant international documents take a clear individual rights-based approach and tend to undermine the necessarily collective aspects of minority right thus somewhat impeding that the documents be as wide-encompassing as they should be³⁴. In fact, as Spiliopoulou Åckermark correctly points out, this supposed conflict is based on the undemonstrated assumption that collective rights would necessarily prevail over individual rights: “the existence of conflicts calls for a balancing of the underlying interests. If one accepts the recognition of collective rights, this does not imply automatically that those rights should always be given priority”³⁵. For instance, individual rights like the right to freely choose the language must prevail even when collective rights such as the protection of the State language are provided³⁶.

A more balanced approach towards the collective dimension of some minority rights, while difficult to achieve due to the conservative attitude of most States on this issue, would certainly help increase the overall effectiveness of international minority-rights documents.

The disproportionate attention paid to the largely artificial (and overly politicized) individual-collective dilemma diverted the focus from a much more pressing and complex issue, which did not receive sufficient consideration at the time when the most relevant documents were drafted.

In fact, the international protection of minority rights is still drafted based on the oversimplified archetype of homogeneous groups that sometimes clash with other homogeneous groups, trying to look for solutions on how to ac-

³⁴ This is true especially for UN, Council of Europe and OSCE documents and is linked to the traditional conceptual and terminological approach of minority rights as human rights. The constitutional terminology of rights seems in this case to be more suitable to deal with this issue, usually referring to fundamental rights. *Fundamental* rights can more easily be those of specific social groups such as minorities than *human* rights, that are conceptually linked to rights of the individuals.

³⁵ SPILIOPOULOU ÅCKERMARK A., *Justification of Minority Protection in International Law*, London/The Hague/Boston 1996, 44-45.

³⁶ See Venice Commission, *Opinion on the Act on the State Language of the Slovak Republic*, Oct. 2010 (n. 555/2009, CDL-AD (2010)-035).

commodate groups by granting rights to individuals. Based on this assumption, international minority law aims at accommodating majority and minority *homogeneous* groups. To belong to a minority, in the prevailing perspective, is a sort of all-encompassing issue, and the divide between belonging or not belonging to a minority is supposed to be always clear for each and every person. One could provocatively call this approach the Bosnian syndrome: in Bosnia, persons who have lived in a multiethnic environment, whose identity was predominantly multiethnic, suddenly became affiliated to one group. Similarly, instead of considering the multiethnic reality, the instruments assumed that belonging to a minority, while a matter of choice (art. 3.1. FCNM) is an easy and clear-cut issue: either does a person belong or not belong to a (national)³⁷ minority.

The problem is, however, that such homogeneity, if ever existed, is now far from mirroring the reality, and minorities of whatever kind are now much less homogeneous than ever in the past: diversities are increasingly present within each group and the factors for differentiation potentially countless. Migrants, people belonging to more than one culture, multilingualism, shifting identities, mobility: all these issues are not or at least not sufficiently dealt with by international minority law. Consequently, they are essentially covered by domestic legislation, usually based on contingent political priorities. In other words, ethnicity (at least in the traditional, monolithic and mono-dimensional sense) is no longer (if it ever was) the most relevant factor for personal identification and becomes (at least in Europe) less a divide for conflicts, while this is still the overall assumption of international documents.

Only if such complexity is fully acknowledged and taken into due account, significant steps forward can be expected in international minority law. This goes also for the so called objective criteria such as language. Linguistic identity might well be clearly defined, but for (many) others, especially for persons belonging no minorities, such identity might be shifting, complex, plural and nevertheless be one of the main factors of their identity and identi-

³⁷ Interestingly enough, the concept of “national” minority is not defined nor does anybody really know what a “national” minority is as compared to other minorities. But the belonging to a collectivity whose contours are not identifiable is supposed to be a non controversial issue.

fication. Language, like identity, is not static but evolves throughout a person's life. The full and effective guarantee of the right to use one's (minority) language(s) implies that instruments must allow free identification of persons through language, and abstain from constraining personal identities into rigid language categories³⁸.

2. Living Instruments?

A second dilemma has to do with natural evolution and changing circumstances. All international documents see themselves as "living instruments", which should be capable to adapt to new circumstances and have to be interpreted flexibly. What the interpretative flexibility and adaptation capacity cannot resolve, anyway, is the decreased influence of the very subject.

The reduction in influence for international minority law over the last decade is due primarily to the very success of the international instruments in resolving the minority-related conflicts they have been drafted to tackle, i.e. particularly the violent confrontation between national minorities and national majorities in the aftermath of the 1989 revolution, in Europe and elsewhere. This is overall good news if one considers that the ultimate aim of legal instruments is to resolve problems and not to perpetuate themselves. In other words, it would be wrong and cynic for the international community to regret the influence it gained on minority protection during the 1990ies, since this influence was due to bloody conflicts and troublesome transitions and not to a sudden openness by the States towards the role of the international community.

Most likely, this also means the end of the era of internationalization of constitutional law and constitutionalization of international law, at least in the magnitude experienced by the cross-fertilization between legal orders in the 1990ies and in the immediately following years. This is much worse news, since it could prove evidence of the fact that States rely to the international community only when they have a problem, but still do not consider international obligations as a structural element of their very existence. In other

³⁸ This is the language rightfully adopted by the Advisory Committee's Thematic Commentary on Language (2012), see in particular para. 13.

words, the exercise of State sovereignty at least to a significant degree through the international community is still considered to be the exception rather than the rule.

With specific regard to minority issues, a particularly telling example of the new trend is provided by the recent confrontation between Hungary and Slovakia over the amended Slovak State language law of 2009³⁹, which extended to a number of other “retaliation” measures, including the amendment to the law on citizenship in Hungary: beside any consideration in the merit, the whole issue testifies of a very limited openness by both States to regulate minority issues according to international standards rather than to contingent political priorities. At the same time, the decreasing effectiveness of international instruments in settling minority-related controversies and in fully implementing standards is testified by an increasing number of cases in which States went “their way” with regard to sensitive minority issues, basically disregarding the calls of the international community⁴⁰.

However, in spite of some structural deficits of the documents and some lack of courage by the international actors, the overwhelming reason for the decrease of influence of international minority law over the last decade has to do with external factors. The main explanation for such a shift towards re-internalization of minority issues is to be found in the fact that new challenges have meanwhile become much more significant and pressing to both the States and the international community than national minority issues. These challenges are represented – especially in Europe – in particular by immigration and more generally by the call for a more comprehensive approach to diversity as a whole. Such an approach is not yet to be found in the current international standards, nor seem the States be willing to let such standards develop.

³⁹ A thorough examination of the law and of its background is provided by the Venice Commission’s Opinion on the Act on the State Language of the Slovak Republic (2010, CDL-AD(2010)035): <[http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)035-e.asp](http://www.venice.coe.int/docs/2010/CDL-AD(2010)035-e.asp)>.

⁴⁰ Examples could be countless. For a valuable analysis of the impact of international norms on the treatment of minority issues and especially language rights in Russia and in Ukraine see ULASIUK I., *Europeanization of Language Rights in Russia and Ukraine*, LAP, Berlin 2010.

As a consequence, the question should be put to international instruments as to whether their being a living instrument allows them to effectively include new challenges (such as in particular migration) or whether formal amendments and normative strengthening is more desirable.

3. The challenge of Integration: overcoming “old” vs. “new”

Against this background, reflection is needed as to whether the current rigid separation in terms of instruments between “protection” (of the “old” minorities) and “integration” (of the “new” ones) is the best way of addressing the challenges both categories of minorities are facing. While nearly all European States are at present quite resolute in keeping the two camps rigidly divided, making it politically unlikely that such a reflection can seriously start within a reasonable time, it seems clear that such an approach is leading to the marginalization of the “old minority” issue and at the same time it is not resolving the pressing integration problem of “new minorities”. Thus, reconsideration of such an approach, based on the damages it may cause, can only be stimulated by the international organizations and more precisely by the international bureaucrats, who are not bound by political directives of the States. Such a deeper reflection does not entail a revolution in approach. More simply, it requires to acknowledge that, keeping in mind the different needs and claims of “old” and “new” minorities in general terms, on the one hand the legal instruments for protecting different identity, for enjoying cultural differences, for fostering effective participation are ultimately the same irrespective of the target groups⁴¹; on the other hand, it requires to admit that both “old” and “new” minorities are heterogeneous groups, whose needs are difficult to determine in abstract terms and impossible to establish based on a mere assumption by the majority. In other words, the wrong paradigm of homogeneity of groups should be overcome by acknowledging that differences exist within each group and these must be given the opportunity to be heard. This can only be done by granting more effective participation to the diverse voices and claims that exist within each group, including the majori-

⁴¹ For a deeper analysis see MEDDA-WINDISCHER R., *Old and New Minorities: Reconciling Diversity and Cohesion. A human rights model for minority integration*, Baden-Baden 2009.

ty. A thorough work on participatory and inclusive procedures is thus the key to let complexity emerge and be represented, and to subsequently better tailor policies of integration of society as a whole. On even more simple terms, some thorough reflection may start, for example, on the possible application of (some provisions of) the Framework Convention to migrant groups, beyond the commendable “article-by-article” doctrine of the Advisory Committee which however so far lacks methodological reflection.

Secondly, and consequently, international law cannot shy away from dealing with the so far rather foggy concept of integration. It follows from the above that this term could not be seen as merely regarding migrants, as it is intended in most countries. Rather, it should be theoretically constructed and practically implemented as a process involving the society as a whole, and all diversities within it, including the majority: thus not as integration of groups of people in the society, but as integration of the society as a whole, celebrating all its diversities and changing according to them. Concretely, this means for international minority law to deal intensively with issues involving the plural identities, such as language laws, population censuses, multilingual education, housing, access to labour market, working out standards that might be applicable to any sort of diversity. This implies a mentality shift from a mono-dimensional approach to identity as defined by only one factor (being it language, religion, “ethnicity”, migration background) to a more nuanced one, in which integration is not simply required by one group from another – and then often denied in practice.

4. The Territorial Question

Finally, the international community and the (hard and soft) law it produces should unavoidably engage more resolutely and with a modern approach on issues that are topical to the protection of minorities, and have so far been addressed either tangentially or superficially. A glaring example is the territorial issue. So far, international law has been reluctant to take up the territorial autonomy discourse and, although the “right” to autonomy for minorities

is being increasingly discussed in the literature⁴², too little attention has been dedicated so far by international actors to territorial autonomy as an instrument for effectively accommodating national minority issues. This has to do primarily with an excessive deference to political sensitiveness in several countries that superficially tend to associate autonomy with secession⁴³, but also, and even more wrongly, to a far too narrow attitude towards territorial autonomy in the minority-rights discourse, which is again the consequence of the mentioned “homogeneity syndrome”: autonomy is seen as something “for minorities”, which are to be given control over “their” territory.

This is understandable as long as the autonomy debate is still trapped within the nation-State discourse, trying to mitigate the deficits of minority-participation by replicating the nation-State on a smaller scale. Not unlike integration, autonomy is read in terms of one group accommodating another, and not as a tool of good governance. But good governance rather than self governance is in fact what autonomy in first place is about: it targets a territory as a whole and not only the dominant group within it. Autonomy was actually devised for this purpose and this function becomes even more relevant the more complex the society and thus the more complex the administration⁴⁴. In other words, autonomy is an instrument for the management of complexity. And as all countries are increasingly diverse and increasingly complex with respect to the governance functions to be performed, autono-

⁴² See HANNUM H., *The Right to Autonomy: Chimera or Solution?*, in: RUPESINGHE K./TISHKOV V.A. (eds.), *Ethnicity and Power in the Contemporary World* (United Nations University Press, Tokyo et al., 1996), available at <www.unu.edu/unupress/unupbooks/uu12ee/uu12ee00.htm>; SUKSI M., *Autonomy: Applications and Implications*, The Hague 1998, SKURBATY Z.A. (ed.), *Beyond a One-Dimensional State: An Emerging Right to Autonomy?*, Leiden/Boston 2005; BENEDIKTER T., *The World's Working Regional Autonomies. An Introduction and Comparative Analysis*, London/New York/Delhi 2007; LAPIDOTH R., *Autonomy. Flexible Solutions to Ethnic Conflicts*, Washington 1997. See also 15:2-3 *International Journal on Minority and Group Rights* (2008), almost entirely dedicated to autonomy issues.

⁴³ See WELHENGAMA G., *Minority Claims: From Autonomy to Secession. International law and State practice*, Ashgate/Aldershot et al. 2000.

⁴⁴ This is the main reason why the number of federal or quasi-federal countries has more than tripled in the course of the 20th century: at present the majority of the world's population lives under federal or quasi-federal rule: HUEGLIN T./FENNA A., *Comparative Federalism: A Systematic Inquiry*, Toronto 2006, 3.

my has benefits that go far beyond minority self-government or the protection of ethno-cultural differences. If a territory, irrespective of its ethnic composition, can autonomously decide on a number of issues (alone or in cooperation with other territories, belonging to the same or to a different country, sharing the same problems), it is likely that the decisions will be qualitatively better and the territory will develop more harmoniously with benefits extending to all communities settled there. Minority issues are embedded in larger contexts and cannot be disconnected from them. Thus, the more efficient overall governance is, the less likely it is that minority rights will be neglected and even less likely that minority issues will develop into conflicts. In fact, the bigger the problems are in terms of territorial, democratic and economic development, the more likely ethnic conflicts will be.

In sum, new and courageous thinking by the international community seems necessary to re-gain the central role for international actors. Such a role is all the more necessary especially in times when States are hostage of increasingly irrational fears. Moving from a black-and-white approach to identity factors, from homogeneity to multiculturalism, from protection to integration, from a dogmatic to a functional approach to territorial issues would help not only the international community re-gain its role, but also, and more importantly, minority issues to be properly addressed.

The Rigidity of Structures to Protect Minorities – Hidden Facets of the Strasbourg Court’s judgment in *Sejdić* and the Banjul Commission’s decision in *Endorois*

Thomas Burri

The European Court of Human Rights in Strasbourg and the African Commission on Human and Peoples’ Rights in Banjul recently decided cases that have far-reaching implications on the way minorities and other groups are to be protected and promoted. The Strasbourg Court in Sejdić and Finci ruled on the ethnical Proporz system established by the Dayton Agreement in Bosnia and Herzegovina. The Banjul Commission in Endorois decided on the eviction of the Endorois from their ancestral lands in Kenya. This article explores the implications of these two groundbreaking decisions. The article in particular discusses the two decisions under a broader aspect that underlies all approaches to group protection, but often goes unnoticed: the rigidity of structures to protect and promote minorities.

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On this long road man needs an iron-bound will,
A purpose clear that strengthens every hour,
A hand to help the weak o'er steepening hill
And heart to cheer the sad through darkening shower.
This is the bright road youth must climb with care
To gain the top and its good blessing share.

From the poem "The Bright Road" by JAMES STILL¹

I. Intro: of rigidity and networks

When one treads the "Bright Road" in a (post-) ethnic conflict situation, apart from "an iron-bound will", "a purpose clear", "a hand to help", and "a heart to cheer", an idea is needed for the direction the road is going to go and for the means to travel on it. One in particular needs to have an idea of what kind of structure is required to protect and promote minorities in a post-conflict society. How rigid should legal structures be that serve to protect minorities? Are rigorous quota necessary? Must political representation be guaranteed? Are a special territory and formal land entitlement required? Are separate schools needed? Such questions beg for answers in all post-ethnic conflict situations. The answers given to these questions determine the rigidity of a group protecting regime. Yet similar questions also call for answers whenever groups are distinguishable in any way (be it that they are national minorities, Roma, refugees, migrants, women, etc.). Rigidity is, in other words, a topic that underlies group protection and promotion in general. It plays a role in each of the variants of group protection.

There is obviously no gold standard of rigidity. The variety of international norms addressing different kinds of group protection is a testimony to this fact. Rigidity can neither be measured in absolute terms nor is it a standard frame of reference. Yet rigidity is an interesting, often overlooked feature of group protecting arrangements. As a deliberately open, unbiased term, it highlights the basic differences of a group protecting regime to the "normal" order. The notion also helps to reduce the tohubohu, which usually reigns in

¹ In: STILL JAMES, *From the Mountain, From the Valley: New and Collected Poems*, University Press of Kentucky, Lexington 2001, 30.

situations where group protection (and promotion) is to be addressed, to the fundamental issue of differentness.

Two recent decisions by international dispute resolution organs dealt with rigid measures to protect groups: The *Sejdić and Finci* judgment² by the Grand Chamber of the European Court of Human Rights in Strasbourg and the *Endorois* decision³ by the African Commission on Human and Peoples' Rights. By means of a discussion of these two cases this article seeks to illustrate the more general aspects of rigidity of group protecting regimes. The article shows that, as there are few – if any – universally valid arguments pro or contra rigidity, it is to be decided mainly in function of the circumstances whether a more or less rigid regime is appropriate in a given situation. The answer varies from case to case, but also within one and the same case, notably when the circumstances change with time passing. Despite this variability, the article shows that there are some grounds to suggest that a rigid system of protection is indicated when the very survival of a group has been severely threatened. Even then, however, care must be taken to avoid perpetuation. One should refrain from over-rigidifying the system of group protection. Instead, it should be designed right from the beginning to be adaptive so that it allows rigidity to phase out gradually with time passing and the threat receding and give way to softer “civil” structures.

Besides the rigidity facets of the *Sejdić* judgment and the *Endorois* decision, the article also discusses how the two rulings insert themselves into the international legal order. The two decisions are grounded in an extraordinarily broad base of international legal documents and caselaw, making them appear like the archetype of what is called *network rulings* in this article. In this regard the African Commission's *Endorois* decision is particularly avant-gardist in that it relies strongly on judgments by the Inter-American Court of Human Rights.

² European Court of Human Rights (ECtHR), *Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06 (22 December 2009).

³ African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003 (4 February 2010).

The article begins with the *Sejdić* judgment (section 2) and then moves on to the *Endorois* decision (section 3). In both cases it assesses the implications for the specific setting (Bosnia and Herzegovina, and Kenya, respectively) as well as for group protection more broadly by putting emphasis on rigidity. The article then discusses the two decisions as network rulings (section 4). Drawing inspiration from *Sejdić* and *Endorois*, the article concludes with some general thoughts that also reach out to the case that has been the linchpin for international law for the past decade: Kosovo (section 5). The article thus seeks not only to illuminate the “Bright Road” From the Mountain, From the Valley – not only from the Bosnian Vlašić Mountain, from the Kenyan Rift Valley, but also from the *Amsselfeld* in Kosovo.

II. *Contra rigidity in Bosnia and Herzegovina*

The Dayton Peace Agreement of December 1995⁴ established the foundations of Bosnia and Herzegovina. The Dayton Agreement basically ended years of warfare in Bosnia, the nadir of which had been the massacre that had taken place in Srebrenica. The task to be fulfilled by the Dayton Agreement had been enormous: it had to bring back together the three communities (Bosniacs, Croats, and Serbs), which had previously constituted the Republic of Bosnia and Herzegovina, under one umbrella and restore peace. In the latter aim at least, the Dayton Agreement had been a success.⁵ The Dayton Agreement, which had been brokered by the United States and the other members of the contact group, is “an extremely complex instrument”.⁶ It provided the constitution for the successor state of Bosnia and Herzegovina

⁴ General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes [Dayton Agreement], 35 ILM 75 (1996), 14 December 1995.

⁵ MCMAHON PATRICE C./WESTERN JON, *The Death of Dayton – How to Stop Bosnia From Falling Apart*, (2009) *Foreign Affairs* (September/October) 72: “The Dayton framework had many advantages. It stopped the bloodshed, and it created the conditions for life to return to normal – at least on the surface”.

⁶ SZASZ PAUL C., *Introductory Note [to the Dayton Peace Agreement]*, 35 ILM 1996, 77.

in annex 4. With the territorial integrity of Bosnia carved in stone,⁷ the approach of Dayton essentially consisted in validating the federation which Bosniacs and Croats had agreed in 1994⁸ and putting it side by side with Republika Srpska, the entity which encompassed most of the Bosnian Serbian population (at least since the end of the war). The two entities were endowed with a large deal of competences, while the overarching roof, the “*Mantelstaat*”⁹ of Bosnia and Herzegovina, was kept to a minimum. In the institutions of this overarching state strict parity between the three constituent communities has been the rule. In particular the office of the president has been tripled in the sense that representatives of each of the three communities simultaneously acts as presidents of Bosnia and Herzegovina. Ethnical *Proporz* has also been the rule for one chamber of the parliament (the House of the Peoples), where a third of the members of parliament are appointed by each of the three communities on an ethnical basis (while the House of Representatives, the other chamber, is constituted through elections in each community, resulting only in a *de facto* ethnical *Proporz*). Essentially in all decisions considered to be destructive of a vital interest of one of the communities, this community (or the member thereof) could veto the decision (arts. IV(3)e-f and V(2)c-d of the constitution of Bosnia and Herzegovina).¹⁰

Since the establishment of the state of Bosnia and Herzegovina by means of the Dayton Agreement it has become obvious that the central state is largely inoperable.¹¹ Obstruction by either the Serb, Croat, or Bosniac community

⁷ SZASZ (FN 6), 75: “[...] in a way that respected the international personality and territorial integrity of Bosnia-Herzegovina, which was an important condition set by the international community”.

⁸ SZASZ (FN 6), 76.

⁹ EPPING VOLKER, *Völkerrechtliche Aspekte der Wiederherstellung von Staatlichkeit in Nachkonfliktgesellschaften*, 83 *Die Friedens-Warte* (Journal of International Peace and Organization) (1) 2008, 34 [emphasis added].

¹⁰ This construction is commonly seen as an ethnic federation. For a differentiated view highlighting territorial elements, see SÖREN KEIL, *Mythos und Realität eines ethnischen Föderalismus in Bosnien und Herzegowina*, 50 *Südosteuropa Mitteilungen* (1) 2010, 76-86.

¹¹ See ROLOFS OLIVER JOACHIM, *Bosnien-Herzegowina: Kein Licht am Ende des Tunnels*, 50 *Südosteuropa Mitteilungen* (1) 2010, 43-44, who points to the fact that

has become more the rule than the exception it was initially intended to be.¹² The High Representative of the international community, designated pursuant to art. 1(2) annex 10 of the Dayton Agreement, had to intervene soon to substitute for the blocked organs of Bosnia and Herzegovina. This process had initially started with the deadlock of the parliament which was incapable of adopting legislation in citizenship matters. The High Representative was consequently forced to enact the relevant legislation instead. Use of this safeguard mechanism soon became common: as of April 2009, Wählisch counted 860 acts in which the High Representative substituted for the local powers.¹³

As a matter of fact, not only Serbs, Croats, and Bosniacs, the “constituent peoples” according to the preamble of the constitution, have been living in Bosnia and Herzegovina. “Others”, also mentioned as such by the constitution of Bosnia and Herzegovina in the preamble, have always been present in the territory of Bosnia, too. Moreover, the constituent groups intermix to some degree. However, failing to declare affiliation to either the Serb, Croat, or Bosniac community, members of these other groups are, pursuant to the constitution and the electoral acts, neither eligible in elections to the House of Peoples nor to the presidency. The declaration of affiliation to one of the three constituent groups is based on self-identification. While elsewhere, notably in Hungary where self-identification is at the heart of the scheme to protect minorities within Hungary, this approach provoked some wrongdoers to identify “falsely” with a group (falsely that is from an objective point of view: some persons having their eyes on benefits to be reaped or harm to be caused identified themselves with a minority, although they had no link whatsoever to this group),¹⁴ in Bosnia some persons refused to identify with

for the first time now since Dayton media and politicians speak of “war” again (p. 43) and who discusses the looming secession of Republika Srpska (p. 48).

¹² SARAJLIĆ-MAGLIĆ DENISA, Bosnia and Herzegovina: Will Europe Make Democracy Work?, 57 *Südosteuropa* (2/3) 2009, 173 and 185 (pointing at the “lack of a consensual political culture”).

¹³ WÄHLISCH MARTIN, Internationale Organisationen als Staatsersatz? Bosnien-Herzegowina als Modell der Relativierung von Staatlichkeit, in: TOMUSCHAT CHRISTIAN (ed.), *Weltordnungsmodelle für das 21. Jahrhundert*, Baden-Baden 2009, 169.

¹⁴ BURRI THOMAS, *Models of Autonomy? Case Studies of Minority Regimes in Hungary and French Polynesia*, Zurich 2010, 81 ff.

one of the constituent groups in the territory concerned. Two prominent individuals, one of Roma, the other of Jewish origin, finally seized the European Court of Human Rights alleging that the ethnical *Proporz* system established by the constitution of Bosnia and Herzegovina pursuant to the Dayton peace settlement violated their rights under the European Convention of Human Rights¹⁵ (ECHR).¹⁶

1. The ruling of the European Court of Human Rights in *Sejdić and Finci*

Mr Dervo Sejdić was of Roma origin. He has held a number of highly respected positions on behalf of the Roma minority in Bosnia and Herzegovina. Mr Jakob Finci was of Jewish belief. He has held public offices in Bosnia and Herzegovina. Both members of minorities in Bosnia and Herzegovina (the “others”), they refused to affiliate with one of the constituent peoples of Bosnia. As a consequence, they were not eligible to the House of Peoples nor to the tripartite presidency.

14 years after the Dayton Peace Agreement had been signed, in December 2009 the European Court of Human Rights in Strasbourg ruled that the exclusion of the applicants from the elections in Bosnia and Herzegovina violated their rights under the European Convention of Human Rights. The Court first held that the bar of the applicants from the election to the smaller chamber of the parliament violated the prohibition of discrimination (art. 14 ECHR) in conjunction with the right to free elections (art. 3 of the first Protocol to the ECHR¹⁷).¹⁸ The Court went on to hold that, given the inapplicability of the right to free elections to executive elections, the exclusion from

¹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, CETS no. 005, 4 November 1950.

¹⁶ For the preceding judgment of the Constitutional Court of Bosnia and Herzegovina, see for instance ENGL ALICE/HARZL BENEDIKT, *The Inter-relationship between International and National Minority-Rights Law in Selected Western Balkan States*, 34 *Review of Central and East European Law* 2009, 331-332.

¹⁷ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, CETS no. 009, 20 March 1952.

¹⁸ ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* (FN 2), paras. 39-50.

the elections to the tripartite presidency of Bosnia and Herzegovina violated the independent general prohibition of non-discrimination¹⁹ contained in art. 1 of Protocol no. 12 to the European Convention of Human Rights.²⁰

The applicability of the right to free elections (together with the prohibition of non-discrimination) to parliamentary elections and the applicability of the general prohibition of non-discrimination to executive elections hardly raised serious questions. Neither did the restrictive character of the Bosnian system. However, the *justification* of the structure of the Bosnian state (i.e. of the ethnical *Proporz*) was subject to sincere doubts. Unfortunately, the judgment of the European Court of Human Rights is quite terse here. The Court equates discrimination based on ethnicity with racial discrimination *in abstracto*, reiterating that the latter

“is a particularly egregious kind of discrimination and, in view of its perilous consequences requires from the authorities special vigilance and vigorous reaction. It is for this reason that authorities must use all available means to combat racism, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment [...]”²¹

The Court then goes on to hold that, for this reason, justification of restrictions of the rights of the European Convention of Human Rights based on ethnicity must be interpreted as strictly as possible²² (while positive discrimination in principle is not precluded).

Turning to the case at hand, the Court acknowledges that restoration of peace is an “aim broadly compatible with the general objectives of the Convention” (para. 45) and that the situation at the time when the Dayton Agreement was signed was difficult: peace between the warring parties had to be restored and the state of affairs was highly fragile. At that time, the Court finds, the situation “could explain, without necessarily justifying” (para. 45) the exclusion of the groups to which the applicants belong from peace nego-

¹⁹ ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* (FN 2), paras. 53-56.

²⁰ Protocol no. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, CETS no. 177, 4 November 2000.

²¹ ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* (FN 2), para. 43.

²² ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* (FN 2), para. 44.

tiations and the ensuing emphasis on equality only between the constituent peoples (i.e. Bosniacs, Croats, and Serbs):

“When the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground. The provisions were designed to end a brutal conflict marked by genocide and ‘ethnic cleansing’. The nature of the conflict was such that the approval of the ‘constituent peoples’ (namely, the Bosniacs, Croats and Serbs) was necessary to ensure peace. This could explain, without necessarily justifying, the absence of representatives of the other communities (such as local Roma and Jewish communities) at the peace negotiations and the participants’ preoccupation with effective equality between the ‘constituent peoples’ in the post-conflict society.”²³

After having held so, however, the Court backs out. It points to the fact that, at the time when the Dayton Agreement was signed, Bosnia and Herzegovina had not been a party to the European Convention of Human Rights and that, hence, the Court is not competent *ratione temporis* to rule on the situation at that time. Sensing that this would not quite suffice in light of the ongoing effects of the Dayton Agreement now that Bosnia has become a party to the European Convention of Human Rights, the Court circumvents the difficult questions of the legitimacy of the aim of peace restoration and of the justification of the rigid structures established to end and prevent further hostilities. Refraining from ruling in this regard, the Court points to the fact that the exclusion of the applicants from the elections is disproportionate in any case (para. 46).

Highlighting that progress has been made in Bosnia and Herzegovina since the Dayton Agreement had been signed, and emphasizing the alternative proposals for less restrictive electoral systems by the European Commission for Democracy through Law (the Venice Commission) and the commitments to reform the electoral system given by Bosnia upon ratification of the European Convention of Human Rights and of the Stabilization and Association Agreement with the European Union²⁴ (para. 55), the Court finally rules that

²³ ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* (FN 2), para. 45.

²⁴ Stabilization and Association Agreement (SAA) between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, not yet entered into force, council doc 8226/08 (available at <http://

the restrictions of the right to free elections in conjuncture with the prohibition of discrimination and of the general prohibition of discrimination cannot be justified (para. 50 and 56).

2. Rigidity precluded after consolidation

Given that the current situation in Bosnia and Herzegovina is marked by deep divisions between the constituent communities and by a hardly functioning central state and given the prior assessments by European expert bodies,²⁵ the ruling of the European Court of Human Rights in *Sejdić and Finci* hardly came as a surprise. It merely confirmed what has been known for some time: the constitution of Bosnia and Herzegovina is in need of reconsideration.²⁶ Not surprisingly, the Court's human rights perspective runs largely in parallel to assessments under more security oriented viewpoints.²⁷

However, the European Court of Human Rights – understandably – avoided the hardest riddle: whether rigid structures such as those established in Bosnia and Herzegovina based on affiliation with a specific community are permissible from a human rights perspective in the phase *immediately after violent conflict*. The Court left open whether such structures could be justi-

register.consilium.europa.eu/pdf/en/08/st08/st08226.en08.pdf>), 16 June 2008, notably 6th indent of the preamble.

²⁵ Cited in ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* (FN 2), paras. 20-25.

²⁶ See for instance ROLOFS, *Bosnien-Herzegowina: Kein Licht am Ende des Tunnels* (FN 11), 59, who notes the need to reform the constitution to make the central state operable. On constitutional reform in Bosnia and Herzegovina, see Saša Gavrić and Damir Banović, *Constitutional Reform in Bosnia and Herzegovina – Procedures, Challenges, Recommendations*, 50 *Südosteuropa Mitteilungen* (1) 2010, 60-75.

²⁷ MCMAHON/WESTERN (FN 5), 71, seeing three broader risks in the current situation of Bosnia and Herzegovina (and notably in a short-term exit from Bosnia): the resumption of violence in Bosnia, sending the wrong signal to the worldwide Muslim community (by abandoning Bosniacs), and darkening the prospects of state building in general due to the failure in Bosnia. For an alternative assessment of Bosnia and Herzegovina under the aspect of the war economy (including the related crimes and the judicial means to address them effectively) see EICHLIN JOHN, *Undercutting the Political Economy of Conflict in Bosnia and Herzegovina: A Transitional Justice Approach to Prosecuting Systemic Economic Crimes*, 48 *Columbia Journal of Transnational Law* (2) 2010, 353-398.

fied by the need to maintain peace immediately after the cessation of hostilities. The debate on whether an “accommodationist” or an “integrationist” approach²⁸ (based on rigid structures relying on group characteristics such as ethnicity, or on a soft, civil, “French” understanding of the nation, respectively) is better suited to address post-conflict challenges is therefore likely to continue. Neither side in the debate can draw significant arguments from *Sejdić* for the phase immediately following conflict. While the development under the Dayton Agreement and the current status quo in Bosnia and Herzegovina suggest that the accommodationist approach has failed, because it has further entrenched ethnicization rather than demobilizing the once warring groups, the integrationist approach fails to present credible alternatives for the immediate post-conflict phase. It would certainly be naïve to believe that truth commissions and reconciliation efforts would do the difficult job of stabilizing peace in the immediate post-conflict phase where the stage is often (still) captured by “ethnic entrepreneurs”²⁹ who draw on ethnic and nationalist resentment to create a “security dilemma”.³⁰ While ethnic demobilization (that is, a move away from apprehending society through the “ethnic lens”³¹) must certainly be the main aim in that phase, it remains uncertain how this goal is to be achieved without formally separating the warring parties through rigid structures (i.e. through an accommodationist approach).

In contrast, it follows clearly from the *Sejdić* ruling that *in a later phase*, some time after hostilities have ceased in an ethnically driven conflict, when peace has been durably restored and consolidated (the often protracted phase of re-building), an accommodationist approach that favours an exclusive, rigid ethnic structure is no longer an option for lack of compatibility with the principle of non-discrimination.³² At that point in time, the ethnic argument

²⁸ MARKO JOSEPH, Processes of Ethnic Mobilization in the Former Yugoslav Republics Reconsidered, 34 *Southeastern Europe* (1) 2010, 4.

²⁹ MARKO (FN 28), 13.

³⁰ MARKO (FN 28), 13.

³¹ MARKO (FN 28), 13. On ethnic (de)mobilization see also MUJIC ASIM, Ethnic Mobilization in the Former Yugoslavia as a Kind of Structural Setting and Framing, 34 *Southeastern Europe* (1) 2010, 16-37.

³² One does well to note, however, that in different circumstances a system based on ethnic or national affiliation could well be reconciled with human rights: in a situa-

must recede – while not necessarily vanishing altogether³³ – and progressively leave the stage to the forces of free and civil democracy. The drafters of the Dayton Agreement had, of course, also thought of such a phase-out. That is why a human rights clause was included in the constitution of Bosnia and Herzegovina via the Dayton Agreement.³⁴ Yet, leaving the crucial phasing-out of the ethnic element from the structure of a constitutional system to a general human rights clause is hardly a reliable approach. With the benefit of hindsight, a more robust long-term approach would likely have been a more credible alternative in the case of Bosnia and Herzegovina. Such an approach would have provided for automatic discontinuation of ethnical *Pro-*

tion, for instance, where a minority is about to disappear through a process of integration (such as the Romansh minority in Switzerland or the German minority in Hungary), a system of cultural autonomy that is based on affiliation with the minority (and thus exclusion of “others”) is compatible with human rights. The positive discrimination-reservation made by the European Court of Human Rights in *Sejdić* (para. 44) creates the space necessary to establish such a system. I have argued elsewhere that such a system could indeed serve as a model for situations of run-away integration of minorities (but exclusively for such situations, and not in situations of a lack of integration: see BURRI, *Models of Autonomy? Case Studies of Minority Regimes in Hungary and French Polynesia* [FN 14], 140 ff.; in contrast, in situations of a lack of integration, which is generally the case with the Roma minority, “special measures” regularly require closer scrutiny, for they often mask particularly elaborate schemes of discrimination – see e.g. FOLZ HANS-PETER, *Ethnische Diskriminierung im Bildungswesen – Das Urteil der Grossen Kammer des Europäischen Gerichtshofs für Menschenrechte in der Sache D.H./Tschechische Republik vom 13. November 2007, Recht der Jugend und des Bildungswesens* [3] 2009, 395-405, re segregation of Roma children in Czech schools; compare with PILVI TORSTI, *Segregated Education and Texts: A Challenge to Peace in Bosnia and Herzegovina*, 26 *International Journal on World Peace* [2], 2009, 63-85, for schools in Bosnia and Herzegovina).

³³ See only the proposals put forward by the Venice Commission to which the European Court of Human Rights refers: ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* (FN 2), paras. 22 and 48.

³⁴ See ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* (FN 2), para. 14: “Fully aware that these arrangements were most probably conflicting with human rights, the international mediators considered it to be especially important to make the Constitution a dynamic instrument and provide for their possible phasing out. Article II § 2 of the Constitution was therefore inserted [...], which reads as follows: ‘The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law’”.

porz and its replacement by a more civil, democratic alternative (e. g. as proposed by the Venice Commission), ideally a decade after the entry into force of the peace settlement of Dayton.³⁵ Under the current approach chosen by the Dayton Agreement, in contrast, it took more than 14 years for the general human rights based phase-out clause to be activated by the European Court of Human Rights and it will quite possibly take many more years until the *Sejdić* judgment will finally be implemented.

Thus perhaps a combination of accommodationist and integrationist ideas is the best option in an immediate post-conflict situation: an approach that is at first more tuned to accommodationist principles but later on, in accordance with a clearly established time schedule, mutates into an integrationist *modus operandi*. Such an approach would likely have maintained peace, demobilized ethnicity on the long run, and been compatible with the European Convention of Human Rights. No need to emphasize that a long-term, strategic vision is needed to put into practice such an adaptive approach, as in fact in any situation of complexity.³⁶ Needless to say also that the sight of potential visionaries is often blinded in post-conflict situations by the dictates of immediacy and urgency – as in fact the Dayton settlement shows.

3. Beyond phasing out rigidity

The *Sejdić* judgment of the European Court of Human Rights has important implications for minority protection. The judgment sets a relatively clear limit to rigid structures based on ethnicity in situations where the rule of law has been consolidated. The principle of non-discrimination requires that members of minorities who do not affiliate with the constituent group(s) are

³⁵ Such an approach would, by the way, also conform broadly with the requirements of adaptive governance: see COONEY ROSIE/LANG ANDREW T.F., Taking Uncertainty Seriously: Adaptive Governance and International Trade, 18 EJIL (3) 2007, 523-551.

³⁶ See EPPING (FN 9), 28: “Auch ist angesichts der Phasen, die eine Mission durchläuft, im Wege einer insoweit intensiveren Begleitung durch den Sicherheitsrat der Mandatsrahmen den Erfordernissen der unterschiedlichen Phasen sukzessive anzupassen. Dies geschieht bislang nicht, was zur leidigen Folge hat, dass viele Aspekte des *post-conflict*-Engagements der Staatengemeinschaft im völkerrechtlichen Graubereich angesiedelt sind“.

not excluded from legislative or executive elections. Beyond these implications for minority protection, the *Sejdić* judgment is important in two more respects. On the one hand, the judgment is the first application of the general principle of non-discrimination of Protocol no. 12.³⁷ As such, the judgment is ground-breaking. The application of the general principle of non-discrimination is even more progressive given that some member states of the Council of Europe have not yet ratified Protocol no. 12 – among them such self-proclaimed trailblazers of human rights as France, Germany, Switzerland or the United Kingdom. Regarding the substance of the general principle of non-discrimination, *Sejdić* makes the important clarification that the general principle is not to be interpreted differently than the accessory principle of non-discrimination in art. 14 ECHR (para. 55 of *Sejdić*).

On the other hand, the *Sejdić* judgment was one of the rare occasions, if not the only one,³⁸ for the European Court of Human Rights to find that a national constitution violates the European Convention of Human Rights. That finding is put in perspective by the sponsorship of the constitution by the contact group in the Dayton process. The “Dayton constitution” probably does not enjoy the same pristine standing as other, non-imposed constitutions. It is thus more amenable to criticism without creating a precedent. However, in spite of the distinctiveness of the “Dayton constitution”, the readiness of the European Court of Human Rights to declare that some constitutional provisions violate the Convention should certainly not go unnoticed in European capitals. In particular in those European states with traditionally flexible constitutions or in European states in which populist forces sometimes successfully capture the people and consequently manage to introduce radical or xenophobic provisions into state constitutions – the example of Switzerland with the ban on minarets and the compulsory preventive detention, both included in the constitution after having been approved by

³⁷ See the general remarks in the partly concurring and partly dissenting opinion of judge Mijović, joined by judge Hagiye, appended to the ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* (FN 2).

³⁸ See ANNE PETERS responding to the EJIL talk! blog of Marko Milanovic, *Grand Chamber Judgment in Sejdić and Finci v. Bosnia*, 22 December 2009, <<http://www.ejiltalk.org/grand-chamber-judgment-in-sejdic-and-finci-v-bosnia/>>.

the Swiss people in referenda,³⁹ inevitably springs to one's mind – in precisely those states the *Sejdić* judgment of the European Court of Human Rights should be read most attentively.

III. *Pro rigidity in Kenya*

Kenya, once one of the most favourite tourist destination in Africa, has changed since the elections in December 2007. Since then, many observers have Kenya in mind as the place where the ethnic, tribal, and political strife took place in early 2008 after the elections. The Rift Valley in the south of Kenya bordering Uganda was in the midst of all the turmoil. The story of the Endorois community, which this article is dealing with, began long before the ethnic violence of 2008, though, and it is largely unrelated to the latter.

The story of the Endorois community is likely to be representative of the fate of indigenous peoples anywhere in the world. The Endorois community is indigenous to Kenyan land and one of four sub-tribes of the Tugen tribe. The Endorois had traditionally inhabited the shores of Lake Bogoria in the Rift Valley where they found water and other resources, fed their cattle, and had their ancestral, religious, and spiritual roots. Since decolonization had taken place, the territory where the Endorois had lived since time immemorial was administered by a trust. In the 1970s, however, a reserve was created there with a view to promote tourism; a hotel was also built later on. Access of the Endorois to the land they had previously resided on was henceforth subject to permission which was granted at the sole discretion of Kenyan authorities. The Endorois had to relocate to lands adjacent to the national park. These lands were semiarid and did not provide the necessary nutrition for the cattle of the Endorois. As a result more than half of their cattle died. About 170 of 500 Endorois families each received what was the equivalent of 30 £ in 1973 for their relocation. Later on, ruby deposits were found in the territory of the

³⁹ For an assessment of the legality of the Swiss ban on minarets under the ECHR as well as under the International Covenant on Civil and Political Rights, 999 UNTS 171, 19 December 1966, see LANGER LORENZ, *Panacea or Pathetic Fallacy? The Swiss Ban on Minarets*, 43 *Vanderbilt Journal of Transnational Law* 2010, 863-951).

national park and mining concessions were granted to companies. The beginning of mining operations is now imminent. Some parts of the land are about to be demarcated and sold to third parties.

The Endorois, supported by international non-governmental organizations, have fought a long battle in Kenyan courts and before international bodies. In early 2010, they scored a decisive victory before the African Commission on Human and Peoples' Rights.⁴⁰ The African Commission had had a strong record regarding rights of indigenous peoples before.⁴¹ On 4 February 2010, the African Commission added on to that record with a seminal ruling concerning the Endorois, in which the Commission ruled that the rights of the Endorois people under the African Charter on Human and Peoples' Rights (sometimes called the Banjul Charter)⁴² had been violated.⁴³

⁴⁰ For an appraisal of the African Commission on Human and Peoples' Rights, see VILJOEN FRANS, *International Human Rights Law in Africa*, Oxford University Press, Oxford 2007, 414-417.

⁴¹ See only SHELTON DINAH, 'Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria), case No. ACHPR/COMM/A044/1', 96 AJIL (4), 2002, 937-942, commenting the *Ogoni* decision by the African Commission on Human and Peoples' Rights, in which the African Commission famously held that the violations in the concrete case included a breach of the right to a generally satisfactory environment (p. 941) and that there was no right in the Banjul Charter, *infra* FN 42, (i.e. including the peoples' rights) that could not be made effective (p. 941) – a decision which, according to SHELTON, "advances the African system well ahead of other regional systems" (p. 942). See also on the influential advisory opinion of the African Commission on the United Nations Declaration on the Rights of Indigenous Peoples, UN General Assembly, UN Doc. A/RES/61/295, GAOR 61th session supp. 49 vol. 3, 15, 13 September 2007: VAN GENUGTEN WILLEM, *Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems*, 104 AJIL (1) 2010, 36 ff.

⁴² African Charter on Human and Peoples' Rights, Organization of African Unity, 1520 UNTS 245 (engl.), 27 June 1981. For an introduction to the African human rights system, see BUERGENTHAL THOMAS/THÜRER DANIEL, *Menschenrechte – Ideale, Instrumente, Institutionen*, Zurich 2010, 319 ff.

⁴³ African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (FN 3).

1. The decision of the African Commission of Human and Peoples' Rights in *Endorois*

The ruling of the African Commission in *Endorois* is long and complicated. The main parts of the ruling address the following issues: whether the Endorois are a people in the sense of the African Charter of Human and Peoples' Rights, whether their rights to practice their religion (art. 8 of the African Charter), to property (art. 14), to culture (art. 17(2)), to freely dispose of their natural wealth and resources (art. 21), and to development (art. 22) have been violated. The right to property plays the central role in the ruling with the arguments of the parties relating thereto comprising paras. 86-114 and the corresponding reasoning of the Commission paras. 174-238 (of altogether 298 paras.).

a) Inspiration from the Inter-American Court of Human Rights

Before addressing any rights, the African Commission had to come to terms with the notion of "people" in the context of the Banjul Charter. At this point already the precedent comes up that would have a crucial influence on the whole decision of the African Commission: The judgment of the Inter-American Court of Human Rights in the *Saramaka* case.⁴⁴ The decisive role this non-African precedent plays in the reasoning of the African Commission comes as a surprise. Arguably, the Commission may draw inspiration from human rights instruments other than the Banjul Charter in accordance with articles 60 and 61 of the latter.⁴⁵ Yet a close reading of the two articles re-

⁴⁴ Inter-American Court of Human Rights, *The Saramaka People v. Suriname*, Series C no. 172 (28 November 2007). See footnotes 69 and 71 in African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (FN 3).

⁴⁵ Article 60: The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instru-

veals that they imply only inspiration to be drawn from instruments accepted by *African states* – which does not include instruments that solely share some distant relationship with the Banjul Charter, because they address a similar subject, such as the American Convention on Human Rights⁴⁶ or the even more remote caselaw of the Inter-American Court of Human Rights. However, the African Commission does not lose more space than absolutely necessary for any doubts in that regard. It merely notes that “[t]he Saramaka case is of particular relevance to the Endorois case, given the views expressed by the Respondent State during the oral hearings on the Merits.”⁴⁷

Indeed the plight of the Saramaka does have much in common with the predicament of the Endorois. The Saramaka are a tribal community in the South American state of Suriname. They are the descendants of African slaves who had once been deported to the region. On the territory which they had traditionally inhabited since their arrival in South America and from which they drew their resources, gold was found. Soon thereafter, the state granted mining (and logging) concessions to private companies. These companies exploited the grounds and caused such extensive environmental damage that the Saramaka could no longer sustain themselves for lack of fresh water and for depletion of other natural resources. They were thus forced to move elsewhere.

ments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

Art. 61: The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member States of the Organization of African Unity, African practices consistent with international norms on human and peoples’ rights, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine.

⁴⁶ American Convention on Human Rights, Organization of American States, 1144 UNTS 144 (engl.), 22 November 1969

⁴⁷ African Commission on Human and Peoples’ Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (FN 3), para. 159 [footnote referring to an argument by the respondent state omitted].

The Inter-American Court of Human Rights in the *Saramaka* judgment rejected all of Suriname's arguments:⁴⁸ although the Saramaka are not indigenous, as a tribal community, they must be treated in the same way as indigenous peoples,⁴⁹ because they maintain the same "strong spiritual relationship with the ancestral territory" (para. 82 of *Saramaka*; rejecting the narrow approach to "indigenous peoples" that relies on presence in pre-Columbus times) and they therefore also require special measures under international human rights law in order to guarantee their physical and cultural survival (para. 86); individual land titles or a recognized privilege of the Saramaka people in the land they inhabited are not sufficient under the right to property (art. 21 of the American Convention on Human Rights),⁵⁰ but a collective conception of land tenure of the Saramaka in accordance with their tradition of communal property must be recognized by the state (para. 95); the state cannot simply lay claim to all resources found on the ancestral territory of the Saramaka, but it has to respect the right of the Saramaka to enjoy the natural resources they have traditionally used – a right that is inherent in the right to property – for such enjoyment is essential for the very survival of the Saramaka and else their collective land title would be meaningless;⁵¹ the enjoyment of such traditional resources is not limited to the resources the Saramaka have directly made use of (such as water), but extends also to resources the exploitation of which has an indirect impact on these traditional resources (such as the gold resources which the Saramaka did not traditionally harness, but the exploitation of which has an impact on the quality of wa-

⁴⁸ On the dubious record of Suriname before the Inter-American Court of Human Rights see HENNEBEL LUDOVIC, *La convention américaine des droits de l'homme – mécanismes de protection et étendue des droits et libertés*, Brussels 2007, 607-608.

⁴⁹ Inter-American Court of Human Rights, *The Saramaka People v. Suriname* (FN 44), para. 84.

⁵⁰ Inter-American Court of Human Rights, *The Saramaka People v. Suriname* (FN 44), paras. 87-117, in particular paras. 96 and 115 (based on previous caselaw of the Inter-American Court of Human Rights).

⁵¹ Inter-American Court of Human Rights, *The Saramaka People v. Suriname* (FN 44), para. 121-122 (relying on its own previous caselaw); see para. 122: "Accordingly, the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land".

ter resources);⁵² finally, it is not sufficient to recognize only the members of the Saramaka people as persons with rights and duties (art. 3 of the American Convention), but the people as such must be recognized as a collective entity with juridical personality and procedural rights, notwithstanding any difficulties of representation or identification (paras. 159-175).

Probably the most significant aspect of *Saramaka* is that the Inter-American Court of Human Rights required a three-pronged *safeguard test* to be passed to live up to the right to property. The Court ruled that, while a complete ban of mining or logging concessions could not realistically follow from the right to property in situations such as that of the Saramaka (para. 126), however, as emanations of the doctrine of the restriction of rights (requiring a prior legal basis, necessity, proportionality, and a legitimate aim), in situations where the survival of a tribal community was threatened, the following safeguards were required: effective participation of the community concerned in conformity with its customs and traditions, a reasonable sharing of benefits flowing from the conceded activity, and a prior environmental and social impact assessment.⁵³

The situation of the Saramaka in Suriname is indeed quite similar to that of the Endorois in Kenya: each situation is marked by a traditional community's forced eviction from its ancestral territory (as a result of the exploitation of newly found resources by third parties) and by the ensuing threat to the survival of the community. As the issues to be addressed are therefore similar, too, it is no wonder – at least from this perspective – that the African Commission drew extensively on the prior judgment of the Inter-American Court of Human Rights in the *Saramaka* case.

⁵² Inter-American Court of Human Rights, *The Saramaka People v. Suriname* (FN 44), para. 126 (explained not by means of the gold v. water-, but by the wood v. water-connection; for the gold v. water-problem see para. 155).

⁵³ See the three safeguards put forward in para. 129, and discussed in paras. 130-154, Inter-American Court of Human Rights, *The Saramaka People v. Suriname* (FN 44).

b) *Formal collective land title required*

Like the Inter-American Court of Human Rights with the *Saramaka*, the African Commission of Human and Peoples' Rights finds, while referring to the *Saramaka* judgment, that the Endorois are a people. They are a people in the sense of the Banjul Charter, although they also belong to the bigger Tugen tribe.⁵⁴ However, unlike the Inter-American Court, the African Commission elaborates more extensively on the definition of the term "people". This is important, because abstract definitions of groups (not only "peoples", but also "minorities") have always proved highly contentious. Notwithstanding, the African Commission, after having underlined that the African Charter is an "innovative and unique human rights document [...] in placing special emphasis on the rights of 'peoples'" and that it "weav[es] a tapestry which includes the three 'generations of rights'" (para. 149), in a bold move notes an emerging consensus on what constitutes a people:

"[...] there is an emerging consensus on some objective features that a collective of individuals should manifest to be considered as 'peoples', viz: a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy – especially rights enumerated under Articles 19 to 24 of the African Charter – or suffer collectively from the deprivation of such rights." (para. 151)

The African Commission continues to find, again explicitly referring to *Saramaka*, that the fact that some individuals fail to affiliate with the Endorois and with their traditions, though belonging to them from an objective point of view, is irrelevant in what regards the constitution of a people. And so is, according to the African Commission (still following *Saramaka* expressly), the related problem of representation of the people, which the Endorois need to sort out according to their own traditions (paras. 161-162).

The main part of the *Endorois* decision of the African Commission is devoted to the right to property (art. 14 of the African Charter). The African

⁵⁴ African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (FN 3), para. 161.

Commission finds that the different, informal conception of property of the indigenous Endorois is indeed covered by the right to property in the Charter. Thus the protection afforded by the Charter's right to property is extended to cover the Endorois and the territory they had traditionally inhabited. They may rely on the right to property, although they could not produce a formal land title (para. 187).

In line with the *Saramaka* judgment (and other caselaw by international courts) it is, the African Commission notes in turn, not sufficient for the respondent state to be in compliance with the Charter's right to property to recognize a mere interest or an access privilege of the community to the territory. Instead, a formal title to land tenure must be given to the Endorois. The trust system set up in Kenya, which granted only beneficial, but no actual title to the Endorois, is thus insufficient in light of the right to property (paras. 199 and 206).

Finding that the property of the Endorois is encroached upon by their eviction and by measures taken by the state (such as the establishment of the reserve), the African Commission then examines whether there is any justification for the encroachment. The Commission applies a variant of the well-known justification test (legal basis, public interest, proportionality) and finds – this is significant – that the public interest test is “much more stringent when applied to ancestral land rights of indigenous peoples” (para. 212). The African Commission thus opts for a high level of protection of indigenous peoples' land rights. Not surprisingly, the Commission concludes that the eviction of the Endorois was a disproportionate measure, one that could have easily been replaced by less restrictive means (paras. 211 ff.). In its reasoning the Commission also relies on the non-derogable right to life of the Endorois, which is at stake, because they lost the connection to their ancestral lands as a result of their eviction (para. 216).

As part of the justification assessment, the African Commission also adopts the safeguard-test developed in the *Saramaka* judgment of the Inter-American Court of Human Rights. It notes that no effective participation had been granted, no benefits had been shared, and no impact assessment had been conducted (paras. 227-231). The 30£ paid to some families for their relocation, in the opinion of the Commission, “fl[y] in the face of common sense and fairness” (para. 236). Moreover, the land on which the Endorois

have settled for now cannot be considered adequate compensation for lack of equal quality (para. 234).

The Commission's examination under art. 21 of the African Charter, which, as opposed to the American Convention, expressly lays down a right to have access to vital resources, adds to the assessment under the right to property. It confirms that a strict proportionality test is to be conducted, when indigenous peoples' land is concerned. Moreover, the Commission also explicitly espouses another view expressed in *Saramaka* by the Inter-American Court: an indirect impact on the vital resources traditionally used by the indigenous community suffices to bring a measure, such as a mining concession, within the ambit of the right of access to vital resources. That the Endorois did not themselves make use of the ruby deposit in their lands is thus no obstacle to them invoking the right to vital resources against ruby mining and against the effects of mining on the resources they effectively made use of (paras. 252-267). With regard to the right to have access to vital resources, the Commission confirms that the same justification test as with the right to property is to be applied – a test which is also failed in the case at hand (para. 267).

Besides the rights to property and access to vital resources, the African Commission also examines the Endorois' right to development (art. 22 of the African Charter). According to the Commission the right to development implies that consultation of the community concerned is required: "Free, prior, and informed consent according to their [i. e. the Endorois'] customs and traditions" (para. 291) would have had to be sought before designating the land as a reserve – a requirement that follows from the *Saramaka* safeguard-test as well, though probably not with the same strength of formal consent. Moreover, creating a *fait accompli* on the ground followed by information regarding the facts for the indigenous community concerned is not compatible with the right to development, either. The unequal bargaining position in which indigenous communities often find themselves needs to be reckoned with (para. 281-282), implying that capacity building ("empowerment", para. 283) is required. In any case, simply to provide food aid is not a way to satisfy the requirements of the right to development (para. 283). A positive obligation is incumbent on the state to create favourable conditions for a peoples' development. Given that obligation, it is not simply up to the Endorois to find new grounds for their cattle to graze (para. 298).

The right to practice religion (art. 8 of the African Charter) is, according to the African Commission, also violated, because the Endorois' access to their traditional religious grounds around Lake Bogoria is hindered. Given recent tendencies to restrict religious freedom in many, not least European states – consider only the recent Burka prohibitions – the finding is especially noteworthy that “exceptionally good reasons” are required for “a particularly harsh limitation on the right to practice religion, such as that experienced by the Endorois” (para. 172). Apart from this, the almost poetic way of the African Commission in establishing a violation of the right to culture (art. 17 of the African Charter) is memorable. According to the Commission's opinion in para. 250, Kenya

“has overlooked that the universal appeal of great culture lies in its particulars and that imposing burdensome laws or rules on culture undermines its enduring aspects.”

c) Some rigidity essential

The quintessence of the African Commission on Human and Peoples' Rights' decision in *Endorois*, from the perspective of rigidity, might be that some rigidity in the structures provided for indigenous peoples is essential. How else would one explain that formal title to land tenure for indigenous peoples like the Endorois is indispensable; that recognized interests or soft privileges in access to their ancestral grounds are insufficient; that recognition of their juridical personality *qua* group entailing communal rights, duties, and procedural standing is essential? The full rigidity of formal law is obviously required to protect indigenous peoples from abuse and exploitation, especially in what regards “*the issue*”⁵⁵ (i. e. land ownership). This conclusion goes hand in hand with the tendency – observable in the latest international approach to issues of indigenous peoples – to afford a higher level of protection and promotion to indigenous peoples owing to widespread neglect and indifference in the past.

The rigidity aspect aside, the *Endorois* decision is remarkable also for other reasons: the definition of “peoples” is illuminated, which truly is a rare oc-

⁵⁵ VAN GENUGTEN (FN 41), 32 [emphasis in original].

currence before (quasi-)judicial organs; group rights are further corroborated and clarified; the *Saramaka* safeguard-test developed by the Inter-American Court of Human Rights in its judgment of 2007 (for concessions to be granted to exploit resources in traditional territories of indigenous and tribal peoples) is further endorsed (and extended to Africa); the wrongs done to the Endorois are finally addressed and corrected – at least on paper.

The right to development is, at long last, examined and found to be violated – so far seemingly a unique occurrence.⁵⁶ Spectacular as this might be, one perhaps fails to see what the right to development adds to the rights to property and access to vital resources discussed extensively in the *Endorois* decision. Arguably, the Commission in *Endorois* merely reiterates for the right to development what already has followed from the rights to property and access to vital resources. However, the somewhat redundant discussion by the African Commission could become meaningful in other, future eventualities where the rights to property and vital resources are not as directly affected as in the case of the *Endorois*. In particular when it comes to *prevent* situations from turning into the likes of the Endorois' and to shape more abstract policies, the right to development as outlined by the African Commission in the *Endorois* decision might serve to underpin arguments of indigenous communities when need arises.

The *Endorois* decision certainly consolidates the leadership role of the African Commission in what regards the rights of indigenous communities. The opinion puts the African Commission right next to the Inter-American Court of Human Rights, which led the way with *Saramaka* (and earlier judgments). Of the regional human rights institutions it seems now that the European institutions are the only ones to lag behind in terms of group rights of indigenous peoples. In modern times, such foot-dragging of Europeans in terms of human rights is certainly unfamiliar. It does not sit easily with the pride Europeans usually display in their human rights record and achievements since World War II. However, one should also keep in mind that human and peoples' rights are not just paperwork. The comparison between regional – and

⁵⁶ Kenya: Landmark Ruling on Indigenous Land Rights (press release), Human Rights Watch, 4 February 2010, (accessible under: <<http://www.hrw.org/en/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights>>, last visit: 20 June 2010).

universal – human rights systems certainly looks different when implementation is focused on.

IV. Network rulings

The *Endorois* decision⁵⁷ by the African Commission on Human and Peoples' Rights might be perceived as a simple facsimile of the *Saramaka* judgment of the Inter-American Court of Human Rights.⁵⁸ Admittedly, the African Commission adopted most of the reasoning of the Inter-American Court. However, this perception overlooks not only the African Commission's expansion of the Inter-American Court's reasoning in *Saramaka* (notably regarding the notion of peoples and the right to development), but also the significance of an adoption in one human rights regime of the legal reasoning originating from another such regime. Indeed it is remarkable how the African Commission relies on a judgment that was rooted in another human rights system with different traditions, even in view of the African Commission's latitude in "drawing inspiration".⁵⁹ It is even more remarkable in light of the Commission's prior admission that the Banjul Charter is a "unique" instrument "weaving a tapestry" of the three human rights generations.⁶⁰

Given this remarkable adoption of *Saramaka*, the other references which the African Commission makes in *Endorois* come into focus. In fact, the African Commission grounds its reasoning in a whole series of decisions and documents issued by other international bodies, even though these do not occupy the same central place in *Endorois* as the *Saramaka* judgment. The African

⁵⁷ African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (FN 3).

⁵⁸ Inter-American Court of Human Rights, *The Saramaka People v. Suriname* (FN 44).

⁵⁹ See arts. 60 and 61 of the African Charter, quoted *supra* FN 45.

⁶⁰ See the citations *supra* page 15. For an inquiry into the references to international law by domestic courts, see BENVENISTI EYAL, Reclaiming Democracy: the Strategic Uses of Foreign and International Law by National Courts, 102 AJIL (2), 2008, 241-274.

Commission thus refers to other judgments by the Inter-American Court of Human Rights (*Mayagna (Sumo) Awas Tigni* in *inter alia* paras. 190 and 207 of *Endorois*, *Moiwana* in para. 208, *Yakye Axa* in paras. 208, 216, 233, and 284⁶¹), to cases addressed by the Inter-American Commission on Human Rights (*Loren Laroye Riebe Star* and *Dianna Ortíz* in footnote 77, *Mary and Carrie Dann* in footnote 157⁶²) and to judgments by the European Court of Human Rights (*Doğan* in paras. 186, 188, and 237, *Akdivar* in para. 202, and *Handyside* in para. 213⁶³). Besides this rather extensive international caselaw the African Commission also reasons by the aid of international, non-African instruments: *inter alia* a report by a UN Special Rapporteur⁶⁴ (para. 147), International Labour Organization Convention no. 169⁶⁵ (paras. 153-155, with the caveat that Kenya has not ratified the Convention), UN Declaration

⁶¹ Inter-American Court of Human Rights, *The Mayagna (Sumo) Awas Tigni Community v. Nicaragua*, Series C no. 79 (31 August 2001) (the Court only refers to this, the second *Mayagna (Sumo) Awas Tigni* case – distinguish it from the first: Inter-American Court of Human Rights, *The Mayagna (Sumo) Awas Tigni Community v. Nicaragua*, Series C no. 66 (1 February 2000), which was inadmissible due to non-exhaustion of domestic remedies); Inter-American Court of Human Rights, *The Moiwana Community v. Suriname*, Series C no. 124 (15 June 2005); Inter-American Court of Human Rights, *The Yakye Axa Indigenous Community v. Paraguay*, Series C no. 125 (17 June 2005) (distinguish from the second *Yakye Axa* case: Inter-American Court of Human Rights, *The Yakye Axa Indigenous Community v. Paraguay*, Series C no. 142 (6 February 2006), which interprets the first re returning the territory and establishing the fund).

⁶² Inter-American Commission on Human Rights, *Loren Laroye Riebe Star et al. (Mexico)*, Report no. 49/99, case 11.610 (13 April 1999); Inter-American Commission on Human Rights, *Dianna Ortíz (Guatemala)*, Report no. 31/96, case 10.526 (16 October 1996); Inter-American Commission on Human Rights, *Mary and Carrie Dann (United States of America)*, Report no. 75/02, case 11.140 (27 December 2002)

⁶³ ECtHR, *Doğan and others v. Turkey*, Applications nos. 8803-8811, 8813 and 8815-8819/02 (29 June 2004); ECtHR, *Akdivar and others v. Turkey*, Application no. 21893/93 (16 September 1996); ECtHR, *Handyside v. United Kingdom*, Application no. 5493/72 (7 December 1976).

⁶⁴ Study of the Problem of Discrimination Against Indigenous Populations (Conclusions, Proposals and Recommendation), Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (José R.M. Cobo), E/CN.4/Sub.2/1986/7/Add.4, 1987 (notably the definition in para. 379).

⁶⁵ Convention concerning Indigenous and Tribal Peoples in Independent Countries, International Labour Organization, no. 169, 1650 UNTS 383, 27 June 1989.

on the Rights of Indigenous Peoples⁶⁶ (paras. 155, 159, 204, and 232, noting that Kenya withheld consent to the Declaration), General Comment no. 22 by the UN Human Rights Committee⁶⁷ (para. 172), General Comment no. 4 by the UN Committee on Economic, Social, and Cultural Rights⁶⁸ (para. 200), resolutions by the UN Commission on Human Rights⁶⁹ (para. 200 and 218), UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities⁷⁰ (para. 248), and concluding observations by the UN Committee on the Elimination of Racial Discrimination⁷¹ (footnote 159 and para. 296). This array of international institutions and their work obviously reads like a who's who of institutional international law. In this aspect again the *Endorois* decision of the African Commission mirrors the *Saramaka* judgment of the Inter-American Court of Human Rights, in which the Court refers to a similar apparatus of international law.⁷²

⁶⁶ United Nations Declaration on the Rights of Indigenous Peoples, UN General Assembly (FN 41).

⁶⁷ General Comment no. 22: The right to freedom of thought, conscience and religion (art. 18), UN Human Rights Committee, CCPR/C/21/Rev.1/Add.4, General Comment No. 22, 30 July 1993.

⁶⁸ General Comment no. 4: The right to adequate housing (art. 11(1)), UN Committee on Economic Social and Cultural Rights, E/1992/23, 13 December 1991.

⁶⁹ *Inter alia* Resolution on Prohibition of forced evictions, UN Commission on Human Rights, Res. 2004/28 (contained in ECOSOC OR 2004, supp. 3, 100, E/2004/23, E/CN.4/2004/127), 16 April 2004.

⁷⁰ United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN General Assembly, UN Doc. A/RES/47/135, GAOR 47th session supp. 49 vol. 1, 199, 18 December 1992.

⁷¹ Consideration of Reports submitted by State Parties under Article 9 of the Convention – Concluding Observations on Ecuador, UN Committee on the Elimination of Racial Discrimination, CERD/C/62/CO/2, 21 March 2003.

⁷² The Inter-American Court of Human Rights in the *Saramaka* judgment *inter alia* refers to the following caselaw: Human Rights Committee, *Länsman et al. v. Finland*, 511/92, UN Doc. CCPR/C/52/D/511/1992 (26 October 1994) (in para. 126; distinguish this case from the second *Länsman* case: Human Rights Committee, *Länsman et al. v. Finland II*, 671/1995, UN Doc. CCPR/C/58/D/671/1995 [30 October 1996]); Supreme Court of Canada, *Delgamuukw v. British Columbia*, 3 S.C.R. 1010 (11 December 1997) (in footnote 122); the *Ogoni* decision by the African Commission on Human and Peoples' Rights (FN 41) (in footnote 122); ECtHR, *Connors v. the United Kingdom*, Application no. 66746/01 (27 May 2004)

A similar phenomenon of extensive reference to documents of other international institutions (though not to caselaw) can be observed in the *Sejdić and Finci* judgment of the European Court of Human Rights. The Court in this decision *inter alia* relies on the following documents: The International Convention on the Elimination of All Forms of Racial Discrimination⁷³ (in paras. 19 and 43 of *Sejdić*); the Concluding Observations on Bosnia and Herzegovina by the UN Committee on the Elimination of Racial Discrimination⁷⁴ (para. 19) as well as those by the Human Rights Committee⁷⁵ (para. 20); the International Covenant on Civil and Political Rights⁷⁶ (para. 20); the election report on the elections of 2006 by the Office for Democratic Institutions and Human Rights of the Organization for Security and Coopera-

(footnotes 76 and 103), as well as the following instruments: Universal Declaration of Human Rights, UN General Assembly, A/810, GAOR 3rd session 217 (III) 71, 10 December 1948 (in footnote 176 of *Saramaka*); African Charter on Human and Peoples' Rights, Organization of African Unity (FN 42) (footnote 176); Convention concerning Indigenous and Tribal Peoples in Independent Countries, International Labour Organization (FN 65) (paras. 92-93 and footnotes 128 and 137); General Comment no. 23: The rights of minorities (art. 27), UN Human Rights Committee, CCPR/C/21/Rev.1/Add.5, General Comment No. 23, 8 April 1994 (footnotes 93 and 128); General Recommendation no. 23: Indigenous Peoples, UN Committee on the Elimination of Racial Discrimination, 18 August 1997 (footnotes 76 and 103), as well as various state reports to and recommendations from the UN Committee on the Elimination of Racial Discrimination (e. g. Ecuador in footnotes 136 and 138; and Suriname in footnotes 43-48, and 95); Report submitted in accordance with Commission resolution 2001/65, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (Rodolfo Stavenhagen), E/CN.4/2003/90, 21 January 2003 (in paras. 97, 134, 135, and 139); United Nations Declaration on the Rights of Indigenous Peoples, UN General Assembly (FN 41) (noting that Suriname approved the Declaration, para. 131; see also footnote 137).

⁷³ International Convention on the Elimination of All Forms of Racial Discrimination, United Nations, 660 UNTS 212 (engl.), 7 March 1966.

⁷⁴ Consideration of Reports submitted by State Parties under Article 9 of the Convention – Concluding Observations on Bosnia and Herzegovina, UN Committee on the Elimination of Racial Discrimination, CERD/C/BIH/CO/6, 11 April 2006.

⁷⁵ Consideration of Reports submitted by State Parties under Article 40 of the Covenant – Concluding Observations on Bosnia and Herzegovina, UN Human Rights Committee, CCPR/C/BIH/CO/1, 22 November 2006.

⁷⁶ International Covenant on Civil and Political Rights (FN 39).

tion in Europe⁷⁷ (para. 24), and documents associated with the European Union, such as the Stabilization and Association Agreement with the European Union⁷⁸ (paras. 27 and 49) and the Commission's 2009 progress report on Bosnia and Herzegovina⁷⁹ (paras. 25 and 47). Besides the European Court of Human Rights in *Sejdić* also bases its judgment on documents originating from institutions within the Council of Europe (like the African Commission with "African" sources), such as various opinions by the Venice Commission (e. g. the opinion on the constitutional situation in Bosnia and Herzegovina,⁸⁰ in para. 22 and 48 of *Sejdić*) or general policy recommendation no. 7 by the European Commission against Racism and Intolerance⁸¹ (para 23).

In all the decisions discussed in this article (*Sejdić* by the European Court of Human Rights, *Endorois* by the African Commission on Human and Peoples' Rights, and *Saramaka* by the Inter-American Court of Human Rights), a similar pattern is discernible: each decision draws on external sources to enhance its own legitimacy. Among the sources referred to are not only the caselaw of the deciding body itself and the standard international treaties and resolutions, but also caselaw of *other* judicial (and quasi-judicial) organs:⁸²

⁷⁷ Election Observation Mission Final Report on General Elections in Bosnia and Herzegovina of 1 October 2006, Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe, 6 February 2007.

⁷⁸ Stabilization and Association Agreement (SAA) between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part (FN 24).

⁷⁹ Bosnia and Herzegovina 2009 Progress Report, European Commission, SEC(2009) 1338, 14 October 2009.

⁸⁰ Opinion on the Constitutional Situation in Bosnia and Herzegovina, European Commission for Democracy Through Law (Venice Commission), CDL-AD(2005) 004, 11 March 2005.

⁸¹ General Policy Recommendation no. 7 on National Legislation to Combat Racism and Racial Discrimination, European Commission against Racism and Intolerance, CRI(2003)8, 13 December 2002.

⁸² The European Court of Human Rights in *Sejdić* does not refer to external caselaw in the strict sense. However, the European Court of Human Rights repeatedly relied on judgments by the Inter-American Court of Human Rights in the past (for instance in ECtHR, *Mamatkulov and Askarov v. Turkey*, Applications nos. 46827/99

The Inter-American Court in some footnotes of *Saramaka* refers to judgments by the European Court of Human Rights and by the Supreme Court of Canada, and to decisions by the Human Rights Committee and the African Commission of Peoples' and Human Rights.⁸³ The African Commission in *Endorois* also refers to judgments by the Inter-American Court (notably *Saramaka*) and by the European Court of Human Rights, and to decisions by the Inter-American Commission on Human Rights.⁸⁴ As such, the decisions examined in this article might seem like an archetype of ruling that has emerged only recently: *network rulings*. Such network rulings typically address issues with wide-ranging implications (such as the human rights compatibility of the structure of a whole system or a State's approach to the situation of indigenous peoples – issues of rigidity, if one so wills). In order to do so in a credible way they rely on international documents and judgments (and decisions) handed down in other international jurisdictions, regardless of their technically non-binding quality for the case concerned. Network decisions such as *Endorois*, *Saramaka*, and to a lesser extent *Sejdić* are thus evidence of the gradual establishment of legal and judicial dialogue on a global scale. They are knitting together the regional systems into a global network of human rights protection.

Yet there are differences between the decisions discussed in this article. The *Sejdić* judgment of the European Court of Human Rights, which is rooted in the whole array of European institutions, is illustrative of the multi-polar Europe of today in which various institutions supplement and support each other. But the instruments on which the European Court of Human Rights relies in *Sejdić* are all congruent: the respondent state, Bosnia and Herzegovina, accepted them all in one way or another. The *Saramaka* judgment of the Inter-American Court of Human Rights goes a step further in relying on external judgments (i. e. judgments stemming from a formally unrelated legal order), albeit only as supplementary arguments adduced in footnotes. Compared to these two judgments, however, the *Endorois* decision enters another dimension. The African Commission in *Endorois* not only refers to

and 46951/99 [4 February 2005], para. 55, or ECtHR, *Öcalan v. Turkey*, Applications no. 46211/99 [12 May 2005], para. 60).

⁸³ See supra FN 72.

⁸⁴ See supra FN 61 ff.

Saramaka in footnotes. It adopts virtually the entire reasoning of the Inter-American Court of Human Rights in *Saramaka* and repeatedly refers to *Saramaka* in diverse paragraphs of its decision.

While it is one thing to decide in the same way in a similar set of circumstances, it is another to lean on an external judgment in such an explicit way. For doing so, *Endorois* is remarkable. However, *Endorois* should not be perceived as a tributary decision for which to take the African Commission, in a weak moment, relied on external sources. Rather, the decision should probably stand out as the harbinger of a coming international legal order in which arguments to be discussed, issues to be addressed, and problems to be solved are in the focus, rather than traditional, binary questions, such as whether a judgment or a rule is binding or not in a given case. In that perspective, the African Commission, having taken the decision in *Endorois*, again is ahead of the other regional human rights systems. Perhaps the openness of the African Commission could inspire those in charge of other systems which are traditionally more closed and self-referential, such as arbitrators in investment disputes, who tend to be reluctant to move beyond their strictly defined domain and consider human rights issues.⁸⁵ Admittedly though, their step would be considerably bigger than the step the African Commission took in *Endorois*, as the Commission stayed within the confines of its traditional subject matter (that is human rights).

⁸⁵ See SIMMA BRUNO/KILL THEODORE, Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology, in: BINDER CHRISTINA/KRIEBAUM URSULA/REINISCH AUGUST/WITTICH STEPHAN (ed.), International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer, Oxford University Press, Oxford 2009, who discusses art. 31(3)c Vienna Convention on the Law of the Treaties, 1155 UNTS 331 (engl.), 27 March 1969, as a possible instrument for arbitrators to allow for human rights considerations in reaching a ruling.

V. Outro: and Kosovo?

“Whoever is a Serb and of Serb birth
And of Serb blood and heritage
And comes not to fight at Kosovo
May he never have the progeny his heart desires!
Neither son nor daughter
May nothing grow that his hand sows!
Neither dark wine nor white wheat!
And let him be cursed from all ages to all ages!”

Thus it is engraved on the monument of Gazimestan on the famous *Amselfeld* in Kosovo⁸⁶ to commemorate the famous existential battle between the Serbian and Ottoman forces in 1389. These days the memorial of Gazimestan, which is dearest to Serbia and which has been one of the bones of contention in the “Kosovo issue”, has been fortified and guarded by NATO forces in Kosovo against hostile acts by anyone – most probably Kosovars. Thus Gazimestan has become symbolic for the whole Kosovo-Serbia situation. While the most rigid of all structures to protect minorities – a state – has been unilaterally erected in Kosovo mainly in retribution for the hostile acts committed by the Milošević-regime at the turn of the millennium, the new state has left many problems unsolved. True to Koskenniemi’s “onion problem of nationalism”,⁸⁷ the new state has merely pushed the minority-majority dichotomy one layer deeper, rendering the Serbian minority in Kosovo (notably in Mitrovica) vulnerable and leaving them, and their

⁸⁶ The author of this article saw the inscription of the Battlefield Curse on the monument on the *Amselfeld* with his own eyes. The translation of the inscription from Serbian to English is from Wikipedia (<http://www.wikipedia.org>); the accuracy of the translation was confirmed by a Serbian native speaker.

⁸⁷ KOSKENNIEMI MARTTI, National Self-Determination Today: Problems of Legal Theory and Practice, 43 ICLQ (2) 1994, 574. For an assessment of new trends in situations involving claims for self-determination see WELLER MARC, Settling Self-Determination Conflicts: Recent Developments, 20 European Journal of International Law (1) 2009, 111-165.

memorials, in need of international protection. It is therefore not surprising that there is talk now of re-adjusting the borders of the new state Kosovo.⁸⁸

While the discombobulated international community is waiting for the International Court of Justice to opine on the legality of Kosovo's declaration of independence, one might want to ask whether anything can be learned for Kosovo from our discussion of the rigidity aspects of the *Sejdić and Finci* judgment⁸⁹ and the *Endorois* decision⁹⁰ – especially so as the state of disorientation of the international community is likely to continue after the opinion will have been handed down.⁹¹

From *Sejdić* we concluded that human rights required the phasing-out of the rigid ethnic structures upon which Bosnia and Herzegovina was built (its institutions must be open to minorities “other” than the three constituent groups), while the European Court of Human Rights left undecided whether such rigid structures could be justified for a limited period of time in the phase following immediately after violent conflict in order to restore and maintain peace. From the African Commission on Human and Peoples' Rights in *Endorois* we learnt that – different – rigid structures were required to protect indigenous peoples and to safeguard their vital interests and survival: the indigenous people must be recognized as a collective entity with juridical personality who is entitled to formal land title in the ancestral lands of the people.

If the general lesson of rigidity – which seems to be that rigid structures are only a temporary option to ensure the survival of a group threatened in its existence – is acceptable at all, then one would have to conclude that the

⁸⁸ See the “The border question”, *The Economist*, 5 June 2010.

⁸⁹ ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* (FN 2).

⁹⁰ African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (FN 3).

⁹¹ See the pervasive pleading by JAMES CRAWFORD on behalf of the United Kingdom (arguing that international law is indifferent to declarations of independence as such): *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion), public hearings (oral statements)*, CR 2009/32 (1-11 December 2009).

rigid minority-protecting structure established in Kosovo (i.e. the state of Kosovo) would have to be phased out, now that over a decade has passed since the cessation of hostilities. However, it seems that the relationship between Kosovo and Serbia has moved well beyond the point where rigidity can be phased out. The state of Kosovo is too far entrenched now to move back to the status quo ante.⁹² Any phasing-out would have had to be addressed at the time when peace was about to be restored. Thus the only way forward is to keep the structure of Kosovo itself soft and make it equally accessible to all groups in Kosovo.

If anything, one can therefore learn that a long-term perspective would be required early in any post-conflict phase, where heavy handedness usually tends to gain the upper hand. That this lesson is plain, almost trivial, is a mere consequence of the nature of rigidity: rigidity is not an established standard nor a frame of reference to be applied in the same way in each situation; rigidity largely depends on circumstances and is often taken hostage by the political requirements of a given situation. While rigidity might not even be the gold standard in an ideal world, it does not follow, either, that rigidity is useless. Quite the contrary, rigidity as a prism, as an open aspect, an inkling, or even a feeling *is* useful. As such, it provides us at least a hint, a first idea on whether a structure would stand or fall before a human rights court. Rigidity might be one, though not the only stepping stone on the “Bright Road” from the Vlašić Mountain and the Rift Valley – and places like the *Amselfeld*.

⁹² EPPING (FN 9), 35.

Minority Protection and the Neglected Importance of Authority

A Fundamental Challenge from Group Rights

Corsin Bisaz

“It is this desire for reciprocal recognition that leads the most authoritarian democracies to be, at times, consciously preferred by its members to the most enlightened oligarchies, or sometimes causes a member of some newly liberated Asian or African state to complain less today, when he is rudely treated by members of his own race or nation, than when he was governed by some cautious, just, gentle, well-meaning administrator from outside. Unless this phenomenon is grasped, the ideals and behaviour of entire peoples who, in Mill’s sense of the word, suffer deprivation of elementary human rights, and who, with every appearance of sincerity, speak of enjoying more freedom than when they possessed a wider measure of these rights, becomes an unintelligible paradox.”

ISAIAH BERLIN¹

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I. Abstract

It is largely accepted today that justice requires some protection of the members of minority groups through international law. At the same time, minority groups as such are largely excluded from this legal regime. This has caused, and continues to cause, strong claims to group rights which faced and still face strong opposition. What does the group rights claim challenge so fundamentally about the common approach of minority protection then? The most common answer is “individualism” implying that group rights are collectivist. However, the seemingly ideological dichotomy between individualism and collectivism is a partial answer at best. Instead, this article introduces an alternative understanding: that what seems to be much more at stake than individualism is the question of authority. The argument is that the current focus of international law on “just” solutions regarding members of minority groups may be limited and that it may be useful, at least in some contexts, to ask who should have the authority to determine a possible solution instead. On the whole, the focus on authority may help to find a more adequate approach of international law to issues concerning substate groups.

Societal diversity within states has increasingly become an issue within international law. On the one hand, it has become clear that “internal” conflicts between societal groups can spill-over and become a danger to international peace and security. On the other hand, large-scale human rights abuses – which also often occur between substate groups – are no longer tolerated by international law. This is true even if the international community has proven reluctant to live up to the international legal obligations in this regard. International minority protection is at the center of international law’s efforts to prevent conflicts between substate groups and either the state or other substate groups. Notwithstanding some progress, especially in the

1990s, international minority protection has largely remained below expectations.²

Among others, KYMLICKA came to the conclusion in a recent article that “the international community’s approach to minority rights is at an impasse.”³ Apart from the problematic sharp dichotomy between the approach to indigenous peoples and that to minorities which he views as wholly inadequate, KYMLICKA argues that its approach is “in particular ... unable to deal with the aspirations to autonomy by homeland national minorities”.⁴ Moreover, the case-specific intervention of the international community in support of autonomy is, according to his analysis, often made in an “arbitrary and ad hoc”⁵-way. Actually, the issue of autonomy⁶ as well as the issue of group rights⁷ more generally has caused quite some philosophical debates over the past decades, the positions taken diverge significantly and only rarely can some common ground be found. The difficulties international law seems to have with these topics only reflect these philosophical controversies. In fact, the approach which underlies contemporary minority protection through international law fundamentally differs from a group rights approach⁸.

² Cf. e.g. CASTELLINO, 393-423.

³ KYMLICKA, 1-32 at 31.

⁴ *Ibid.*, 31.

⁵ *Ibid.*, 31.

⁶ Cf. generally, HANNUM; SKURBATY; SUKSI, *Autonomy*; TKACIK, 369-401; for a more recent discussion of case-studies on autonomy, see BURRI.

⁷ By “group rights” I will mean rights which a group of individuals holds as such and not its members severally (for such an understanding, see e.g. JONES, *Group Rights and Group Oppression*, 353-77).

⁸ By a “group rights approach” I will mean one which predominantly relies on such group rights to legislate in what is referred to as “diversity management” (on “diversity management”, see THÜRER/KEDZIA).

II. Two approaches: groups as subjects or objects

When contrasting the minority protection approach⁹ with a group rights approach, many argue that the main difference is that in a group rights approach, groups are subjects whereas in the minority protection approach they are objects.¹⁰ This hypothesis seems plausible at first sight and could be an explanation for the reluctance of states to accept group rights in international law; in fact, it is more likely that states would accept certain guidelines for their approach to “internal” groups rather than support a view that these “internal” groups are subjects in their own name on the international level and as such, to some extent on the same level as states.

The notion of “minority protection” can be seen as supporting such a view as it arguably expresses a biased view on the issue. Of course, the term “minority” in “minority protection” expresses the numerical inferiority of a group in comparison with other groups within a certain entity and appears as such unbiased; however, this appearance is superficial for two reasons. First, a minority as reflected in this expression is not defined positively by what it is, but by what it is not, the majority. Speaking of cultural or ethnic groups, such a frame of reference is in fact biased and based on a nationalist logic. Second, especially in connection with the term “protection”, it implies weakness and vulnerability of the group. A “minority” does not seem to be a constitutive pillar of the state which it carries together and equally with the

⁹ By the “minority protection approach” I will mean the philosophical approach which seems to underlie contemporary international law with regard to minorities which is largely individualistic and, as I will argue, paternalistic. Admittedly, I may overdraw the two approaches and exaggerate their differences but I think that this is helpful in order to outline their strengths and weaknesses in a prototypical way and to discuss a potential complementarity.

¹⁰ However, it needs to be clarified that the subject position of groups (also in law) does not require moral standing as many authors imply. Group rights can be conceptualized in different ways, also in such a way that they derive their legitimacy fully from the moral standing of their members; an example for such a conceptualization is the one by JOSEPH RAZ (see 207-9.). Hence, understanding group rights as a collectivist tool endangering individualism, as mentioned in the abstract of this essay, is wrong from a conceptual point of view. For a general discussion of moral standing and group rights, see JONES, *Human Rights, Group Rights, and Peoples’ Rights*, 80-107.

majority, but an extraneous part of society which needs to be carried itself. Hence, “minority protection” understood in such a (critical) way demands the benevolent treatment of the minority by the state. Such an approach could be called “paternalistic” as minority groups are mainly reflected as beneficiaries of a special legal regime.

Typically, the minority protection approach aims at a legal regime of states which allows members of minorities to gain an equal position with members of the majority. But why does the minority protection approach focus on group members and not on groups as such? Apart from the fact that rights are generally thought of as protected interests/wills of individuals¹¹ not groups, the weakness of the group is generally seen as a consequence of inequalities of its members compared with members of a majority. In fact, framed in this way the mere beneficiary position of the minority group does not require any (legal) subjectivity of the group at all, it is neither its will nor its interest which is legally protected, rather the special legal regime is based on the generous will of the state and its majority towards its citizens who are members of minorities. As a result, the main discussion in such a theoretical framework is on what kind of legal regime is “just” and is based on the idea of equality between individuals typically reflected in the legal principle of non-discrimination¹².

¹¹ For a general discussion of the concept of rights and a critique of the two main schools, the will (or choice) theory and the interest theory, see RAINBOLT.

¹² The principle is included in the UN human rights treaties, most importantly the CCPR, CESC, CERD, and CEDAW. For a general overview of the practice of the treaty bodies with regard to non-discrimination and equality, see VANDENHOLE. Generally, the scope of the right of non-discrimination is restricted in the CESC, CERD and the CEDAW to the provided (human) rights and hence, it is not autonomous. (The CEDAW is a special case in that it is the only convention which is ‘asymmetrically’ conceptualized with women as the only beneficiaries and not naming the status ‘sex’ as a prohibited ground of discrimination allowing women as well as men to claim such a discrimination. On this, see HANGARTNER, 1306-7.). In contrast, art. 26 of CCPR provides, as confirmed by the practice of the Human Rights Committee, the right of non-discrimination as an independent right in addition to the accessory prohibition of discrimination in art. 2 of CCPR. See NOWAK, 604-5. It is worth noting that in the context of the ECHR it has only recently been extended by the entry into force of Protocol No. 12 to the ECHR for 18 states up to

Opposed to this narrative, the group rights approach focuses on groups instead of individuals.¹³ Such an approach implies that groups are able to decide “their matters” for themselves and that “their” will/interest needs to be respected. Such an understanding is prototypically reflected in the legal right/principle of self-determination¹⁴. In other words, in such a theoretical framework, groups become (legal) subjects.

Admittedly, the two approaches could theoretically cover the same load, if a group would decide for itself to apply the legal solution which, according to the minority protection approach, is just. However, this would only cover up the underlying fundamental difference between the two approaches. In fact, that groups are objects in one approach and subjects in the other does not explain the reason for why this is the case. To find the underlying reason for this fundamental difference, a distinction between authority and justice may be useful.¹⁵

the 1st of November 2010 with the general prohibition of discrimination. See Protocol No. 12 to the ECHR, 04.11.2000.

¹³ Literature on group rights has given much attention to the problems that are inherent to such an approach. Among others, difficulties arise from the definition of the subject “group”, from the relationship of groups to its members as well as to non-members, from its relationship to individual rights, and its relationship to other group rights. (For an overview on the discussion, cf. TORBISCO CASALS). However, the seriousness of these difficulties varies from issue to issue and seems in no way a reason to reject the category of group rights altogether. Moreover, a pure group rights approach in substitution of any individual rights would surely be illiberal; but of course, such an extreme perspective is anyway out of discussion.

¹⁴ This legal principle is namely found in article 1(2) of the UN Charter which states that the development of friendly relations among nations is “based on respect for the principle of equal rights and self-determination of peoples.” More importantly, both articles 1 of the CCPR as well as the CESCRC read: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” For a general discussion of the right/principle of self-determination, see CASSESE.

¹⁵ For a general discussion of such a division in the context of constitutional rights, see WALDRON, 18-51.

III. Authority versus justice

The distinction between authority and justice is a distinction in substance; authority focuses on the subject and the process, while justice basically focuses on the outcome.¹⁶ In fact, the two approaches seem to fundamentally disagree on which question matters most: “who decides on what the solution shall be?” or “what is a just solution?” In other words, the first approach tries to answer the question of “who” has to decide and “how” (procedural frame) when people disagree and as such, it mainly reflects on authority. Instead, the second approach tries to give a normative framework within which a solution has to be found, and as such, focuses on justice of solutions. These two issues are complementary, but this should not distract from the fact that logically the question of authority always takes precedence to alternative views of justice; in the end, a theory of justice needs to be accepted by the person/institution through the according procedure the theory of authority prescribes.¹⁷ Ultimately, the division appears to be basically that the group rights approach reflects a theory of authority, whereas the minority protection approach reflects a theory of justice.

Is this true? As always, it depends. Group rights are a very diverse category of rights and does not include rights which are on authority only, as it also includes rights which reflect a theory of justice. Indeed, classic group rights may be connected with the right of self-determination and other rights based on such a principle, but a right to physical existence as reflected in the prohibition of genocide or a group’s right to a territory like indigenous land rights, are better subsumed to the field of a theory of justice as they echo the result of thinking what is “just” and not a guidance on who had to find a solution to a certain problem and how. Hence, it is not right as a matter of principle that the group rights approach reflects a theory of authority rather than justice; nevertheless, the majority of group rights which are proposed in

¹⁶ Of course, the choice of subject and process can both be viewed as just/unjust, that is in terms of justice and both can also be the issue of an outcome; hence, some overlap is possible. Nevertheless, the questions differ substantially and a complete political theory would need to answer both separately. Cf. *IBID.*, 31-4.

¹⁷ Cf. *IBID.*, 31-4.

the context of diversity management likely seem connected with a theory of authority rather than justice.

On the other hand, the minority protection approach is largely, but also not exclusively, focused on a theory of justice rather than authority. Indeed, most rights in this approach are based on a theory of justice, take for example the right to use one's own language, the freedom of speech, and the right not be discriminated against, they all reflect what is "just". Nevertheless, namely the right to political participation is not only a reflection of what is "just" but also an instruction on how to find solutions and who to involve in finding them. Indeed, the principle is that the governed must have a say on their governance; in other words, it can be seen as a principle of political self-determination of individuals. In this sense there is an overlap between the two theories. However, the overlap is not to be overestimated as the unit where this democratic principle is to be applied is beyond the scope of the principle; the "self" is an individual, not a group. To put it another way, the "who" assumes a collective without guiding how to find or frame it. Hence, overall, the minority protection approach does not exclude rights from the authority field, but it clearly focuses on rights reflecting a theory of justice.

All in all, a group rights approach seems to put more weight on the question of the subject and the process, while a minority protection approach puts more weight on just results. It could also be said that group rights are typically on governance, while rights within a minority protection approach are typically individual rights in opposition to a collective. Actually, after the discussion so far, we can conclude that the two approaches generally have a different focus. Hence, it seems justified to understand the group rights approach as mainly reflecting on authority while the minority protection approach as mainly reflecting on justice.

IV. Disagreement as a problem for justice and the human rights claim

During the last few decades, political philosophy with its emphasis on rights and justice has largely focused on theories of justice and only marginally

discussed theories of authority.¹⁸ There may be many reasons for this; in the context of international law namely the “human rights revolution” may have played an important role. The human rights movement has managed to question the exclusiveness of the “international community” as a community of states and has entered the international stage as an actor. Moreover, it has questioned state sovereignty by arguing that the state’s legitimacy is derivative and that it, in fact, derives from the consent of the individuals it governs. The revolutionary claim from an international law perspective is that the state is to be re-thought inductively, and that it is not to be seen as the starting point for a deductive system where individuals are mere objects of the states. Indeed, human rights are declared to be inalienable and thus unquestionable for states but also for private persons; human rights do not derive their power from the consent of states but simply from the idea of an inherent human dignity. As such, human rights reflect a theory of justice, a “just” outcome which cannot be questioned by any result of a procedure even if it reflects the best theory of authority. In other words, human rights are not only out of reach for states, but also for democratic decisions.

This huge success of the international human rights movement¹⁹ has arguably also affected our thinking on minority protection and autonomy. The quest of international law seems to be to find “just” solutions for minority groups on a global level. Members of minorities shall have the same rights as members of majorities; justice requires as much. However, this approach presupposes some things which are rather questionable. Among others, it presupposes generalizability regarding problems which should be solved, it presupposes generalizability of possible solutions to such problems; more generally, it presupposes that it can be objectified which solutions are “just” or if this is not the case, it presupposes at least that the legislators of international law are best suited to find such a solution in the most common case that there is disagreement on what is “just”.²⁰ In light of the complexity and

¹⁸ This has namely been criticized by WALDRON (FN 15).

¹⁹ For a useful overview of empirical studies on the impact of the human rights movement, see HAFNER-BURTON/RODIN, 360-401.

²⁰ JEREMY WALDRON’s critique of the ignorance of disagreement regarding most basic values as well as his claim that it does not seem very convincing to let a democrati-

diversity of the manifold issues which traditionally are involved when minority groups and their interests are at stake, as well as in light of the creativity and learning capacity of people, these assumptions are doubtful. There is also reason to doubt that such an approach does justice to the different views on what justice requires. This is not to question that there are some legal principles on which to base an approach to minority groups nor is it to question that (international) law can play an important role in this field; instead, this is to argue that an approach which largely focuses on outcomes remains inescapably limited in scope.

Nevertheless, also theories of authority are informed by the values which underlie human rights, take human dignity as an example. Indeed, as the human being is the starting point as well as the end of any human rights-compatible system, the will of the governed has to be the basis for any legitimate authority, and accordingly, there is no basis for any other system than a democratic one. Admittedly, the will of the people could be against such a democratic system but still, there is no way around their right and duty to renew or change their commitment to another system from time to time; in fact, this is what POPPER has rightly seen as the crucial essence of (indirect) democracy, that the governed regularly have the possibility to change the government.²¹ Hence, people could democratically decide to give up their power to an authoritarian leader or monarch, but the democratic principle would at least demand a regular possibility to renew this choice or change the system again. Overall, the democratic principle is also based on the idea of human dignity and is the starting point for any theory of authority which should be consistent with international human rights law today.

Nevertheless, the democratic principle is limited. Indeed, we can agree that the democratic principle may prohibit colonization of an existing entity against the will of the majority of that entity and to subordinate it to the will of the colonizer; yet, as mentioned before, the democratic principle does in fact not provide an answer to the question of who should be seen as the “demos” in “*democracy*” as long as the entity is not “god given”. The “demos” is largely assumed and not much guidance is given on how to “discover” the

cally only weakly legitimized institution decide on the disagreement when a democratic institution could do it instead, applies here *mutatis mutandis*. Cf. WALDRON.

²¹ Cf. POPPER, 224-6.

right entity. Admittedly, when entities exist and there is a disagreement as to whom for example a village at the border should belong to, the democratic principle may help to find an answer through plebiscites in this village.²² However, the typical problem arises when a country consists of different, however defined (permanent) groups, and depending on what part of the state one takes as the relevant entity a different group gains a majoritarian position. In such situations the democratic principle provides little guidance as to which entity should correctly be seen as the relevant polity for democracy. Moreover, understood in such a way, democracy is largely an all-or-nothing game with regard to the entity and content.

It is important to mention at this point that the question of whether it is good or bad that different groups exist within states is irrelevant in this context for pragmatic reasons. As a matter of fact, more often than not they exist, and more often than not people tend to think along such lines. In other words, groups are a reality of social and political life in many states and where they are, group-related problems arise which call for group-related solutions.²³ Where individuals feel to be part of and/or are treated as a part of a group which is permanently excluded from governance, little comfort comes from the human right to (individual) political participation. Indeed, in such a case this right only secures that one has a “say” but this say may never prevail in a democratic procedure. A theory of justice can take group-related factual exclusion into account as an injustice and corrective mechanisms can be applied; however, such corrective mechanisms regularly have the drawback of weakening a principled approach to authority reflected by a theory of authority. To do justice for the majority of individuals can mean to do injustice to groups of individuals and vice versa.

The problem is best illustrated where members of certain ethnicities have for example the right to certain political positions in the government and/or a certain percentage of seats in the parliament. Where the ethnos becomes

²² Again, in such a case the village is kind of a natural entity to apply the democratic principle. This is not necessarily the case where a village, or a town like Jerusalem, is split.

²³ This is not to argue that groups would be more important than individuals, framing the issue in such a way is common but inadequate. See generally TORBISCO CASALS, 19-42.

more dominant than the demos, *democracy* inevitably becomes weak. This should not distract from the fact that in many cases where group belonging is reflected in the institutional architecture, institutions largely reflect social reality; therefore, the institutional solution may only be a substitute for a larger problem. Actually, the rights of ethnicities to fix positions in the government or parliament are group rights and it is in this form that such rights are most harshly criticized. However, there are other kinds of group rights which are much more in line with the democratic principle, namely when providing an answer to the question of which group has to decide on a certain issue. As such, the democratic principle stays but according to the theory of authority, the entity it will be applied to depends on the issue.

Overall, the focus on human rights and the individual human being has led to neglect the issue of authority. Moreover, the dominance of the theory of justice approach has arguably entailed the search of international law for rights of prototypical minority groups with prototypical needs in prototypical situations leaving behind the question of authority.²⁴ Instead, authority seems to have remained exclusively an attribute of the sovereign state. In conclusion, there is reason to believe that the current approach of international law to minority groups would gain from a serious discussion of the issue of authority.

V. The need for a theory of authority

The exclusive focus on possible solutions to issues concerning minority groups runs the risk of being too general and as such not applicable, too static, or simply not fitting. As mentioned, the complexity of the topic is tremendous and cause for the failure of such approaches. Actually, it would seem to be natural in this field to start from another point, that of the specific

²⁴ BENEDICT KINGSBURY has rightly remarked that such classifications of groups in international law “are often simplistic, and miss important parts of identities, and of the structure of claims and conflicts, including their territorial, historical, resource, and class aspects. The power of the lexicon shapes the way in which claims are formulated and groups define themselves ...” KINGSBURY, 481-513 at 497. Footnotes omitted.

needs of specific minorities and not imagined ones. To get to know the needs, the involvement of the group/its members seems important. However, the involvement of groups rests implicitly on assumptions of a theory of authority. Actually, authority needs some clarification at this point as it has different dimensions; the two main ones are the subject dimension which inquires “who” shall decide, and the procedural dimension which asks “how” a solution shall be found. The subject dimension can again be divided into a collective and an individual part; the collective subject dimension refers to the “polity” as the entity whose majority should decide, and the individual subject dimension asks who should be considered part of this polity. With regard to problems which are generally discussed under the heading of “minority protection”, the collective subject dimension seems to be a crucial and often ignored one.

Generally, one can observe that the state as such is understood as the exclusive polity in international law today. This seems justified for many reasons among which stability may be an important one. Nevertheless, when international law legislates on the issue of substate groups this veil of sovereignty in an absolute understanding is factually removed and individuals as well as groups of individuals become visible. Lifting the sovereignty veil from states reveals that many states have found institutional approaches to better accommodate the challenges posed to them by their diversity – in many cases the challenge was in fact less posed by diversity than by an attempted unity. Hence, many states provide some kinds of autonomies within their legislation, most commonly through federal structures.²⁵ On the whole, within states there is a long tradition of adjusting the polity for certain questions and along certain lines. However, the approaches were largely “ad hoc” in nature or simply more or less random historical products; all in all, a common theoretical ground for these solutions is largely missing.

Again, the many different solutions states have found during time are in no way to be seen as failures and to be replaced by a prototypical solution for prototypical groups in prototypical situations that is by a unified solution. As discussed before, there are reasons to doubt that in this highly diverse and

²⁵ For an in-depth-analysis of such examples, cf. e.g. HANNUM, 119-448; for an overview restricted to territorial autonomies, cf. e.g. BENEDIKTER.

complex field such a general solution could ever be found. Instead, the challenge today is rather to find a general theory on authority to lead the decision-making process in finding flexible, suiting solutions for every specific situation. In other words, what is to be criticized about the current approach is not that the found solutions within states are patchwork, but rather that the question of authority is only answered with regard to few topics, in few cases, and in a limited, ad hoc-way. More generally, the focus should shift from finding the “just” solution for problems with regard to groups worldwide to finding criteria which would guide to find the right “polity” to decide on solutions to specific topics.

VI. A substantial distinction of group claims

Groups today are in a very strange way trapped between the state and the individual. On the one hand, group claims to some autonomy are countered by the reproach of separatism in reference to the international legal principles of sovereignty and territorial integrity of the state and, on the other hand, by the reproach of tribalism by reference to individual human dignity. However, autonomy for groups essentially means a distribution of public power, not the creation of new public power in substitution of individual rights let alone human rights. The claim of groups to some autonomy is best understood as a claim for a certain amount of authority on specific issues.²⁶ Hence, with regard to possible conflicts with human rights the situation does not substantially change, the group may in certain questions replace the state, and still the legal obligation towards individuals does not change by this. As regarding the sovereignty of the state, the distribution of some public power to a group could only amount to separatism where this power is absolute;

²⁶ In my view, this is blurred by discussions on an “emerging right to autonomy” when autonomy is being treated as a “just” outcome for certain groups instead of acknowledging that what makes autonomy valuable is that certain groups have a say on issues concerning them. Indeed, what may matter more than the outcome of an autonomy regime is that certain groups are “taken seriously”, and being involved in solution-finding as implied by the right to (internal) self-determination. For a discussion of the right of self-determination as a right to be taken seriously, see KLABBERS, 186-206.

where the power is restricted to certain issues, such a reproach is unconvincing.

The interesting question now is on which issues certain groups should have a right to decide. To put it another way, which are the questions that justify regarding a group as the relevant polity to answer them in an authoritative way? It is not easy to find a good answer to this and it cannot be the aim to provide such an answer in this short essay. However, the following thoughts may be useful to consider when reflecting on a framework for a more general theory of authority. Particularly, it seems important to introduce a distinction between political claims and claims connected with language, culture, and religion;²⁷ this is a distinction which current approaches with their focus on ethnicity do not make.²⁸ Although they might come together more often than not,²⁹ there is a significant difference between these two categories of claims.

1. Claims to political power

Typically, when discussing the issue of autonomy, people tend to think of claims by ethnic groups to political power and this pushes the discussion into a minefield. In fact, claims to political power are a highly problematical category of claims for international law as they are likely to destabilize states and to create problems which can become a threat to international peace and security. Admittedly, the stability argument works on the opposite side as well, as the destabilization could arguably be avoided by states by providing the claimed political rights to a group. Nevertheless, if such claims are to secession, they are seen as conflicting with the sovereignty and territorial integrity of the state. But if we understand the principles of equality and self-

²⁷ Of course, such claims can also be seen as ‘political’ – the distinction is not meant between political and apolitical, but between claims to political power and claims to maintain what is at the core of a group.

²⁸ For an early criticism of the focus on ethnicity of the international law’s approach to minority groups, see KINGSBURY, 497.

²⁹ This is also reflected in the well-known aphorism that a language is “a dialect with an army”; however, it has to be reminded that many dialects have remained dialects notwithstanding ‘having’ an army.

determination as applicable also to substate groups,³⁰ this cannot be the end of the story.³¹ In fact, sovereignty and sovereign equality of states arguably derive their legitimacy from the same principles. Hence, if a territorially concentrated group which has been present long-term expresses the wish to form a politically independent entity, it can be justified for the same reasons as the sovereignty of the state; from a principle perspective, the case does not easily fall on one side or the other. Secession is the most extreme case here, and international law is, for reasons of stability, justifiably reluctant to provide a right to it. However, when claims to political power are short of secession, the two legal principles of international law indicate that the state has to take them seriously³² and find viable arrangements (legal and/or political) with such groups. A failure to do so could amount to a noncompliance with international law.

It is clear that political claims pose the biggest challenges to international law, are much broader and complex in content, and meet with the greatest resistance from states. Moreover, empirically, the danger is always present that populist politicians could simply use ‘groups’ as vehicles to reach pow-

³⁰ Of course, this is a contested view. However, the principle of equality is inherent to the concept of law and it is hard to see why the *principle* of self-determination should apply to “peoples” but not to groups as the difference between these two subjects is rather a gradual and not a qualitative one. In fact, the elements which are constitutive for a people are typically as well constitutive for substate groups which share an identity and claim political rights, the difference may be one of more-or-less. On the applicability of self-determination to substate groups, see e.g. BROWN-LIE; and SUKSI, *Keeping the Lid on the Secession*, 189-226. Cf. also the claim by several minority rights experts for a dynamic and broad understanding of self-determination in THÜRER, 250.

³¹ Moreover, note that the ICJ has held in its Advisory Opinion on *Kosovo’s Declaration of Independence* that “the scope of the principle of territorial integrity is confined to the sphere of relations between States.” Hence, this principle does not protect states from secessionist movements inside of their territory. See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Advisory Opinion of 22 July 2010, para. 80. Not yet reported, available at <www.icj-cij.org/docket/files/141/15987.pdf>, visited on 13 January 2011. Only Judge Koroma dissented on this issue, see his Dissenting Opinion, paras. 21-22. Not yet reported, available at <www.icj-cij.org/docket/files/141/15991.pdf>, visited on 13 January 2011.

³² Cf. KLABBERS.

er³³ and hence, this field is highly political and resistant to detailed legalization with pre-formulated solutions for all possible situations. Instead, international law's role is basically restricted to encouraging a distribution of power within states according to the principle of subsidiarity³⁴ in order to prevent far-reaching political claims as well as restricted to providing and securing the normative and procedural framework within which the involved parties have to find solutions.

2. Linguistic, cultural, and religious claims

A very different issue is that of group rights regarding their language, culture, and religion. Here, a development of rights is theoretically possible and politically much more probable. Indeed, if groups are to be taken seriously and treated equally, it seems rather convincing to argue that religious groups could demand rights connected to the exercise and maintenance of their religion and related issues, cultural groups could demand rights connected to the exercise and maintenance of their culture and related issues, and linguistic groups could demand rights connected to the exercise and maintenance of their language and related issues. All these claims would be restricted to the topic which is at the center of such a group and it would not politicize groups.³⁵ Religious claims will typically include rights to create the infrastructure needed to pursue the religious belief in community with other be-

³³ “Il faut enfin qu’il s’agisse vraiment d’une collectivité animée d’une volonté réelle et non point soit d’un caprice motivé par quelque une de ces circonstances fâcheuses mais passagères, qui sont inséparables de la vie politique, soit de l’apparition d’une bande de politiciens avides de places et de puissance, capables d’égarer, de fanatiser les groupes humains en dissimulant leurs ambitions sous le couvert d’un patriotisme exacerbé.” SCELLE, 387.

³⁴ This is for example proposed in: The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note: The Lund Recommendations, The Hague 1999, para. 19. In its explanatory note it provides the following comprehensive description of the meaning of this principle: “decisions are taken as close as possible to, and by, those most directly concerned and affected”.

³⁵ The politicization of such things like culture, language, and identity is typical for nationalism (cf. NORKUS, 389-418 at 410-1.) and at the root of many of the ‘minority’ problems.

lievers, and the ownership and/or use of certain religiously important sites. Meanwhile, linguistic claims will typically include rights to the use of the language (in administration, media, schools) and to means for this purpose. Cultural claims will typically include rights which enable people to live their cultural life, own/use culturally important sites, education on the culture, and in some cases, land rights and economical rights – if strongly connected with the culture. Much of this has already been acknowledged in the practice of the international treaty bodies, if often in an individualistic tone.³⁶

Of course, there are different obstacles to such an approach. A major difficulty arises namely when it is not self-evident if an issue can or cannot be subsumed to language, culture, or religion; this is in fact an issue which has to be approached by a theory of authority. However, much would be gained from an acknowledgement that it is in principle the group and not the state which has to decide on such issues. This would at least mean that where a state legislates in these fields, the burden of proof is with the state that it is acting on behalf of the affected groups and that it does not discriminate against these groups.

Many such rights can also be seen as covered indirectly through existing laws,³⁷ however, the development and clarification of this field is much needed and has arguably been blocked due to fears of its connection with political claims.³⁸ By and large, claims to have a say on one's identity need not question political order at all; hence, depoliticizing these issues could defuse the explosiveness of such claims from the beginning. A first step in this direction would be the distinction of these issues in international law. Above all, in contrast to language, culture, and religion, mere reference to ethnicity is not a convincing reason for a principled claim to authority. Hence, when discussing authority questions, international law should keep these issues strictly separate.

³⁶ Cf. HENRARD, 141-80.

³⁷ Think for example of the right to identity. On the right to identity, see e.g. THORNBERRY, 141-254; for a recent short overview of the international law and jurisdiction regarding political participation, see GHAI, 613-21.

³⁸ Accord IBID., 623.

VII. Conclusions

To pose the question of authority and to regard groups as the possibly relevant “polity” in some contexts, may question an absolutist understanding of the sovereignty of the state. However, in light of a liberal reluctance to ascribe too many functions to the state as well as a broadly understood democratic claim that the affected should be the ones who have a say on an issue, a more differentiated view on state sovereignty seems to be justified. Indeed, international law has started to acknowledge that substate groups may have a say on issues regarding language, culture, and religion which are strongly connected with their common identity. Admittedly, the argument that authority is a crucial issue may be less radical and less far from reality than it may seem at first sight. Nevertheless, to strengthen the focus on authority could help to find a more adequate approach of international law to issues concerning substate groups and especially enable learning processes and solution-finding by the affected on the basis of their actual needs. In conclusion, there are many open questions as regarding the issue of authority in the context of plural societies. Is there a rationale on which to decide who should have a say on an issue? Would such an approach challenge today’s understanding of the role of the state and its institutions? Which should be the institutional and democratic demands to such autonomous entities? One mentioned before is, who should decide in cases where it is not clear if the question belongs to a field where autonomy is acknowledged? What has been argued in this article crystallizes in the introductory observation by Berlin that being treated “justly” may in cases not be as important as having had a say on an issue.

Bibliography

- BENEDIKTER T., *Autonomien der Welt: Eine Einführung in die Regionalautonomien der Welt mit vergleichender Analyse*, Bozen: Athesia 2007.
- BERLIN I., *Four Essays on Liberty*, London/Oxford/New York: Oxford University Press 1969.
- BROWNLIE I., *The Rights of Peoples in Modern International Law*, in: CRAWFORD J. (ed.), *The Rights of Peoples*, Oxford: Clarendon Press 1988, 1-16.
- BURRI T., *Models of Autonomy?: Case Studies of Minority Regimes in Hungary and French Polynesia, convivenza*, Zurich/Basel/Geneva: Schulthess Juristische Medien 2010, vol. 2.
- CASSESE A., *Self-Determination of Peoples: A Legal Reappraisal*, Hersch Lauterpacht Memorial Lectures, Cambridge: Cambridge University Press 1995.
- CASTELLINO J., *The Protection of Minorities and Indigenous Peoples in International Law: A Comparative Temporal Analysis*, 17 *International Journal on Minority and Group Rights* 2010, 393-423.
- GHAI Y., *Participation as Self-Governance*, in: WELLER M. (ed.), *Political Participation of Minorities: A Commentary on International Standards and Practice*, Oxford: Oxford University Press 2010, 613-33.
- HAFNER-BURTON E./RON J., *Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes*, 61 *World Politics* 2009, 360-401.
- HANGARTNER Y., *Staatliches Handeln im Bereich von Diskriminierungsverboten*, in: BREITENMOSEER S./EHRENZELLER B./SASSÒLI M./STOFFEL W.A./WAGNER PFEIFER B. (eds.), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber*, Zürich/Baden-Baden: Dike Verlag; Nomos 2007, 1301-14.
- HANNUM H., *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, Rev. ed., Philadelphia, Pa.: University of Pennsylvania Press 1996.
- HENRARD K., *The Protection of Minorities Through the Equality Provisions in the UN Human Rights Treaties: The UN Treaty Bodies*, 14 *International Journal on Minority and Group Rights* 2007, 141-80.
- JONES P., *Group Rights and Group Oppression*, 7 *Journal of Political Philosophy* 1999, 353-77.
- JONES P., *Human Rights, Group Rights, and Peoples' Rights*, 21 *Human Rights Quarterly* 1992, 80-107.
- KINGSBURY B., *Claims by Non-State Groups in International Law*, 25 *Cornell International Law Journal* 1992, 481-513.
- KLABBERS J., *The Right to be Taken Seriously: Self-Determination in International Law*, 28 *Human Rights Quarterly* 2006, 186-206.

- KYMLICKA W., The Internationalization of Minority Rights, 6 *International Journal of Constitutional Law* 2008, 1-32.
- NORKUS Z., Max Weber on Nations and Nationalism: Political Economy before Political Sociology, 29 *Canadian Journal of Sociology* 2004, 389-418.
- NOWAK M., U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd rev. ed., Kehl: Engel 2005.
- POPPER K.R., *Alles Leben ist Problemlösen: Über Erkenntnis, Geschichte und Politik*, Serie Piper, 12th ed., München: Piper 2009, vol. 2300.
- RAINBOLT G.W., *The Concept of Rights*, Law and Philosophy Library, Dordrecht: Springer 2006, vol. 73.
- RAZ J., *The Morality of Freedom*, Oxford/New York: Clarendon Press; Oxford University Press 1986.
- SCELLE G., Quelques réflexions sur le droit des peuples à disposer d'eux-mêmes, in: CONSTANTOPOULOS D.S./EUSTATHIADES C.T./FRAGISTAS C.N. (eds.), *Grundprobleme des Internationalen Rechts: Festschrift für Jean Spiropoulos* (Bonn Schimmelbusch & Co. 1957, 385-91.
- SKURBATY Z.A. (ed.), *Beyond a One-Dimensional State: An Emerging Right to Autonomy?*, Raoul Wallenberg Institute Human Rights Library, Leiden/Boston: Martinus Nijhoff 2005.
- SUKSI M. (ed.), *Autonomy: Applications and Implications*, The Hague: Kluwer Law International 1998.
- SUKSI M., Keeping the Lid on the Secession Kettle – A Review of Legal Interpretations Concerning Claims of Self-Determination by Minority Populations, 12 *International Journal on Minority and Group Rights* 2005, 189-226.
- THORNBERRY P., *International Law and the Rights of Minorities*, Oxford: Clarendon Press 1992.
- THÜRER G./KEDZIA Z. (eds.), *Managing Diversity: Protection of Minorities in International Law, convivenza*, Zürich: Schulthess Juristische Medien 2009, vol. 1.
- THÜRER D., Minorities and Majorities: Managing Diversity – A Fresh Look at an Old Problem, in: THÜRER G./KEDZIA Z. (eds.), *Managing Diversity: Protection of Minorities in International Law, convivenza*, Zürich: Schulthess Juristische Medien 2009, vol. 1, 247-53.
- TKACIK M., Characteristics of Forms of Autonomy, 15 *International Journal on Minority and Group Rights* 2008, 369-401.
- TORBISCO CASALS N., *Group Rights as Human Rights: A Liberal Approach to Multiculturalism*, Law and Philosophy Library, Dordrecht: Springer 2006, vol. 75.
- VANDENHOLE W., *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, Antwerpen: Intersentia 2005.
- WALDRON J., A Right-Based Critique of Constitutional Rights, 13 *Oxford Journal of Legal Studies* 1993, 18-51.

The view of a member of a member of a so-called national minority

Romedi Arquint

“Niemand hat mich gewarnt, ich solle mich vor Wörtern hüten, die trunken sind von Mohnblumen des Jenseits. Geh über Wörter wie über ein Minenfeld, ein falscher Schritt, eine falsche Bewegung ... und alle Wörter ... werden mit dir zusammen in Stücke gerissen“¹.

Thesis 1

As a “medieval relic” originating from a multinational European form of state and society, Switzerland has preserved this form of government and shaped it to a modern type of multinational state. The difference of this concept of state from the nation-state becomes visible in notions such as “federal state” and “linguistic and cultural communities” which stand in opposition to notions like “nation-state” and “national minorities”. In Switzerland, the concept of state and the concept of nation never melt together (apart from the fact that Switzerland got itself the epithet of a “nation by will” to position itself as a “nation”); moreover, the idea that all other communities, peoples and nationalities had to subordinate themselves to a homogeneity ideal of the majority of the population never prevailed. The success story of the Swiss Model is mainly based on the fact that the federal state does not regulate in the linguistic, cultural, and educational sector. These are reserved to the cantons and even within the cantons, to the municipalities. Ultimately, these sensitive issues are beyond the power of the central state and have to be treated pragmatically and close to the basis rather than ideologically.

¹ ABRAHAM SUTZKEVER, a Baltic Yiddish poet.

By contrast, the nation-state merged the idea of the state with the idea that the state should also be responsible for a however constituted ethnic, linguistic, and cultural “nation” in the meaning of a “people” which has resulted in problems. Indeed, from this perspective the state would reach its perfection in the complete fusion of the principles of a “Rechtsstaat” with the people as a naturally and monolithically grown unit. However, attempts to reach homogeneity of the “people” through the creation of an own state have failed in most of the European states.

“Managing diversity” is based on a conception of a state which views itself as multi-national as a matter of principle. An essential consequence of this is the claim not to assign to the state a de facto monopoly in the field of preservation and promotion of the historic national heritage of the majority population.

Thesis 2

The most disastrous notions of the 20th century are the “nation-state” and the “national minorities”, both inventions of the late 19th century.

Who are the “persons belonging to a national minority”? Do the Rhaetoromanshs, the Sorbs, the Catalans or Basques belong to them although they understand themselves as autochthon peoples? By contrast, “national minorities” are groups of a people who are typically separated by artificial state borders from the rest. “Many international organizations have struggled with this issue without any clear resolution, and their current policies and practices are full of ambiguities and inconsistencies”².

As a Rhaetoromansh (one of the four linguistic and cultural community making up 0.5% of the population of Switzerland) I have never felt as such a “person belonging to a national minority” (moreover, “minority” as such was a concept even unknown to the Swiss Constitution); rather the opposite, the consciousness of belonging to one of the different patches – even if smaller

² KYMLICKA W., The internationalization of minority rights, 1.

than the others – within the patchwork of Switzerland has strengthened my loyalty and sense of responsibility as a citizen towards this state.

The finding that the nation-state was not a success story is trite; however, few alternatives to this state model can be found in the politically relevant literature. Therefore it's unsurprising that the nation-state model has been unreflectedly exported to Eastern Europe as an ideological substitute for communism after the political opening up. To the infection of the new states with the “national” as a worth of its own and its “ethnization” corresponded the qualification of other communities as “persons belonging to national minorities” with all consequences that we know.

The export of the Western European nation-state model to the new states contrasted the historical experiences with multinational societies of most states of Eastern Europe and the Balkans. Indeed, even in the Soviet Union – and despite the ideology of the “homo sovieticus” to build – a notion of “nationality” was preserved which at least in theory accepted the equality of nationality in a state. Overall, this explains the many reservations of peoples with regard to the expression “national minority”.

The pair of notions “nation-state” and “national minority” belongs to the rubbish heap of history. Managing diversity uses and speaks instead of “nationalities” or “linguistic and cultural communities”. By doing this, it deprives the modern state of the foundation for a fictional and nevertheless aimed fusion to the one people who make up its majority.

Thesis 3

To the status of peoples and communities without their own state in the international political debate: The communities are often excluded from the process of creation and implementation of laws.

Examples: In the Ad hoc Committee for the elaboration of the European Charter of Regional or minority languages, the only members of minority communities were the two representatives of Switzerland. The same is true of the advisory boards and expert committees. Institutional bodies are often

perceived as working “for” – but not “with” the communities. The same is true for the contacts of the international institutions on national level. The effective participation of the communities remains in the “shadow”. “It is very rare, however, to find that these good things (the states will do in relation to minority communities) have been developed in cooperation with communities directly concerned³.”

The principle of “effective participation of persons belonging to national minorities”, stipulated by the OSCE (Copenhagen doc 1990), the Framework Convention (art. 15), and finally the Lund Recommendations (art. 12) have had weak consequences. Appropriate institutional frameworks (consistent structures), funding or rights given to the communities to delegate their members in such bodies have not been realized sufficiently. If one wants to create strategies and propose solutions which serve the communities these have to be viewed and treated as equal partners “at eye-level” within states as well as in international organizations.

Two main players are involved in the debates and decisions about the needs and rights of communities, the state authorities on the one side and scientists/expert groups on the other side – with almost marginal/symbolic representation of representatives of the communities directly involved.

Managing diversity requires national and international institutions in which the communities are represented adequately.

Thesis 4a

To enable dialogue between states and communities, the communities have to be established as legitimate partners. Indeed, this is the decisive step which has to be done with priority given to the interest of a long-term process. All the relevant international documents talk of participation by the “persons belonging to national minorities”; however, if one asks about the organization form and structures, hardly anything relevant can be found.

³ WELLER MARC, Filling the frames, 256.

More importantly, if something can be found, in my view, it pushes in the wrong direction. At the moment where one was trying to introduce democratic rules to the new states the focus was on forms of participation in the political system and the recommendations aimed at converting these into the parliamentary and administrative state structures. Yet, the basis of such forms of participation in a democratic state consists of the political parties. Accordingly, an ethnization of the political structures and processes took place.

In the medium-term this was a viable way for the “big” communities with obvious potential for violence and separatism. Admittedly, also the symbolic power of the inclusion in the apparatus of state may have had some importance for the people who were used to being confronted with an omnipotent state. *However, the wave of political representation by ethnical affiliation did not leave out the smaller of the communities where the integration in the parliamentary system generally isn't useful (more than 75% of the European communities consist of less than 300 000 speakers).*

Three indications of the questionability of this development: The ethnization of society brings with it a double dilemma for the members of communities. Should they vote according to their political ideals or prioritize their ethnical belonging?

Furthermore, the attitude of the majority will not be positive towards such communities if there need to be exception clauses from the principles underlying a “Rechtsstaat”. Indeed, this is even more the case when such ethnic parties advance to the stage whereby they are able to tip the scales in coalition negotiations.

My third point concerns the representativity of a political party of a community as such. Politics is interested in power whereas “managing diversity” aims at the preservation and promotion of linguistic and cultural values. A political party is not fit to develop a holistic and consistent strategy for a community.

Democratically and politically the representation of communities through political parties is a questionable way to secure their interests on the long run.

There is a real danger of losing the perspective of the state as a whole and cementing ethnic divisions when states are politically organized on the basis of ethnic parties. “Managing diversity” stresses the responsibility of the emancipated citizens for the entire state and, accordingly, defuses the danger of violence in a multinational state.

Thesis 4b

In addition, I want to give an outlook on possible alternative forms of organization of communities. It makes sense to take up again the idea of a depolitization of communities as for example RENNER had thought of to save the multinational state structure of the former Austro-Hungarian monarchy by taking it into modernity. Two indications in this regard: First, RENNER recommends that the communities first of all should establish a legitimate representation under public law. This form of organization enables them to take their affairs in their own hands and to negotiate with state institutions. Accordingly, this enables them to negotiate and to reach compromises between claims for linguistic and cultural autonomy and the cohesion of the state as a whole. Second, Renner gives preference to personal autonomy instead of territorial autonomy. The reason for this is that he believes that personal autonomy helps to preserve personal identity alone or in (a) community with others in an adequate way, especially with regard to the fact that community members do not live exclusively in their historical territory. In certain cases, of course, mixed forms with application of both principles are possible as well. However, such approaches have been disregarded notwithstanding their huge potential (St. Oeter, *Selbstorganisation der Volksgruppen in Form öffentlich-rechtlicher Vertretung*). Only a few states experienced the model of personal autonomy, namely Finland and for a short period in the 20^{ies} of the last century Estonia, while most of the states and the international instruments remained strongly linked to the territorial autonomy.

Usually, communities are organized as institutions of civil law in most of the states of Western old Europe, in some with de facto public law claims, e.g.

the Rhaetoromanshs in Switzerland. However, they have not managed to organize themselves in a way which legitimizes their institutions democratically and is recognized in public law.

As far as Hungary is concerned the fact is quite astonishing that it is one of the new states which has at least in part chosen the way of depolitization in its politics with communities by applying the personal principle and granting political autonomy to minorities.

Communities need to organize themselves in forms which give them a democratic legitimacy in order to be able to reach sustainable policies based on dialogue, cooperation, and/or forms of autonomy. Indeed, this is a prerequisite for the creation of tailored measures which guarantee a “real” participation of communities. Specifically, as strategic options we can think of models based on public law which grant personal autonomy, eventually connected with some territorial components for communities.

Thesis 5

In conclusion, please let me express my appreciation for the efforts of the Council of Europe from the perspective of a “managing diversity”-policy perspective. It is important to notice that the work on the European Charter for Regional or Minority Languages started late but nevertheless before the events of the 1990s. The Charter is an attempt by the Council of Europe to grasp and regulate the ethnic questions in their cultural dimension and view them not as a political issue. To preserve and promote the values of linguistic and cultural diversity means to deprive them from the power politics at the central level of the state. Conversely, political questions like those of decentralization and the application of forms of territorial autonomy within the organization of the state should be tackled with political instruments like the European Charter of Local Self-Government. From the experiences of Europe after WWII it came to the right conclusion, even if some details are disputable: a clear separation of the idea to preserve languages as a cultural task from the political organization of the state.

However, we have to admit that the Council of Europe has not succeeded in the time since WWII to develop a sufficient, politically supported strategy to avoid or resolve smoldering ethnic conflicts. Unfortunately, the timid efforts in this direction have ended abruptly in the face of the dramatic collapse of Communism and have moved again strongly in a political direction with the Framework Convention. The eruption of violence in the new states has forced the international community to deal with the problem and to present solutions within a few months. The Framework Convention tries to work out solutions based on an “unreflected” approval of the concept of nation-state and consequently, many measures seem limited to fighting the symptoms but not curing the disease.

Whereas the European Charter for Regional or Minority Languages constitutes a timid attempt to understand and to put into action linguistic diversity as a cultural task, the Framework Convention is fighting the symptoms as its solutions are based on an “unreflected” approval of the concept of nation-state. In conclusion, it is a prerequisite of “managing diversity” to separate the promotion of linguistic and cultural diversity from institutional questions of state organization.

Die Befreiung der Sprachen aus dem Gefängnis des Nationalstaates

Romedi Arquint

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I. Ein moderner Staat setzt auf Mehrsprachigkeit

„Miär túa Amish, Englisch u Bärntütsch verminggmämnggle.“ (Ausstellung zu den Amish in Zürich 2005)

Volksgruppen sind nicht Nachzügler im europäischen Integrationsprozess, sondern deren Avant-Garde. Keine Minderheit ist zu klein. Will eine Mehrheit einen inneren Feind haben, ruft sie, gerade sie, zu einer nationalen Bedrohung aus, vor der man sich zu verteidigen hat.¹

The ability to speak 3 or 4 languages with moderate proficiency is regarded in Britain and in America as a property of head waiters and ho-

¹ GAUSS KARL-MARKUS, Beide Zitate in Masurische Storchenpost, Mai 2006.

tel concierges (A. Burgess). People like this are not towering intellectuals. They are often of very moderate intelligence. What makes them good at languages is the fact that social and economic circumstances force them to be good. So far, the anglophone world has never really been forced out of his monoglot complacency and the legend that there is something in the Anglo-Saxon genes that forbids language proficiency continues to be fostered.“

Die Sprachwissenschaft hat längst die „Defizithypothese“ widerlegt, wonach Zwei- oder Mehrsprachigkeit zu einem Verlust an einer persönlich reifen Identität führe; eher erscheint es berechtigt, diese heute umgekehrt auf die Monolingualen anzuwenden. Im Nationalstaatskonzept dominiert jedoch immer noch der ideologische Müll, wie wir ihn bei Fichte angetroffen haben, der die Einsprachigkeit zum einzigartigen Identität bildenden und Identität sichernden Faktor erklärt. Hier streiten sich die Geister, wie und wann der Kontakt mit den „Fremdsprachen“ beginnen soll.

Es ist eine banale Tatsache, dass die Angehörigen der Mehrheitsnationalitäten weitgehend einsprachig sind. Je grösser die Kulturnation, desto ambitionierter ihre Ansprüche an die Welt und umso weniger wird sie sich um die Aneignung anderer, „fremder“ Sprachen und Kulturen kümmern. Für einen Indianer ist es eine Selbstverständlichkeit, neben der Sprache seiner Region auch Hindi und Englisch zu beherrschen. Für einen Rätoromanen, Sorben oder Kärntner Slowenen gilt Ähnliches: Neben oder parallel zur ersten Sprache (L1) lernen sie auch die Staatssprache L2 (die Rätoromanen in der Schweiz mindestens zwei). Wenn ich die Angehörigen der „nationalen Minderheiten“ als Prototypen eines Europa von morgen bezeichne, so zunächst deshalb, weil sie tatsächlich eine echte Zwei- und Mehrsprachigkeit leben. Echte Zwei- und Mehrsprachigkeit bereichert den Einzelnen, denn sie eröffnen neue Weltsichten und verbreitern den geistigen Horizont. Mit der Sprache bilden wir die Welt. So lernen wir etwa bei den romanischen Sprachen mit ihrer Zentrierung der Aussagen um das Verb die analytische Entwicklung der Gedanken, Schritt für Schritt nähern wir uns der zentralen Aussage an, während die deutsche Sprache mit dem Substantivtum des „Dampfschiffahrtsgesellschaftskapitäns“ direkt auf die damit intendierte zentrale Aussage fokussiert.

Die Mehrsprachigkeit ist andererseits auch ein essentieller Bestandteil auf dem Wege zu einem Europa von morgen. Dabei geht es nicht nur um die

Aneignung einer einigermaßen verantwortungsvollen Kompetenz zur Kommunikation in Politik und Wirtschaft. Es geht um mehr, es geht um das Kulturerbe, das diesen Kontinent auszeichnet und das als Nährboden der zivilisatorischen Entwicklung der Menschheit eine bedeutende Rolle spielte. Mehrsprachigkeit wirkt sich auch im gesellschaftlichen – und dazu gehört auch das politische – Umfeld aus. Die Tendenz einsprachiger Welterfahrungsmuster auf kollektiver, staatlich geförderter Ebene wird relativiert, sie dämpft Allmachtsphantasien und fördert eine Kultur des Dialogs.

Der Turm zu Babel und die Sprachverwirrung

Die geläufige Interpretation der biblischen Geschichte des Turmbaus zu Babel erklärt die Vielfalt der Sprachen als Strafe Jahves für den Übermut der Menschen. Die Sprachverwirrung wird negativ interpretiert und volksetymologisch haben sich Anklänge an Babel im Sinne von „wirrem, unverständlichem Reden“ in verschiedenen Sprachen und Dialekten niedergeschlagen. In der Geschichte haben sich zu verschiedenen Zeiten und in verschiedenen Kontexten auch verschiedene Interpretationen ergeben.

Zunächst kann man sie als ätiologische Sage deuten, die neutral versucht, den Zeitgenossen die Sprachenvielfalt zu erklären. Für die alten Babylonier bedeutete der Name ihrer Stadt „Tor Gottes.“ Die Sumerer und später die Babylonier bauten Tempel, „so hoch wie die Berge“, nicht, um die Götter zu versuchen, sondern um einerseits den Göttern die Möglichkeit zu geben, auf die Erde herunterzusteigen. Der Turm von Babel soll 90x90 Meter im Grundriss gemessen haben und 90 m hoch gewesen sein. Die nomadisierenden Israeliten hörten am Lagerfeuer von den mächtigen Bauten der Babylonier, den Zikkuraten, und verglichen deren Götter mit ihrem unsichtbaren Gott Jahve, der sie schützend auf ihren Wanderungen begleitete. Und natürlich galt es, die eigene Wirklichkeit gegen die erstaunlichen Errungenschaften der Hochkultur im Zweistromland zu verteidigen. Und weil ja alles vom Willen Jahves abhing, die Babylonier jedoch andere Götter anbeteten, mussten sie die hohen Türme als dekadente Erscheinung des Feindes auslegen. Aus israelitischer Sicht war es nicht die zivilisatorische Leistung einer Hochkultur, die es zu würdigen galt, ihre – strukturkonservative – Sicht musste „ihren“ Gott als den allen anderen Göttern Überlegenen herausstreichen. Damit kam der Hochmut in die Legende. Die Endfassung der Legende

erfolgte zu einer Zeit, als das Reich der Babylonier längst untergegangen war, womit der Beweis für die „richtige“ Interpretation aus israelischer Sicht erst recht gegeben war.

Die Rezeption des Turmbaus von Babel zeigt, wie Symbole umgedeutet werden; sie zeigt damit aber auch, dass Legenden dann lebendig werden können, wenn sie mit neuen zeitgemässen Interpretationen in die Gegenwart hinein leuchten. Wir könnten heute neue Interpretationen wagen, die unserer Zeit gemäss sind. Zum Beispiel die folgende: Die Einsprachigkeit der Menschen könnte, nicht zuletzt wegen der jeder Sprache eigenen „einseitigen“ Weltdeutung, zu einer Hybris und Arroganz führen, die fehlgeleitet in den Untergang mündet. Die Sprachenvielfalt hingegen garantiert den Ausgleich, die Relativierung der einzelnen Weltbilder und deren Allmachtphantasien und zwingt dazu, dass Menschen – glücklicherweise – dazu verurteilt sind, Weltdeutungen miteinander in Verbindung zu bringen, aufeinander zu hören und miteinander in den Dialog zu treten.

II. Das Territorialprinzip und Babuschka

Der auf die Territorialität angelegte Sprachenschutz der Nationalstaaten verschiebt alte Probleme und schafft neue. Das Prinzip schützt Sprachen auf einem umschriebenen Staatsgebiet, es schützt sowohl die Sprache der Mehrheitsbevölkerung vor den „nationalen Minderheiten“, wie auch die der „nationalen Minderheiten“ vor der Mehrheitsbevölkerung. Diesen Grundsatz haben alle Nationalstaaten schon früh durchgesetzt. Die kulturellen und politischen Instrumente des Europarates haben logischerweise ebenfalls die Territorialität als Grundlage, die Charta schützt Sprachen „in den Gebieten, in denen diese Sprachen gesprochen werden“; zu konkretem Handeln werden die Staaten in der Konvention beauftragt „in den Gebieten, die von Angehörigen nationaler Minderheiten traditionell oder in beträchtlicher Zahl bewohnt werden“. Was sich als Schutzmassnahme ausgibt, erweist sich für viele der zahlenmässig kleineren „nationalen Minderheiten“ als wenig wirksam und oft kontraproduktiv. Angesichts der Mobilität werden sie in peripheren Gebieten geschützt, die – bedingt durch Abwanderung und Überalterung – zu Brachregionen werden, oder – bedingt durch die touristische Vermarktung – eine massive Zuwanderung zur Folge haben, die die einheimische

Bevölkerung derart in die Minderheit versetzt, dass nachhaltige Sprachenschutzbestrebungen kaum mehr greifen. Andererseits findet sich die zahlenmässig grösste Zahl von Angehörigen dieser „nationalen Minderheiten“ in den städtischen Agglomerationen, wo sie auf keinerlei Förderungsmaßnahmen rekurrieren können. Territoriale Bestimmungen haben Sprachghettos zur Folge, in denen „Angehörige aussterbender Sprachen“ zur exotischen Folklore verdammt werden, andererseits schützt sich so die Mehrheitsbevölkerung vor sprachlicher Durchmischung und „Verunreinigung.“ Pointiert formuliert fördern internationale und einzelstaatliche Sprachregelungen auf der Grundlage des Territorialprinzips das Verschwinden der Gemeinschaften, die sie zu schützen vorgeben, schützen jedoch die Mehrheitsbevölkerung vor der Infiltrierung und der „Gefährdung“ der sprachlichen Homogenität. Kurz, das Territorialitätsprinzip bindet die Sprachen an Territorien und nicht an Menschen, erschwert so normale informelle Sprachbegegnungen, die den durch die familiäre und berufliche Mobilität der Menschen, den Freizeitaktivitäten und den Medien und bestimmten Alltag längst zur Selbstverständlichkeit geworden sind. Die Schweizer Kantone verhalten sich in Bezug auf die Sprachenfrage wie die Nationalstaaten. Es mutet geradezu absurd an, dass das Konsulat Italiens in deutschsprachigen städtischen Agglomerationen italienischen Kindern Einführungskurse in die italienische Sprache und Kultur anbietet, Schweizer Eltern italienischer Sprache hingegen für ähnliche Anliegen in Bezug auf die schulische Ausbildung auf keinerlei staatliche Förderung ausserhalb des Kantons Tessin zählen können. Erst recht gilt dieses Prinzip für die kleinste der Schweizer Sprachgemeinschaften, die die Bundesverfassung zu schützen vorgibt; die Rätoromanen bilden in Zürich die grösste rätoromanische „Gemeinde“, haben jedoch keinen Anspruch auf staatliche Förderung der rätoromanischen Sprache und Kultur. Das Territorialitätsprinzip steht der Forderung nach dem grundlegenden Recht auf Förderung der sprachlichen und kulturellen Identität einer vorab durch die Mobilität veränderten Gesellschaft hinderlich im Weg.

Die strukturelle Schwäche des Territorialitätsprinzips: Es funktioniert nach dem Babuschka-Prinzip: Nimmt man die eine der „Sprachpuppen“ weg, ist die nächste da. Jedes Lösungsmodell, das nach diesem Grundsatz vorgeht, verschiebt die Probleme auf die nächsttiefere Stufe, schafft neue „nationale Minderheiten“.

III. Aktualisierung des Personalitätsprinzips

„Auch dem deutschen Offizier, der in einem galizischen Städtchen garnisoniert ist, wäre es von Wichtigkeit, von seiner Nation, zu deren Lasten er beitrüge, die Bereitstellung eines deutschen Schulunterrichtes für seine Kinder fordern zu können.“ Und: „Was eintreten würde, wäre die von den Minoritäten selbst realisierte Doppelsprachigkeit ihrer Schulen, ein wahres Glück für den Staat“.²

Renner hatte zu Beginn des 20. Jahrhunderts ein Staatskonzept entwickelt, in dem die sprachenrechtliche Ordnung auf einer nicht-territorialen Grundlage fusste. Renner erinnerte daran, dass Sprache und Kultur (und Recht) während des Mittelalters nicht ausschliesslich territorial bestimmt waren: „Das karolingische Weltreich vereinigte ursprünglich zahlreiche Stämme „ohne deren nationales Recht, Sprache und Eigenart aufzuheben. Bevor der Richter eine Streitfrage verhandelte, fragte er: „Quo iure vivis“ (nach welchem Recht lebst du?). Die Habsburg-Monarchie sei von einer durch das Militär, die Verwaltung und die Wirtschaft bestimmte Mobilität geprägt, die eine territoriale Aufteilung der historischen Sprachgebiete nicht zulasse. Diese Analyse der gesellschaftlichen Lage erfolgte vor knapp 100 Jahren! Heute ist die Mobilität zu einem Faktor geworden, der Renner’s Analyse weit in den Schatten stellt, ihr aber einen geradezu prophetischen Charakter gibt. Und doch halten die nationalstaatlichen Konzepte unbeirrt an der Territorialität fest. Das Territorium bestimmt, welche Sprache(n) Du zu lernen und zu beherrschen hast! Es sind nicht die Menschen mit ihren Sprachen, es sind nicht die Prinzipien der Menschenwürde und der Sprachenfreiheit, denen der Staat sich in erster Linie verpflichtet fühlt. Die Vormachtstellung des Territorialitätsprinzips in den Nationalstaaten hatte zur Folge dass die sprachlichen Grundrechte des Individuums in einem engen „privaten“ Bereich angesiedelt wurden. Dieses Ungleichgewicht ist zu korrigieren, weshalb Renner’s Forderung einer „Nicht-Gebietlichkeit der Kultur“ ihre Aktualität keineswegs verloren haben. Seiner Überzeugung nach ist eine Verschiebung der Gewichte zu Gunsten des Personalitätsprinzips notwendig. Die Priorität des Personalitätsprinzips gegenüber dem Territorialitätsprinzips bedeutet letztlich, dass die eine „nationale“ Sprache und Kultur der „staatlichen Über-Fürsorge“

² RENNER KARL, 1918.

entzogen wird; der Staat verhält sich sprachlich und kulturell neutral, er stellt sich in den Dienst der Bedürfnisse seiner Bewohner. Dies hat Folgen: Die individuelle Sprachenfreiheit ist nicht auf den privaten Gebrauch beschränkt; als Grundrecht nimmt sie auch den Staat in die Pflicht, allen Menschen, unabhängig des Ortes, wo sie wohnen, die Rahmenbedingungen für einen kompetenten Umgang mit der je eigenen Sprache und Kultur zu gewährleisten. Wohnt beispielsweise in Zürich eine genügende Anzahl von Rätoromanen, Tessinern oder Romands, so haben diese das Recht auf einen vom Staat finanzierten Schulunterricht, der ihre Sprache mit berücksichtigt, und sie können auf öffentliche Unterstützung für eigene kulturelle Anliegen und Projekte zählen. Welches die konkreten Massnahmen für den Erhalt und Weitergabe der je eigenen Sprache und Kultur notwendig sind, dies zu formulieren, ist Aushandlungssache zwischen dem Staat und den Sprachgemeinschaften. Sowohl für die strukturelle wie auch für die praktische Umsetzung hat Renner interessante Vorschläge gemacht, die an dieser Stelle jedoch nicht weiter ausgeführt werden können. Immerhin kann auf Beispiele verwiesen werden, in denen das Personalitätsprinzip ansatzweise zum Tragen kommt. So hatte Estland in der frühen Nachkriegszeit seine Sprachen- und Kulturpolitik nach dem Personalitätsprinzip ausgerichtet. Nach der Wende führte Ungarn diesen Ansatz – zumindest in seiner Innenpolitik – weiter: Die Verfassung zählt die nationalen Minderheiten auf, die unter die gesetzlichen Förderungsgesetze fallen. Wo immer in Ungarn eine Gruppe dieser anerkannten nationalen Minderheiten lebt, diese sich organisiert und weitere Rahmenbedingungen erfüllt wie den Eintrag der Mitglieder in ein zentrales Register, den Nachweis einer zahlenmässige Mindestgrösse, so hat sie auf lokaler Ebene ein Anrecht auf Sprachunterricht innerhalb des Bildungssystem sowie auf finanzielle Unterstützung der kulturellen Tätigkeiten. Selbstverständlich wurde eine solche Lösung dadurch gefördert, dass die Volksgruppen in Ungarn – „dank“ einem Assimilationsdruck seitens der Öffentlichkeit und der Politik – kaum mehr in geschlossenen Siedlungsgebieten anzutreffen sind. Die „Selbstverwaltung“ der nationalen Minderheiten erfolgt mit entsprechenden Institutionen auf kommunaler und auf staatlicher Ebene. Ähnlich hat Finnland die Sprachenrechte der Finnlandschweden und der Sami Bevölkerung geregelt.

IV. Wo das Territorialitätsprinzip noch Sinn macht

Das Territorialitätsprinzip gehört nicht einfach abgeschafft, es wird auch in Zukunft ein Strukturelement darstellen, auf das sowohl der Staat wie auch die Volksgruppen, die im Staat leben, angewiesen sind. Während der Staat insbesondere für die Umsetzung der Amtssprachenregelungen auf das Territorialprinzip und dessen differenzierte Anwendung angewiesen ist, ist dieses ein geradezu existenzielles Instrument für die Volkgruppen und Völker, die im Staat als zahlenmässige Minderheit leben. Es bildet die Grundlage für Massnahmen zur Erhaltung der gefährdeten Sprache im Siedlungsgebiet, der Staat wird dadurch legitimiert und aufgefordert, besondere rechtliche, finanzielle und andere Anstrengungen gegenüber den Sprach- und Kulturgemeinschaften zu unternehmen. Eine besondere Bedeutung hat das Territorialitätsprinzip bspw. für die Erhaltung der im Siedlungsgebiet vorhandenen Orts- und Flurnamen. Diese, zum Teil während der ersten Besiedlung durch Menschen, erfolgte sprachliche Eroberung der Umwelt leistet langfristig einen unverzichtbaren Beitrag an die historische Erinnerungsarbeit der Nachkommen.

Das traditionelle Siedlungsgebiet der meisten sog. nationalen Minderheiten ist durch die Mobilität der Menschen, die wirtschaftliche und soziale Entwicklung gefährdet. Der Einfluss der fremdsprachigen Medien nagt an der Substanz der Sprachträger, und der Schritt von der Zweisprachigkeit zur Einsprachigkeit – unter Verlust der alten Sprache des Siedlungsgebietes – ist nicht mehr weit. Mit dem Territorialitätsprinzip haben die Gemeinschaften ein Mittel in der Hand, der dem Mehrheitsprinzip entgegen gestellt werden kann. Aber auch dieses Instrument kann möglicherweise den Sprach- und Kulturverlust nicht aufhalten. Immerhin bewirkt es in solchen Fällen, dass die Entwicklung im Siedlungsgebiet nicht einer zufälligen Entwicklung überlassen wird, sondern in geordneten, der Erhaltung der Sprache möglichst dienenden Bahnen, erfolgt.

V. Ein moderner Staat unterscheidet zwischen Landesprachen und Amtssprachen

In diesem Zusammenhang ist auf eine wichtige Unterscheidung hinzuweisen. Renner fordert einerseits die „Entstaatlichung“ der Sprache und Kultur, andererseits hat der Staat jedoch auch die Grundätze des innerstaatlichen Zusammenhaltes durch strukturelle und ordnungspolitische Massnahmen zu berücksichtigen.

Zunächst regelt der Nationalstaat die auf seinem Staatsgebiet geltenden Amtssprachen. Die Regel ist dabei, dass amtliche Verlautbarungen landesweit in der/n gleichen Sprache/n erfolgen. Hier könnte in Berücksichtigung des Personalitätsprinzips eine stärkere Gewichtung nicht-territorialer Aspekte erfolgen, etwa mit einer Bindung der Amtssprache an die Sprache/n der Bürgerinnen und Bürger. Es ginge dabei dem Staat darum, der Bürgernähe mehr öffentlichen Raum zu geben.

Ein Blick auf Staaten, die nicht dem Nationalstaatsprinzip unterliegen, ist Indien. Mit seinen über einer Billion zählenden Bevölkerung ist Indien wohl eines der Staaten mit der grössten Vielfalt an Sprachen. Man zählt weit über 100 Sprachen, die verschiedenen Sprachfamilien entstammen. Nachdem Indien die Unabhängigkeit erlangt hatte, entbrannte der Streit über die Amtssprachen, der 1959 mit dem Entscheid Nehrus endete: „Am Gebrauch des Englischen wird solange festgehalten, wie es die nicht Hindi sprachigen Völker wünschen“. Damit sind Hindi und Englisch die beiden Amtssprachen der Zentralregierung. Den 28 Bundesstaaten steht es frei, ihre Amtssprache(n) festzulegen. Während die Verfassung 21 regionale Amtssprachen aufführt, kommen auf Beschluss einzelner Bundesstaaten weitere 5 hinzu. Die sprachliche Vielfalt kann selbst unter derart komplexen Verhältnissen so geregelt werden, dass Konflikte minimiert werden. Vor allem muss hier nicht auf die nationalstaatlich übliche Begrifflichkeit der Mehrheit-Minderheit zurückgegriffen werden, ein Rückgriff, der, wie die Geschichte zeigt, eher konfliktverschärfend sich auswirkte.

Man muss jedoch nicht in eine derart weite Ferne blicken. Die Schweiz hat in dieser Hinsicht insbesondere im Hinblick auf die Rätoromanen interessante Vorarbeit geleistet. Die Bundesverfassung unterscheidet zwischen den Landesprachen und den Amtssprachen. Während die drei Sprachen Deutsch,

Französisch und Italienisch als Amtssprachen erklärt werden, gilt für das Rätoromanische die Einschränkung: „Im Verkehr mit rätoromanischen Personen ist auch das Rätoromanische Amtssprache „(BV 70.1)“. Das Wesentliche an diesem Artikel ist weniger der Text als der prozedurale Weg, der zu dieser Formulierung führte und der bestimmt war von einem konstruktiven Dialog zwischen den staatlichen Behörden und den Rätoromanen. Die Rätoromanen können beispielsweise die Abstimmungs- und Wahlunterlagen für eidgenössische Belange einfordern, sich in Rätoromanisch an die Behörden wenden, an den ETH Zürich und Lausanne wird den Studenten das Abschlusszertifikat auf Rätoromanisch ausgestellt, Entsprechendes gilt für den Schweizer Pass. Auf Gesetzesebene wurde beispielsweise das Jagdgesetz übersetzt, weil es für den Verkehr mit den Rätoromanen als wichtig angesehen wurde! Öffentliche Anschriften, Beschilderungen und Standortbezeichnungen für militärische und andere Anlagen erfolgen im Siedlungsgebiet in rätoromanischer Sprache usw. In Belgien, einem weiteren multinationalen Staat werden die drei Gemeinschaften der Wallonen, Friesen und Deutsch Belgier vom Staat gleichwertig behandelt. Das Territorialprinzip beherrscht zwar die sprachenrechtlichen Regelungen, die Region um Brüssel ist zweisprachig. Die Verfassung Finnlands hält fest, dass Finnisch und Schwedisch auf nationaler Ebene gleichberechtigte Sprachen sind, wobei die Finnlandschweden mit an die 300 000 Angehörigen (ca. 6%) ausmachen. Auf den Åland-Inseln ist Schwedisch die einzige Amtssprache, während im übrigen Finnland bei einem bestimmten Bevölkerungsanteil sowohl Finnisch wie Schwedisch als Amtssprachen gelten. Norwegen kennt zwei Standardvarianten des Norwegischen, die beide Amtssprachecharakter haben. Nynorsk als die ältere Variante ist in etwas über 20 Gemeinden Amtssprache und zählt 10-15% Angehörige, während Bokmaal vor allem in den Städten, Wirtschaft und Handel überwiegt. In der Provinz Südtirol sind Deutsch und Italienisch gleichwertige Amtssprachen. In ganz Dänemark ist Dänisch die Amtssprache, auf den Färöer Inseln gilt das Färöische, in Grönland das Kalaallisut ebenfalls als Amtssprache. Die Regelungen der Amtssprache/n gründen im Wesentlichen auf dem Territorialitätsprinzip, der ausschliesslich und/oder in Kombination mit dem Personalitätsprinzip angewendet wird.

Die Vielfalt der staatlichen Lösungen zeigt, dass Amtssprachenregelungen gefunden werden können, die den Bedürfnissen der Sprachgemeinschaften und deren Träger entgegen kommen, gleichzeitig aber auch den gesamtstaat-

lichen Zusammenhalt nicht gefährden. Es gelingt so dem Gesetzgeber, alle Sprachgemeinschaften als „gleichwertig“ zu erfassen, ohne dass auf den Status einer „Minderheit“ zurückgegriffen werden muss.

Die „Sprachneutralität“ beschränkt sich nicht auf eine Bedürfnis orientierte Regelung der Amtssprachen; dem Staat würden neben den Bestimmungen zu den Amtssprachen weitere entscheidende Aufgaben zugewiesen, die in neuen Formen prozeduraler Auseinandersetzungen zu entscheiden wären. Während die Amtssprachenregelungen der Kommunikation und der gesamtstaatlichen Kohäsion dienen, also auf ihre staatspolitische Bedeutung beschränkt werden, wird das Bildungssystem zur eigentlichen Herausforderung. Hier hat der Staat die Aufgabe, die Minimalbedingungen für den inneren staatlichen Zusammenhalt festzulegen sowie die Folgen der globalen gesellschaftlichen Entwicklungen auf seinem Territorium zu berücksichtigen.

VI. Entrümpelung des Staates vom nationalen Müll

Einstein: „Wenn meine Relativitätstheorie richtig ist, werden mich die Deutschen als Deutschen proklamieren und die Franzosen als Weltbürger. Sollte sie sich jedoch als unzutreffend erweisen, werden die Franzosen sagen, ich sei Deutscher und die Deutschen erklären mich als Juden“.

Valentin Breitenberg, selber ein zweisprachiger Südtiroler und Direktor am Max Planck Institut, hat ironisch auf den blinden Fleck dieser Logik aufmerksam gemacht:

Eine der dummen Fragen lautet: Fühlst du dich eigentlich als Deutscher oder als Italiener? Das ist ja so, als ob man wissen wollte, auf welcher Seite ich im nächsten Krieg zu schießen bereit wäre. Die Antwort ist: Ich bin auf der Seite derer, die solche Fragen nicht stellen.³

Lederhosen in La Paz. Leo Spitzer wurde 1938 in La Paz geboren, wo seine Familie und weitere jüdische Familien sich kurz davor aus Österreich abgesetzt hatten. Die kleine jüdische Gemeinschaft pflegte in

³ NZZ Folio, 1990.

Südamerika eine österreichische Heimatverbundenheit, die in den „nationalen“ Eigenarten von der Kleidung bis hin zum Volkstanz zum Ausdruck kam – dies bei einer gleichzeitigen Ablehnung des Staates Österreich, der ihnen Lederhosen und Dirndl Bekleidung ausdrücklich verboten und sie in die Emigration getrieben hatte. Spitzer ortet eine „wurzellose“ Heimatbindung bei der ersten Generation, während die nächste Generation, die von Bolivien aus zu einem grossen Teil nach den USA auswandert, sich eine Heimatverbundenheit mit dem Bolivien verbindet. Beiden ist eine nostalgische emotionale Bindung eigen.⁴

Der Nationalstaat hat im Laufe seiner kurzlebigen Geschichte eine Machtfülle angesammelt, die alle Bereiche des Lebens seiner Bürger umfasst. In besonderem Masse gilt dies für die „Nationalisierung“ des Staates. Ein Kernbereich der persönlichen und gemeinschaftlichen Identität geriet schon in einer sehr frühen Phase unter der Staatsherrschaft. „Tatsächlich haben alle Staaten diesen Prozess der Nationenbildung betrieben. Historisch gesehen haben alle Staaten irgendwann den Versuch gemacht, eine einzige gesellschaftliche Kultur auf ihrem Staatsgebiet zu verbreiten. Die Stossrichtung ging dahin, den Staat als einen territorial verdichteten Raum zu schaffen, dessen Kernstück eine Sprache ist, welche über ein breites Spektrum gesellschaftlicher Institutionen (Schulen, Medien, Recht, Verwaltung, Wirtschaft usw. Verwendung verfügt, und zwar im öffentlichen wie im privaten Leben. Die an Phantasie reichum kaum zu überbietende Instrumentalisierung des „Nationalen“ durch den Nationalstaat hat sich als Irrweg erwiesen, und so folgert Kymlicka: Eine liberale zukunftsweisende Staatskonzeption besteht in „the degree of coercion used to promote a common national identity“⁵. Ein moderner liberaler Staat ist auf die Konservierung einer auf historischem Wege angereicherten „erfundenen“ nationalen Identität, die die komplexen und eine Vielfalt an sprachlichen, kulturellen, territorialen und politischen Diversitäten ausklammert oder zu einer schwammigen Einheit zusammenzufassen versucht, nicht mehr angewiesen. Die Symbole nationalstaatlicher Identität gehören auf den „Müllhaufen der Geschichte“. Es war übrigens der Schweizer Karl Schmid, der 1933 sich für eine Abgrenzung des Nationalen vom Kulturellen ausgesprochen und eine „doppelte Staatsbürgerschaft“ postuliert

⁴ SPITZER LEO, Rootless nostalgia: Vienna in La Paz, *Shofar: An interdisciplinary Journal of Jewish studies*, 200119,3, 6-17.

⁵ KYMLICKA WILL/MARIN MAGDA, 22.

hatte. „Ein Staat, der sich Toleranz vorschreibt, kann die intolerante Kultur einer seiner Ethnien – auch nicht der im Staat dominanten – nicht dulden, will er nicht selber Opfer werden“⁶. An die Stelle der nationalen Symbolik tritt die regionale und lokale Verankerung der Menschen. Hier haben historische Tatsachen und verklärte Mythen, Legenden und Sagen ihren Platz, hier erfüllen sie die Aufgabe des „small is beautiful“ als Kontrapunkt zur globalen Welt, hier wird Instrumentalisierung des nationsspezifischen Erbes durch Machtpolitiker aller Schattierungen der Boden entzogen.

Im Gegensatz zu den Sprachen hat sich die Kultur seit Gründung der Nationalstaaten als relativ „staatsresistent“ erwiesen und ist der Tendenz der Verstaatlichung, wie dies in den totalitären Staaten der Fall war, nicht erlegen. Sie war und ist bis heute weitestgehend die Angelegenheit der Zivilgesellschaft; dem Staat kommt dabei eine subsidiäre – weitgehend finanzielle – Aufgabe zu. Dabei hat er die verschiedenen Bereiche des Kulturlebens, demnach auch sprachenspezifische Fragen wie sie in der Aktualisierung der Orthographie oder der Dialektforschung etwa zum Ausdruck betrieben wird, zu berücksichtigen. Grundsätzlich hat er den Sprach- und Kulturgemeinschaften auf dem Staatsgebiet gleichwertige Bedingungen zu gewährleisten. Er darf nicht Hand bieten zu einer Monopolisierung, Bevormundung und Privilegierung der einen gegenüber anderen Gemeinschaften, die Erstellung von Leitkulturen und Kanons ist nicht Sache des Staates. Formen kultureller Autonomie haben dabei eine lange Tradition im „alten“ Europa. Die spezifischen Kulturbereiche sind zu grossen und zivilgesellschaftlichen Organisationen geworden, die ihren Einfluss geltend machen und auch selbstbewusst dem Staat gegenüber auftreten. Auch wenn den kulturellen Aktivitäten inhaltlich seitens des Staates kaum Schranken auferlegt werden, hat es der Staat vor allem mit dem Finanzknüppel in der Hand, diese mit der Drohung und tatsächlichem Entzug staatlicher Beiträge bei der Stange zu halten.

Auch die „nationalen Minderheiten“ haben sich in zivilgesellschaftliche Vereinigungen organisiert, denen in mehr oder weniger ausgedehnter Form kulturelle Autonomie zugestanden wurde. Im Zuge einer Explosion des Verwaltungsapparates sind diese zunehmend unter die „Fürsorge“ der Staaten geraten und in ihrer Eigenständigkeit beschnitten und eingeengt. Die meisten

⁶ Schweizer Monatshefte, Heft 779, 40.

dieser Gemeinschaften bekommen es dort zu spüren, wo der Staat inhaltliche Eingriffe im Bildungswesen vornimmt oder – aufgrund der Finanzknappheit – Beitragskürzungen vornimmt und damit die kulturellen Tätigkeiten einschränkt.

VII. Verfassungspatriotismus.

Der ehemalige Bundespräsident Gustav Heinemann hatte bekanntlich auf die Frage, ob er Deutschland liebe, geantwortet: „Ich liebe nicht den Staat, ich liebe meine Frau.“

Es war Dolf Sternberger, der in der Nachkriegszeit den Begriff des Verfassungspatriotismus in die staatspolitische Debatte einführte. Für Sternberger ist „das Wesen und Bestreben des Verfassungsstaates (...) die Sicherung der Freiheit“. Mit der Einlösung der „Menschenrechte (...) als Bürgerrechte“ legitimiert sich das Gewaltmonopol des Staates, da dieser für den Schutz der Rechte sorgt. Ein demokratischer Rechtsstaat kann diesen Schutz schließlich am ehesten gewährleisten. Weizsäcker beschreibt den Staatspatriotismus als eine auf Staatsfreundschaft abgestellten Loyalität zum Staat und der Verfassung. „Mit der Verfassung hat der Patriotismus wieder einen Gegenstand, an den er sich halten und orientieren kann“⁷. Damit wird die Aufmerksamkeit auf die Unterscheidung zwischen dem, was Sache des Staates ist und dem, was der Nation (dem Volk) zukommt, gelenkt. Eine aufgeklärte Vernunft tut wohl daran, den Staat zu dem zurückzustufen, was er sein sollte, eine vernünftige Ordnungsmacht für eine umschriebene Bevölkerung in einem umschriebenen Territorium. Für Habermas, der schon früher – 1987 – diesen Ansatz aufgegriffen hatte, ist der Verfassungspatriotismus denn auch Ausdruck eines historischen Lernprozesses, der den Nationalstaat alter Prägung im Zuge der Differenzierung von Kultur und staatlicher Politik hinter sich lässt. Der neue, postnationale Staat taugt nicht für eine ekstatische emotionale Bindung. In der postnationalen Konstellation verwandelt sich der Staatspatriotismus in eine Loyalität gegenüber den Verfahren der demokratischen Willensbildung und den Rechtsgarantien der Verfassung, die „auf die Bedin-

⁷ Alle Zitate in: Die bewegende Kraft der Geschichte, Berlin 1991.

gungen des Zusammenlebens und der Kommunikation zwischen verschiedenen, gleichberechtigt koexistierenden Lebensformen“ abzielen. Habermas geht noch einen Schritt weiter, wenn er im Zuge des Historikerstreits das Postulat eines europäischen Verfassungspatriotismus einer postnationalen Gesellschaft entwickelt, der aus den verschiedenen nationalgeschichtlich imprägnierten Deutungen zu universalistischen Rechtsprinzipien zusammenwachsen müsse. Damit möchte Habermas einem neuen politisch begründeten europäischen Patriotismus das Wort reden. „Der einzige Patriotismus, der uns dem Westen nicht entfremdet, ist ein Verfassungspatriotismus als eine in Überzeugungen verankerte Bindung an universalistische Verfassungsprinzipien“⁸. Nach der Überzeugung von Habermas könnte es so zu einer klaren Aufgabenteilung kommen; die nationalen Kulturen könnten in ihrer Vielfalt erhalten bleiben, während die Staaten ihre historisch gewachsenen verfassungsmässigen Grundlagen auf eine gemeinsame europäische und universalistische hin zu entwickeln hätten. Der Staat bedarf keiner ethnisch-kulturellen Basis.

Nach Habermas soll der Verfassung auch eine affektive und bindende Kraft zukommen, wie sie dem Patriotismus eigen ist. Die Verlagerung der sinnstiftenden Bindung auf die Verfassung erfolgt, ohne dass die vielen nationalen Kulturen beeinträchtigt würden, ihnen wäre die Sprengkraft entzogen, die dem Nationalen inhärent ist und die ihn für vielfältige Formen des Nationalismus anfällig macht, während rationale und emotionale Energie für den Einsatz zu Gunsten demokratischer Rechtsnormen freigesetzt würden. So sehr der Ansatz, einer Politik das Wort zu reden, die das Staatswesen sowie die internationalen Institutionen an ihre Verfassungsmässigkeit als Kernaufgabe zu binden versuchen, zu überzeugen vermag, er leidet doch an einer „Begriffskrankheit“. Nur schon das Transportmittel „Patriotismus“ ist fragwürdig und inadäquat. Die Gefahr, im Fahrwasser zu segeln, das sich in der Geschichte als wenig hilfreich erwiesen hat, ist nicht von der Hand zu weisen. Man kann die Aktualisierung eines Begriffes auf dem Hintergrund eines gestörten Verhältnisses der Deutschen zum Staat und zur Nation sehen und verstehen, dass nach neuen Bindungskräften zur kollektiven Identifikation mit einer dem Gemeinwohl verpflichteten Staatsform gesucht wird. Man kann es wenden wie man will, auch das Modell eines postnationalen Patrio-

⁸ HABERMAS, 1987, 135.

tismus bleibt nicht frei von den negativen Bezügen sowie von den möglichen Folgen solcher -ismen. So könnte ein Verfassungspatriotismus, der sich in eine Art demokratische Zivilreligion verwandelt, „im Namen des Liberalismus dezidiert illiberal“ auftreten⁹.

Letztlich bleibt die Gretchenfrage, ob und wieweit eine affektive Bindung an den Staat überhaupt notwendig ist. Mir scheint eine rationale Bindung an die Institution, die wir gemeinhin als „Staat“ bezeichnen, durchaus zu genügen. Beschwörungsformeln à la „Verfassungspatriotismus“ bewegen sich in einem oft intellektuellen Hohlraum, der von den tatsächlichen Wirkkräften des Staates ablenkt, ja, diese sogar verdeckt. Verfassung und Rechtsnormen sagen noch sehr wenig aus über die Art, wie der Bürger und die Bürgerin den Staat in ihrem Alltag erleben und wie der Staat die ihm von der Bürgerschaft übertragenen Aufgaben löst. Es sind dies die Fragen nach der institutionellen und organisatorischen Umsetzung der „res publica“ und nach der Rolle, die dem Bürger als „citoyen“ zukommt. Daniel Thürer geht in seiner Abschiedsvorlesung in Zürich den Pfaden nach, die zu einer positiven Identifikation mit dem Staat und seinen Institutionen führen können. Anlehnend an Cicero, Rousseau und Montesquieu skizziert Thürer 4 konstituierende Elemente der „res publica“: Die Sache der Allgemeinheit, die Sache der Öffentlichkeit, das Primat verfassungsrechtlichen Denkens über Wirtschaft und andere gesellschaftliche Mächte, und schliesslich: Ziel der Politik „ist Wahrnehmung von Verantwortung durch Behörden und Bürger *für das Ganze*. Oberstes Ziel der „res publica“ ist, national und international, *das Wohl aller*, das Gemeinwohl“¹⁰. Thürer beleuchtet in dem erwähnten Text auch die Bedeutung der Menschenrechte als Richtschnur des politischen Handelns. Diese Aufgaben erfüllt der Staat, indem er die Rolle des citoyen ernst nimmt und ihr entsprechend Raum gibt. Im Kontext der Demokratie und insbesondere der halbdirekten Demokratie bedeutet dies – in die heutige Situation übertragen – verschiedene Dinge: „Die Fähigkeit zur Deliberation; die Fähigkeit zum selbstständigen und nicht experten-hörigen Denken als Generalist; die Imagination und Repräsentierung des Ganzen; die Einordnung politischer Vorgänge in die internationalen Zusammenhänge; und schliesslich die politische

⁹ MÜLLER J.-W., in: NZZ Nr. 133/2011, S. 71.

¹⁰ THÜRER DANIEL, Res publica, 2011, 14.

Willensbildung und Beschlussfassung auf faire Weise und in geordneten Prozeduren“¹¹. Der citoyen als „Teilhaber am Grundgut der öffentlich-republikanischen Autonomie“ (Rousseau) hat sich aktiv in eine „res publica“ einbringen zu können. Es ist das Gleichgewicht zwischen Staatsgewalt und einer starken Bürgerschaft, die die Demokratie vor der Diktatur und der Anarchie zu bewahren hat. Damit ist der Rahmen für Übernahme staatspolitischer Verantwortung und aktiver Partizipation gesetzt. Der citoyen kann seine Rolle loyal und partizipativ übernehmen, wenn ihm der Staat diese Möglichkeiten nicht nur offeriert, sondern dies von ihm auch einfordert. Eine reine Wahldemokratie genügt diesem Anspruch nicht, ebenso wie auch die Delegation operativer Geschäfte an eine öffentliche Verwaltung nicht genügen kann.

Die vorliegende Abhandlung versuchte, den Allmachtphantasien, die der Nationalstaat in erster Linie durch die Instrumentalisierung der Sprache zu seinen Zwecken den Bürgern entrissen und an sich gerissen hat, nachzugehen mit dem Ziel, einen Kernbereich persönlicher und gemeinschaftsbildender Identität der Zivilgesellschaft zurück zu geben. Man könnte diese Feststellung ohne Not auf weitere Bereiche des öffentlichen Lebens ausweiten und sich fragen, ob und wie weit der citoyen heute eher unter der Vormundschaft des Staates steht als dass er/sie vom Staat und seinen Repräsentanten als willkommener und mitverantwortlicher citoyen wahrgenommen wird. Die gewaltige Zunahme der Bürgerbewegungen, die auf politische Entscheidungen einzig mit Protest reagieren können, können auch als Hinweis für die Entfernung des Staates und seiner Repräsentanten vom Ideal des citoyen gedeutet werden. Während seitens des Staates diese als unliebsame Betriebsstörung interpretiert werden, erhöht sich in der Bevölkerung die Staatsverdrossenheit.

Wie der Staat in den Wald ruft, so tönt das Echo der Bürger. Gegenwärtig zeigt sich die Haltung der inneren Emigration vom Staat auch in einer Reproduktion der Fehlentwicklung des citoyen, wie sie in den geradezu inflationären Rufen nach dem staatlichen Eingreifen zum Ausdruck kommt – vom Minarettverbot, über die Rauchergesetzgebung, dem Hundeverbot usw.

¹¹ THÜRER (FN 10), S. 20.

Der citoyen ist gefragt!
Staatliche Monopolschule und freie Schulwahl

In Dänemark besuchen mehr als 20% der Kinder freie Schulen, die von den Eltern verantwortet, vom Staate beaufsichtigt und zum grössten Teil auch finanziert werden. Eltern und ausgebildete Lehrkräfte übernehmen die Verantwortung für die Bildung ihrer Kinder und sind bereit, persönliche und überschaubare finanzielle Opfer zu erbringen. Die freien Schulen haben einen positiven Einfluss auf die Entwicklung der Staatsschulen. Das Argument, damit bevorzuge man einseitig die begüterten Eltern und schaffe soziale Ungleichheiten trifft auf Dänemark nicht zu; es erweist sich als ideologisches Überbleibsel des Kampfes um die Allgemeinbildung im ausgehenden 19. Jahrhundert. Das Monopol der allgemeinen Schulbildung, das der Staat für sich beansprucht, entmündigt engagierte Eltern, die sich verantwortungsvoll mit der Bildung ihrer Kinder auseinandersetzen wollen.

Zur Bildung des citoyen. Als ich als 20jähriger Rekrut meinem Lehrer begegnete begrüßte er mich mit den Worten: „Mit deinem Militärdienst bist du endlich ein mündiger Schweizer geworden, ab heute duzen wir uns“. Es kann mit gutem Recht gefragt werden, inwieweit eine militärische Ausbildung die politische Mündigkeit fördere. Wenn der Grundsatz gilt, dass man das lernt, was man erfährt (sinnlich, rational, emotional), und wenn man nach „Erfahrungsorten“ sucht, die Tugenden des citoyen fördern, so wird man enttäuscht sein. Staatsbürgerlicher Unterricht wird, wenn überhaupt, auf rein formaler Ebene betrieben; angepasste Formen echter Partizipation, die Erfahrung von Auseinandersetzungen und das Akzeptieren von Kompromissen als Königsweg zum mündigen Bürger, finden sich in der Institution Schule kaum, Kinder sind rechtlose Wesen. Anders in Dänemark, wo im Schulrat gleichmässig verteilt Vertretungen der Politik, der Lehrerschaft, der Eltern und der Schüler sitzen. Auf staatlicher Ebene melden sich die dänischen Schülerorganisationen zu Wort und werden prominent in den Medien berücksichtigt.

Der FÜR-sorge-Staat an die Stelle des MIT-mach-Staates. Ich habe mich während Jahrzehnten für die Anliegen der sprachlichen und kulturellen Gemeinschaften eingesetzt, an zahlreichen internationalen Veranstaltungen, Seminaren und Anhörungen und Kongressen teilgenommen. Sei dies bei nationalen Anlässen oder bei Tagungen internationaler Organisationen, die Muster

waren mit Regelmässigkeit dieselben, wie ich es etwa 2010 an einer Sitzung in Strasbourg erlebt habe, als es um die Auswertung und Follow-up-Strategie der Rahmenkonvention zum Schutze der nationalen Minderheiten ging: Von den ca. 40 Teilnehmenden waren neben den Staatsvertretungen und Experten gewissermassen als Dekoration ganze 3 Angehörige der nationalen Minderheiten selber. Experten und Staatsbeamte entscheiden, die direkt Betroffenen stehen „draussen vor der Tür“. Dasselbe Bild bei der Zusammensetzung der Arbeitsgruppen, die die beiden Instrumente des Europarates überwachen. Die Tatsache, dass nicht mit den Betroffenen, sondern von andern über die Anliegen der Betroffenen debattiert und entschieden wird, kann ohne grosse Mühe auf andere Bereiche ausgeweitet werden, in denen der Staat aktiv ist.

VIII. Multiple Identitäten

Die Vorstellung, die Identität des Menschen sei in einer exklusiven und einzigartigen Weise mit EINER Sprache und Kultur, womöglich auch noch in einem territorial klar begrenzten Gebiet, verbunden, ist Teil der nationalstaatlichen Ideologie und als solche in den wesentlichen Alltagsbereichen der Menschen als ideologisch entlarvt. Es ist ebenso wahr, dass Habermas Recht hat mit der Propagierung des Verfassungspatriotismus, wie seine Kritiker, die diesen Ansatz als ergänzungsbedürftig ansehen. Die Identitätsdebatte krankt an den Exklusivitäts-ansprüchen, die sich damit verbinden. Hinter derartigen Ansprüchen steht zunächst der – uneingestandene – Versuch, den Staat als alleinige politische Identität stiftende Institution erhalten zu wollen. Das Kernproblem der „Identitätsdebatte“ ist jedoch, dass sie keine inklusive und positive Definition im Blick hat.

Die sozial-politischen Identitäten der Menschen haben heute einen Patchwork-Charakter. Räumlich sind sie im lokalen Lebensraum zu orten, von da aus verteilen sie sich mit verschiedener Intensität auf die Region, den Staat und die internationalen Institutionen. Nur 37% (57% der alemannischen Schweiz) der lateinischen Schweizer fühlen sich in erster Linie dem Land

zugehörig, 29% indessen der Sprachregion und 16% ihrem Kanton.¹² Neben der Partizipation an den Staatsangelegenheiten in diesem erweiterten Sinn ist der citoyen auf allen Ebenen in zivilgesellschaftliche Aktivitäten nationaler und globaler Organisationen, die eine beträchtliche Anziehungskraft haben. Amnesty International, Green Peace, humanitäre Organisationen wie das Rote Kreuz und andere eröffnen neue Identität stiftende Horizonte.

An der Erosion „nationalstaatlicher Identitäten“ nagen auch andere Wirkkräfte. So wird die nationalstaatliche Souveränität sowohl „von unten“ durch Regionalisierungsbestrebungen bedroht wie „von oben“ durch deren Anbindung an Entscheidungen über-nationaler Institutionen.

Was wir gemeinhin mit dem Begriff der „nationalen Identität“ verbinden, ist also längst nicht mehr als eine exklusive Ganzheit zu veranschlagen, sie macht nur einen der multiplen Identitätsbereiche aus, die wir mit der guten Organisation des Lebens und unserer Zugehörigkeit zu einem Staatswesen in Verbindung bringen. Der Begriff ist kaum mehr brauchbar für die Beschreibung komplexer Tatbestände, er gehört zum „politischen Begriffsmüll“.

Erst recht helfen bei der Suche nach einer nationalen Identität Versatzstücke wie „das Vaterland“ nicht weiter. Dieser Begriff stammt aus der Kriegsgeschichte der Völker und hat sich derart disqualifiziert, ohne dass man nicht einmal auf die männliche Exklusivität hinweisen muss. M. Creveld vermutet, dass die Identität stiftenden Merkmale, die der moderne Mensch auf den Staat bezieht, auch aus dem Grunde erodieren, weil die bindende Kraft der Kriegsführung keine emotionalen Bindungskräfte mehr freimache. „Eine der wichtigsten Aufgaben des Staates seit seiner Erfindung durch Hobbes war die Kriegsführung. Der Krieg war nicht nur wichtig für den Aufbau und die Organisation des Staates, wichtig war vor allem seine vereinigende Wirkung auf emotionaler Ebene, vor allem seit der Einführung der allgemeinen Wehrpflicht erstmals nach der franz. Revolution durch Frankreich (levée en masse). Staaten können nur solange an die Emotionen der Bürger appellieren, wie sie sich für den Krieg rüsten und ihn auch führen. Falls sie aus irgendeinem Grunde aufhören würden, das zu tun, dann hätte es keinen Sinn, wenn die Menschen ihnen gegenüber loyaler wären als bspw. gegenüber General

¹² MIAUTON M.-H./RAYMOND A., Der nationale Zusammenhalt – Mythos oder Realität MIS Trend, in: NZZ vom 3. Juli 1998.

Motors oder IBM. Das heisst ebenso viel wie, dass der Staat in diesem Fall einen Grossteil seiner *raison d'être* verloren hat¹³.

Das Pendant zum männlichen Vaterland ist die mütterliche Heimat. Auch diese löst sich im Zuge der gesellschaftlichen Veränderungen mehr und mehr auf. Die Bindungskraft der Heimat hat sich von der kollektiven Bedeutung stark auf die persönliche Biographie verlagert. Heimat kann als Ort der Kindheit gesehen werden und hier mit einem Dorf, einer Gasse oder mit einem Platz verbunden werden, in dem einem etwas ausserordentlich Schönes – aber auch etwas Schreckliches zugestossen ist, Heimat kann dem Erwachsenen der Arbeitsort und die Familie an verschiedenen Örtlichkeiten bedeuten, Heimat kann schliesslich im Alter der Ort der letzten Dienstleistungen sein. Oder: Wie definiert mein eigener persönlicher Stammbaum meine sprachliche, religiöse, ethnische Identität? Was ist eine „ethnische“ Identität angesichts der von der Mobilität gezeichneten Gesellschaft, was eine „konfessionelle“ oder religiöse Identität, wie kann Heimat behauptet werden bei jungen Menschen, die zwischen traditioneller Folklore, regionaler Musik und Pop switchen, wie ist es um eine „territoriale“ Identität bestellt, die vom Urnerland bis zum Ferienparadies Mallorca reicht? Als Möglichkeiten kollektiver Verwurzelung bieten sich sowohl lokale wie auch regionale und gar globale Ausrichtungen an, die als gebasteltes Patchwork anzusehen sind mit beschränkter zeitlicher Haftung. Die Palette reicht hier von musikalischen Präferenzen, modischen Accessoires-Trends, geografischen Urlaubstrends, Extrem-Erfahrungen, wissenschaftlichen Interessenbereichen usw. usw. Es zeigt sich auch hier, eine Anbindung der Heimat an den Staat ist unrealistisch und noch weniger zielführend.

Wenn es stimmt, dass die ideologische Realität hinter der tatsächlich gelebten um mindestens eine Generation hinterher hinkt, dann versteht man die Beharrlichkeit der Fixierung der Identität auf wenige und eindeutige Merkmale von gestern. Dies gilt in besonderem Masse für monopolistische Institutionen wie den Staat. Der Nationalstaat erhebt immer noch einen Monopolspruch auf die „nationale Identität“, und dies entgegen die Realität des Faktischen. Es ist erstaunlich, dass noch in den 90er Jahren in der Schweiz ein umfassendes Forschungsprogramm zur „nationalen Identität“ lanciert

¹³ CREVELD M., *Aufstieg und Niedergang des Staates*, Gerling 1999, S. 372.

worden ist. Dass im Programm auch eine Arbeit zur Bedeutung der Kuh für die nationale Identität Unterschlupf fand, gehört in den Bereich der Merkwürdigkeiten.

Dem Staatsvolk ist die Füllung des Staates mit Werten wie der Liebe zur Heimat, dem Patriotismus und der Vaterlandsliebe zu verbauen.

IX. Eine europäische Identität?

„Heute verliert der Begriff Heimat als Land unter den jungen Leuten seine Bedeutung. Die meisten verbinden sie mit der Wohngegend. Die Menschen wollen ein gemeinsames Europa. Ein Europa ohne Grenzen – diese Vision unterstütze ich auch. Aber ich weiss, dass es sehr viel Zeit dauern wird, bis alle Grenzen gefallen sind“.¹⁴

Eric Hobsbawm hat das politische Europa als einen Entscheid der zu einer bestimmten Zeit herrschenden Machtverhältnisse beschrieben. Was als „Europa“ zu gelten hatte, war immer der Entscheid eines „Clubs“ und Hobsbawm hat die Geschichte dieser „Club-Entscheide“ vom Altertum bis in die Neuzeit nachgezeichnet. Die Schlussfolgerung daraus ist einfach: Europa ist mit politischen Definitionen nicht zu begreifen. Hält man sich nicht an die geographischen Grenzen, die politischen Machtverhältnisse und an die staatlichen Einrichtungen, öffnet sich der Horizont, Europa erstehen zu lassen, zu begreifen. An die Stelle der politisch ausgerichteten Förderung einer europäischen Identität tritt die Vielfalt der Sprachen und Kulturen als Identität stiftendes Element auf den Plan, Kultur im weitesten Sinn verstanden als Ort der Begegnung von Menschen, die sich eben gerade durch ihre Verschiedenheit auszeichnen. Die Europäerinnen und Europäer haben kulturelle und zivilisatorische Errungenschaften aus Asien, Afrika und den USA übernommen und integriert, sie schufen und beeinflussten wesentlich die weltweite Entwicklung von der Antike bis zum heutigen Tag. Der sprachlich kulturelle Wettbewerb führte zu gewaltigen zivilisatorischen Leistungen, derjenige um Macht und Vorherrschaft aber auch zu grausamen Ausbrüchen von Gewalt und Unmenschlichkeit.

¹⁴ BORYSIK ANNA, 16 Jahre Opole, Polen, zit. nach: Die Zeit, 10. Oktober 2002.

Die geistige Legitimation Europas liegt deshalb weniger auf dem Projekt einer politischen Einheit als vielmehr auf der Idee der Einheit in der Vielfalt. Zu den Anstrengungen, Europa „neu zu erfinden“, gehört die Wiederbelebung einer Erinnerungskultur, die die Vielfalt als selbstverständliche Gegebenheit begriff und lebte; eine Vielfalt, wie sie dem vor-nationalstaatlichen Europa eigen war. Diese Idee kann nicht mit territorialen Grenzen, Staaten und Armeen verteidigt werden. Das ist die Lehre, die aus der historisch kurzzeitigen Periode der Nationalstaaten zu ziehen ist, die die sprachliche und kulturelle Vielfalt in eine sprachliche und nationale „Einfalt“ verwandelte.

**Speech by the
Foreign Minister of Switzerland**

Ansprache

Micheline Calmy-Rey*

*Seul le texte prononcé fait foi!
Es gilt das gesprochene Wort!*

Es ist mir eine Ehre und eine Freude, heute Abend hier zu sein, um die ebenso weitreichende wie komplexe Frage des Minderheitenschutzes und der Vielfalt zu erörtern.

Seit November letzten Jahres bekleide ich in meiner Eigenschaft als Vorsteherin des Departements für auswärtige Angelegenheiten den Vorsitz des Ministerkomitees des Europarates. Dem vor mehr als sechs Jahrzehnten gegründeten Europarat gehören heute 47 Mitgliedstaaten an, die ein Gebiet abdecken, das von Reykjavik bis Wladiwostok reicht. Der Europarat vertritt damit alle Europäerinnen und Europäer und verkörpert die ganze Vielfalt unseres Kontinents. Jedes Land und jede Gesellschaft hat ihre Minderheiten. Wir müssen nicht in die Ferne reisen oder abgelegene Täler aufsuchen, um ihnen zu begegnen: Allein in Europa gibt es 100 Millionen Menschen – also fast ein Siebtel der Bevölkerung –, die einer Minderheit angehören.

Was verstehen wir unter Minderheiten?

Die Existenz von Minderheiten hat eine Differenzierung zur Folge. Wir fühlen uns veranlasst zu sagen: „Ich bin nicht so wie sie, ich bin anders“. Manche Minderheitengruppen haben eine gewisse Anziehungskraft. Ihre Riten oder ihre Art, sich zu kleiden, oder auch ihre Sprache gelten als attraktiv. Man kann in eine Minderheit hineingeboren werden, oder man kann sich bewusst für die Zugehörigkeit zu einer Minderheit entscheiden.

* Diese Ansprache wurde von Bundesrätin Micheline Calmy-Rey gehalten anlässlich der Konferenz in der Aula der Universität Zürich.

Es gibt Minderheiten, die seit Jahrhunderten bestehen, und es gibt andere, die in jüngster Zeit entstanden sind. Über die Zugehörigkeit zu einer Minderheit kann man stolz sein. Sie kann jedoch auch eine schmerzliche Erfahrung sein. Die Zugehörigkeit zu einer Minderheit ist manchmal kaum wahrnehmbar. Es kommt jedoch vor, dass sie das Leben eines Menschen zutiefst prägt, und darauf möchte ich heute näher eingehen.

Vor mehr als zwanzig Jahren fiel die Berliner Mauer. Das war – nicht nur für Europa, sondern für die Welt – eine historische Wende. Seit damals ist die Globalisierung weiter fortgeschritten, und die kulturelle Vielfalt ist zu einem integralen Bestandteil einer Gesellschaft geworden. Die Schweiz bildet hier keine Ausnahme. Eines ihrer prägenden Merkmale, die Vielfalt, ist noch komplexer geworden. Oder noch reichhaltiger – das hängt vom Standpunkt ab. Auf diese Frage werden wir noch zurückkommen.

Die Welt wird immer stärker vernetzt und erscheint dadurch in gewissem Sinne immer kleiner. Dennoch wird sie nicht homogener. Ganz im Gegenteil! Die zunehmende Mobilität der Menschen hat zur Folge, dass sich unsere Gesellschaft heute aus einer Vielzahl von Gruppen zusammensetzt, die in einem gemeinsamen Raum leben.

Diese Vielfalt ist nicht nur kultureller Art, sondern umfasst auch Aspekte wie Geschlecht, Behinderung, sexuelle Orientierung oder soziales Milieu. Heute sind unsere Lebensweisen genauso eng miteinander verflochten wie die ethnischen Zugehörigkeiten, und wenn wir versuchen, die Unterschiede zwischen den Menschen zu erkennen und zu verstehen, dann müssen wir zunächst eine ganze Reihe von komplexen Zusammenhängen und Beziehungen entwirren.

Klar ist vor allem eins: Heute haben die meisten Menschen eine mehrfache Identität. Jeder Mensch kann also gleichzeitig mehreren verletzlichen Gruppen angehören.

In dieser Vielfalt zu leben, diese Vielfalt mitzugestalten, ist keineswegs eine Selbstverständlichkeit: Ein solches Patchwork unterschiedlicher Lebensweisen stellt uns vor zahlreiche Herausforderungen. Und durch den zunehmenden Pluralismus wird unser tägliches Miteinander am Arbeitsplatz, in der Schule und selbst in der Familie nicht gerade einfacher.

Das Fremde oder die Sichtweise des Anderen verunsichert, beunruhigt oder wirkt auf einige manchmal gar bedrohlich. So entstehen zahlreiche negative Stereotypen, gegen die wir mit aller Entschiedenheit vorgehen sollten. Mit einigen dieser Herausforderungen möchte ich mich heute beschäftigen, und zwar in drei Schritten:

Zunächst werde ich kurz den auf unserem Kontinent geltenden normativen Rahmen beschreiben. Nach einem historischen Exkurs möchte ich auf die folgenden Fragen eingehen: Welche Vorkehrungen hat unser Land für den Schutz von Minderheiten getroffen? Welches sind unsere Besonderheiten? Sind wir mit den gleichen Herausforderungen konfrontiert wie die anderen Länder der Welt? Und im Anschluss werde ich unseren aussenpolitischen Ansatz erläutern und hierbei insbesondere auf die Frage eingehen, wie die Schweiz konkret zum Schutz und zur Förderung der Rechte von Minderheiten beitragen kann.

Meine Ausführungen sind von zwei grundlegenden Fragen geleitet:

Erstens: Welche Lehren können wir aus unseren Erfahrungen mit Instrumenten und Verfahren für den Schutz, die Integration und die Koexistenz von Minderheiten ziehen?

Zweitens: Ist unser Ansatz im Bereich der Minderheitenpolitik an seine Grenzen gestossen? Oder mit anderen Worten: Wie sollte unser Ansatz zu Beginn des 21. Jahrhunderts aussehen? Der Europarat vertritt die gleichen Werte, die unserem politischen System zugrunde liegen, namentlich die Menschenrechte und die Grundfreiheiten sowie die Idee des Rechtsstaats und der Demokratie.

Die Europäische Menschenrechtskonvention ist die Grundlage für das, was wir als „öffentliche Ordnung Europas“ bezeichnen könnten. Zudem hat der Europarat über 200 weitere rechtsverbindliche Übereinkommen verabschiedet.

Dank der Annahme dieser Konvention sowie weiterer regionaler Menschenrechtsinstrumente konnten wir auf unserem Kontinent – und in gewissem Sinne auch darüber hinaus – gezielt und Schritt für Schritt einen Raum schaffen, der sich durch Frieden und die Achtung der Menschenrechte auszeichnet.

Eines dieser Übereinkommen ist das Rahmenübereinkommen zum Schutz nationaler Minderheiten, das von der Schweiz am 21. Oktober 1998 ratifiziert wurde.

Der Europarat misst dem Schutz nationaler Minderheiten grosse Bedeutung bei, und das Rahmenübereinkommen zum Schutz nationaler Minderheiten ist ein Meilenstein in diesem Bereich. Es ist das erste rechtsverbindliche multilaterale Instrument, das den allgemeinen Schutz nationaler Minderheiten sichern soll. Es wird von den meisten Ländern Europas anerkannt, und die Zahl der Ratifikationen ist schnell gestiegen: 39 Mitgliedstaaten, darunter die Schweiz, haben es ratifiziert, vier weitere Staaten haben es unterzeichnet, jedoch noch nicht ratifiziert.

An diesem Übereinkommen, das für unser Land 1999 in Kraft trat, orientiert sich die Minderheitenpolitik der Schweiz. Ihr Ziel ist es, zum einen jegliche Diskriminierung von Angehörigen nationaler Minderheiten zu verhüten und zu bekämpfen, und zum anderen die Voraussetzungen dafür zu schaffen, dass diese Personen ihre Identität ausdrücken, erhalten und weiterentwickeln können.

Die Schweiz hat 1997 zudem die Europäische Charta der Regional- oder Minderheitensprachen ratifiziert, die dem Schutz sprachlicher Minderheiten dient. Das Rahmenübereinkommen zum Schutz nationaler Minderheiten enthält bekanntlich keine Definition des Begriffs der „nationalen Minderheit“. Daher steht es den Vertragsparteien frei, den Geltungsbereich des Übereinkommens je nach ihrer spezifischen Situation selbst zu bestimmen. Anlässlich der Ratifikation des Rahmenübereinkommens hat mein Land erklärt:

„dass in der Schweiz nationale Minderheiten im Sinne des Rahmenübereinkommens die Gruppen von Personen sind, die dem Rest der Bevölkerung des Landes oder eines Kantons zahlenmässig unterlegen sind, die schweizerische Staatsangehörigkeit besitzen, seit langem bestehende, feste und dauerhafte Bindungen zur Schweiz pflegen und von dem Willen beseelt sind, zusammen das zu bewahren, was ihre gemeinsame Identität ausmacht, insbesondere ihre Kultur, ihre Traditionen, ihre Religion oder ihre Sprache“.

Gemäss dem Rahmenübereinkommen setzen sich also die nationalen Minderheiten aus Personen zusammen, die die schweizerische Staatsangehörig-

keit besitzen und die den sprachlichen Minderheiten unseres Landes angehören.

Das ist die rechtliche Sichtweise. Doch im Grunde genommen entspricht das Rahmenübereinkommen nicht wirklich den historisch gewachsenen Gegebenheiten der Schweiz. Die Schweiz war und ist im Unterschied zu anderen Staaten nie ein Land mit *einem* Staatsvolk mit *einer* Sprache und *einer* Kultur, wo es noch ein paar Minderheiten gibt, deren Fortbestand man schützen muss, so wie man beispielsweise bedrohte Tierarten schützt. Wir sind vielmehr stolz darauf, eine Gemeinschaft von verschiedenen Sprachen, Kulturen, Mentalitäten und Religionen zu sein, die sich freiwillig zu einem Staatsgebilde zusammengeschlossen hat. Wohl sind die Romands, die Tessiner und Rätoromanen zahlenmässig in der Minderheit gegenüber den Deutschschweizern. Aber jede Sprachgruppe betrachtet sich zu Recht als vollwertiges, unverzichtbares und selbstbewusstes Mitglied dieser Eidgenossenschaft. Selbst die einzelnen Sprachgruppen sind in sich keine homogenen Gebilde. Man sagt uns Genfern nach, dass wir die Waadtländer nicht mögen, und das gleiche sagt man über die Zürcher und die Basler.

Jemand ging einmal sogar so weit zu behaupten, was uns Schweizer zusammenhält, sei unsere gegenseitige Abneigung zueinander. Diese Behauptung ist natürlich übertrieben, aber sie zeigt eines: Wir sind nicht ein Volk von Minderheiten, wir sind ein Volk von Eigenheiten. Diese Vielfalt ist ein Reichtum, welcher unser Land so unverwechselbar und so schön macht.

Internationale Konventionen zum Schutze von Minderheiten sind wichtig und richtig. Aber die Pflege unseres kulturellen und sprachlichen Erbes, des nationalen Zusammenhalts über die Sprachgrenzen hinweg, kann uns keine Konvention abnehmen. Das ist unsere eigene Aufgabe und Verantwortung.

Heute schrieb der Journalist Jean-Martin Büttner im Tages-Anzeiger den richtigen Satz: „Reden wir nicht übereinander, reden wir miteinander“.

Was uns bei allen Unterschieden zusammenhält, ist der gemeinsame Wille zur Schweiz zu gehören. Es sind ferner Werte wie Föderalismus, direkte Demokratie und Rechtsstaatlichkeit, welche neben der sprachlichen und kulturellen Vielfalt die tragenden Säulen unseres Staates bilden.

Dank des Grundsatzes des Föderalismus, kombiniert mit dem Territorialitätsprinzip, ist eine Minorisierung von Sprachgruppen gar nicht möglich.

Sogar religiöse Unterschiede haben zu regionalen Aufteilungen innerhalb von Kantonen geführt. Zusammengefasst baut unser System im Grunde genommen darauf auf, dass es gar keine eigentlichen Minderheiten gibt, sondern dass wir alle gleich berechnete Teile des grossen Puzzles bilden, das Schweiz heisst.

Ohne Föderalismus gäbe es in der Schweiz keine Vielfalt, ohne Vielfalt keinen Föderalismus. Die Schweiz als historisch gewachsener Zusammenschluss verschiedener Bevölkerungsgruppen wäre im Zentralismus gar nicht denkbar.

Im Unterschied zu anderen Staaten, welche ein ursprünglich zentrales Gebilde waren und sich erst nachträglich, sozusagen von oben herab, eine föderale Struktur gegeben haben, ist der Föderalismus in der Schweiz von unten her organisch gewachsen. Unsere geschichtliche Erfahrung hat gezeigt, dass die Eidgenossenschaft als Gesamtheit nur funktioniert, wenn sie die Einzelteile, aus denen sie besteht, schützt und respektiert. Es war deshalb entscheidend, ein Gleichgewicht zwischen der Souveränität der Gliedstaaten, das heisst der Kantone, und der Souveränität des Bundesstaates zu finden.

Die direkte Demokratie – mit der Volksinitiative und dem Referendum – leistete ebenfalls einen zentralen Beitrag zum friedlichen Zusammenleben der verschiedenen Gemeinschaften, denn sie stärkte die Rolle der sprachlichen und politischen Bestandteile im Entscheidungsprozess.

Auch in der direkten Demokratie können wir dank der doppelten Mehrheit der Kantone und des Volkes bei Verfassungsabstimmungen das Gleichgewicht aller Teile der Eidgenossenschaft bewahren und automatische Mehrheiten eines Landesteiles verhindern. Das System wirkt also der Übermacht der zahlenmässig Überlegenen entgegen.

Trotz dieser pluralistischen Tradition und der gelungenen Entwicklung sind die daraus hervorgegangenen Mechanismen nicht perfekt – und deshalb auch verbesserungsfähig. Zudem können sie sich auch dem Einfluss der Globalisierung nicht entziehen.

Nachfolgend möchte ich auf einige Bereiche eingehen, in denen die Schweiz noch Fortschritte machen könnte und müsste. Das bestehende System funktioniert gut für die konstituierenden Bestandteile der Schweiz. Die Situation für die eigentlichen Minoritäten ist jedoch eine andere. Hier brauchen wir

mehr Schutz. Ich beginne mit zwei Punkten, die im Zusammenhang mit der Anwendung des Rahmenübereinkommens zum Schutz nationaler Minderheiten stehen.

Zur Gemeinschaft der Fahrenden mit Schweizer Nationalität, der hauptsächlich autochthone Jenische angehören, zählen schätzungsweise 30'000 Personen, von denen 3'000 bis 5'000 noch eine nomadische oder halbnomadische Lebensweise pflegen.

In ganz Europa war die Geschichte der fahrenden Völker von dunklen Episoden und Diskriminierungen geprägt. Auch in unserem Land waren die Fahrenden, abgesehen von wenigen Lichtblicken, während Jahrhunderten Opfer von Diskriminierungen. Erst Mitte der Siebzigerjahre konnten sich die Jenischen in der Schweiz gegen Angriffe auf ihre Identität zur Wehr setzen, sich organisieren und die Rechte einfordern, die ihnen zuvor systematisch verweigert worden waren.

Doch wenn wir ehrlich sind, müssen wir zugeben, dass die Schweiz beim Schutz und bei der Förderung der Rechte und der Identität von Fahrenden ihren Verpflichtungen nicht gerecht wird.

Zwar bestehen Anstrengungen, die Situation der Fahrenden in der Schweiz umfassend zu regeln. Die Grundlage dazu bildet ein umfangreicher Bericht, den der Bundesrat Ende 2006 zu diesem Thema verabschiedet hatte. Wir müssen uns aber eingestehen, dass Angehörige dieser Gemeinschaft weiterhin mit Diskriminierungen konfrontiert sind. Es wird für sie immer schwieriger, eines der wesentlichen Elemente ihrer Identität, ihre fahrende Lebensweise, zu leben. Das Problem fehlender Stand- und Durchgangsplätze ist bei Weitem noch nicht gelöst, und die allgemeine Haltung gegenüber den Fahrenden ist noch immer von negativen Stereotypen geprägt.

Gerade habe ich den Föderalismus und die direkte Demokratie gelobt. Erlauben Sie mir nun dazu eine kritische Bemerkung. Die Einrichtung dieser Plätze für Fahrende wurde auf Bundesebene sowie von mehreren kantonalen Behörden unterstützt. Nun stellen sich aber die betroffenen Gemeinden und die lokale Bevölkerung diesen Projekten entgegen – mit demokratischen Mitteln wie Referenden, Petitionen und Einsprachen.

Ende letzten Jahres lebten in der Schweiz fast 1'700'000 Ausländerinnen und Ausländer. Sie bildeten somit 22,8% der Schweizer Wohnbevölkerung.

In Europa haben nur noch Luxemburg und Liechtenstein einen höheren Ausländeranteil. Sehen wir uns nun die Situation der ausländischen Staatsangehörigen in unserem Land etwas genauer an.

Natürlich können sich diese Personen darauf verlassen, dass ihre Grundrechte geschützt werden, wie dies in der Bundesverfassung, in den Kantonsverfassungen und in den von der Schweiz unterzeichneten internationalen Übereinkommen verankert ist. Sie sind zudem durch den Grundsatz der Nichtdiskriminierung im Sinne der Bundesverfassung geschützt. Dieser Grundsatz untersagt namentlich jegliche Diskriminierung aufgrund der nationalen oder geografischen Herkunft.

Aber reicht das auch?

Heute reden mehr Menschen in der Schweiz spanisch, portugiesisch, türkisch, serbisch oder kroatisch als rätoromanisch, eine offizielle Landessprache. Immer mehr Menschen, die in der Schweiz leben und arbeiten, verstehen die lokale Sprache nur schlecht oder gar nicht.

Diese Vielsprachigkeit stellt die Gesellschaft vor zahlreiche Herausforderungen, einerseits für die Betroffenen selbst, andererseits für den Staat, der sie aufnimmt.

Dies ist ein anschauliches Beispiel für eine Frage, die verschiedene Beobachter beschäftigt: Entspricht das Territorialitätsprinzip, auf dem das Sprachenrecht in unserem Land basiert, noch der Realität?

Ist aber unser Modell für die Ausländerinnen und Ausländer in der Schweiz nicht zu einer Hürde für die Integration geworden? Auf gesamtschweizerischer Ebene ist das Stimmrecht für Ausländer sicher noch nicht mehrheitsfähig. Auch wenn verschiedene Stimmen dies fordern – mit dem Argument, dass ein Grossteil der Bevölkerung, die wesentlich zur Wirtschaftsleistung und zum sozialen Leben im Land beiträgt, vom politischen Leben ausgeschlossen wird –, ist die Mehrheit der Stimmberechtigten in der Schweiz nicht bereit zu diesem Schritt.

Anders sieht es auf den übrigen Stufen des Gemeinwesens aus: Je nach Kanton hat die ausländische Bevölkerung in unserem Land unterschiedliche politische Rechte. Heute debattieren immer mehr Kantone und Städte über diese Frage, und in acht Kantonen gilt bereits das Ausländerstimmrecht auf Gemeinde- und/oder Kantonsebene.

Von der Ausländerfrage in der Schweiz lässt sich eine andere Frage nicht loslösen, die in der politischen Arena regelmässig zu reden gibt: die Frage der Einbürgerung.

Auch wenn sich der Prozentsatz der Einbürgerungen seit 1992 verdoppelt hat, erhält nach wie vor nur ein minimaler Teil der ausländischen Staatsangehörigen in unserem Land den Schweizer Pass: Gemäss Statistiken werden von 100 Ausländerinnen und Ausländern etwas mehr als drei eingebürgert.

Eigentlich könnte ein erleichteter Einbürgerungsprozess eine Chance für uns alle sein. Denn wenn sie den Pass mit dem weissen Kreuz beantragen, entscheiden sich diese Ausländerinnen und Ausländer für unser Land. Und mit diesem Entscheid fühlen sie sich noch stärker verpflichtet, am Aufbau unserer Schicksalsgemeinschaft mitzuwirken.

Trotzdem wurde die Vorlage von 2004 zur Änderung der Bundesverfassung, der für Ausländer der zweiten und dritten Generation eine erleichterte Einbürgerung vorsah, vom Volk abgelehnt. Hier muss ich noch anfügen, dass der Bund sein finanzielles Engagement in der Integrationsförderung seit 2007 verstärkt hat und dass seit dem Inkrafttreten des neuen Bundesgesetzes über die Ausländerinnen und Ausländer vor zwei Jahren die Integrationspolitik ganz klar Sache des Bundes ist. Dieses Gesetz legt zum ersten Mal auf Bundesebene die Ziele und Grundsätze der schweizerischen Politik in diesem Bereich fest.

Im März dieses Jahres hat der Bundesrat zudem die Integrationspolitik aus einer Gesamtsicht überprüft und einen Bericht zur Weiterentwicklung der Integrationspolitik des Bundes gutgeheissen. Dieser Bericht schlägt vor, die aktuelle Integrationspolitik zu stärken und dazu Verbesserungen in verschiedenen Bereichen einzuführen. Der Grundsatz des Gleichgewichts zwischen Fördern und Fordern bleibt von zentraler Bedeutung, da die Integration Anstrengungen von allen Seiten bedingt.

Für eine Erfolg versprechende Schweizer Integrationspolitik müssen daher die aktuellen Massnahmen auf allen Ebenen weitergeführt – und intensiviert – werden.

Generell bin ich der Auffassung, dass die Normen für das Zusammenleben in der Schweiz genauso wie in anderen Ländern überdacht und neu formuliert werden müssen. Dabei müssen wir akzeptieren, dass es vielfältige Lebens-

stile gibt. In einer stark globalisierten Gesellschaft, wie wir es sind, ist es unsere Pflicht, sich mit diesem Konzept der Vielfalt auseinanderzusetzen.

In meinen Augen muss diese Auseinandersetzung mit der Frage einhergehen, was Staatsbürgerschaft bedeutet und welchen Platz Minderheiten erhalten sollen. Zu Recht stellt sich in diesem Zusammenhang die Frage, inwieweit es sinnvoll und an der Zeit ist zu prüfen, wonach der Schutz vor Diskriminierung, auch aufgrund der Staatsbürgerschaft zu verbieten sei. Dieses Thema wird im Verlaufe dieser Konferenz weiter vertieft.

In der Schweiz reden die verschiedenen Gemeinschaften miteinander, und sie hören einander zu. Das ist nicht nur ein frommer Wunsch von meiner Seite, sondern konkreter Alltag, auch auf besonders schwierigen Gebieten. Wer bezweifelt, dass unser Land weniger gut als andere gerüstet ist, um mit der heutigen Vielfalt umzugehen, täuscht sich. Davon bin ich fest überzeugt. Natürlich stellt uns die Vielfalt vor Herausforderungen, ich habe nur einige wenige erwähnt. Doch unser Land, ein Mosaik aus verschiedenen Kulturen und Sprachen, ist reich an Erfahrungen und Traditionen, wenn es um gegenseitigen Respekt, Gewaltenteilung und Konsens geht. Und Dialog und Respekt vor der Identität des Gegenübers haben sich nicht nur beim Aufbau der Schweiz bewährt, sondern müssen mehr denn je oberstes Gebot bleiben.

Mehr denn je, weil heute nur dieser Weg gangbar ist. Lassen Sie mich dazu noch etwas zu religiösen Fragen sagen. Zu meinem grossen Bedauern erinnert uns die anhaltende Polemik um das islamische Kopftuch im öffentlichen Raum oder die Initiative gegen den Bau neuer Minarette in unserem Land daran, dass die Unsicherheiten und Ängste, die ein Teil unserer Gesellschaft verspürt, instrumentalisiert werden können.

Auch wenn die Angst vor dem Islam geschürt wird – etwa mit dem Argument, dass diese Bevölkerungsgruppe nach politischer Dominanz strebe und die Frauen grundsätzlich unterdrücke –, kommen wir nicht um einen Dialog herum, und es sollte uns auch nicht davon abhalten, die erzielten Fortschritte zu anerkennen.

Als Vorsteherin des Eidgenössischen Departements für auswärtige Angelegenheiten möchte ich auch den Standpunkt der Schweiz zum Schutz von Minderheiten in der Aussenpolitik ansprechen. Der Schutz und die Förderung der Menschenrechte gehören zu den aussenpolitischen Prioritäten unserer Regierung. Der Schutz der ethnischen, religiösen, sprachlichen und nati-

onalen Minderheiten steht im Zentrum der Politik von Staaten, die sich für die Förderung von Stabilität und Demokratie sowie für die Prävention von Konflikten und Völkermorden einsetzen.

Die internationalen Bemühungen unseres Landes in diesem Bereich beruhen auf der Überzeugung, dass die Stabilität und der Wohlstand eines Land gefördert und die Häufigkeit von Konflikten merklich gesenkt werden, wenn der Grundsatz der Nichtdiskriminierung und der Rechtsgleichheit eingehalten wird und wenn die kulturelle, religiöse und sprachliche Identität nationaler Minderheiten geschützt und ihre Mitwirkung am politischen und gesellschaftlichen Leben gefördert wird.

Unser Ziel ist es dabei, Interessenkonflikte nicht gewaltsam, sondern mit friedlichen Mitteln zu regeln und nachhaltige, sozial gerechte Lösungen zu finden.

Allgemein achten wir stets darauf, dass sich unsere Bemühungen an den Bedürfnissen der am meisten betroffenen Personen orientieren. Ausserdem versuchen wir alle Parteien einzubeziehen, die von den Entscheidungen betroffen sind und so eine Lösung zu finden, die den Anliegen und Bedürfnissen aller Betroffenen entspricht.

Eine vereinfachende, naive Sicht ist in dieser Debatte weder angebracht noch hilfreich, und wir sind uns bewusst, dass das Minderheitenproblem in der Realität aus einer Vielzahl spezifischer Probleme besteht. Dabei spielt ein breites Spektrum an komplexen wirtschaftlichen, gesellschaftlichen, historischen, ethnischen, politischen, kulturellen und religiösen Faktoren eine Rolle, die je nach Land unterschiedlich sind. Für jeden konkreten Fall müssen deshalb innovative Lösungen gefunden werden.

Denn es geht nicht darum, andere davon zu überzeugen, dass das Schweizer Modell das einzig richtige ist und ihnen dieses Modell aufzudrängen, sondern darum, die Rechte der Menschen schützen, die am meisten gefährdet sind.

Unsere Erfahrung mit Vielfalt und einem friedlichen, konstruktiven Zusammenleben ist dabei keineswegs eine Gegebenheit. Im Gegenteil: Wir müssen uns ständig darum bemühen, dieses Gut zu bewahren und die Modalitäten neu auszuhandeln. Wir haben gesehen, dass unsere Geschichte uns gezwungen hat, die Kluft zwischen Sprachgruppen, Stadt und Land, Industrie- und

Landwirtschaftskantonen, Protestanten und Katholiken und in jüngerer Zeit zwischen schweizerischer und ausländischer Bevölkerung zu überbrücken.

Entsprechend engagieren wir uns nicht im Ausland und bei Friedensbemühungen, weil wir besser sind. Vielmehr war unsere Geschichte durch schmerzhaft Erfahrungen geprägt, und wir möchten die daraus gezogenen Lehren weitergeben. Zu diesen Ereignissen gehört sicher der Sonderbundskrieg, aber auch der kürzliche Volksentscheid gegen den Bau von neuen Minaretten.

Meine Botschaft lautet deshalb wie folgt: Trotz unserer wechselhaften Geschichte haben wir immer versucht, konstruktiv zu bleiben und gemeinsam zu lernen, wie wir neue Realitäten bewältigen können. Genau diese pragmatische Vision möchten wir weitergeben!

Schutz und Förderung der Rechte von Minderheiten auf internationaler Ebene umfassen vier Bereiche: Existenzbedrohung, Bewahrung und Entwicklung der Identität von Personen und Gruppen, Nichtdiskriminierung und öffentliche Mitwirkung der Minderheiten an den für sie relevanten Entscheidungen.

Ich möchte mich nun kurz diesen Aspekten zuwenden.

Völkermord, diese grausame Tat, ist stets untrennbar mit der Minderheitenfrage verknüpft, und noch heute werden Völkermorde begangen. Niemand kann diese traumatischen Akte der Barbarei einfach hinter sich lassen. Aus diesem Grund halten wir Vergangenheitsarbeit für ein wichtiges Instrument der zivilen Friedensförderung. Der Kampf gegen Straffreiheit, die Wiederherstellung der Rechtsstaatlichkeit und die Rehabilitation der Opfer stehen im Zentrum eines Prozesses, mit dem die zerrütteten Gesellschaften wieder aufgebaut und ein nachhaltiger Friede herbeigeführt werden sollen.

Die Schweiz hat deshalb Instrumente zur Unterstützung von Menschen entwickelt, die mit einer Vergangenheit voller Gewalt und Verbrechen leben müssen. Diese Instrumente sollen dazu beitragen, dass die Betroffenen – in einem gemeinsamen Prozess – die schmerzvollen Ereignisse verarbeiten und zu einem dauerhaften Frieden beitragen können, indem sie Massnahmen gegen Straffreiheit und für die Versöhnung ergreifen.

Mein Departement ist auf verschiedenen Kontinenten stark engagiert und hat wesentlich zur Entwicklung eines konzeptionellen Rahmens in diesem Be-

reich beigetragen. Ausserdem treiben wir verschiedene Initiativen zur Prävention von Völkermord und Massengewalt voran.

Häufig sollen Friedensabkommen umgesetzt werden, wenn der Konflikt noch in den Herzen präsent und das Bild des Anderen noch von Hass geprägt ist. Die Schweiz ist an zahlreichen Mediationsprozessen beteiligt. Im vergangenen Oktober mündete unser Engagement, um das wir im Mediationsprozess zwischen Armenien und der Türkei gebeten worden waren, hier an der Universität in die Unterzeichnung von Protokollen zwischen beiden Parteien.

Wenn Minderheiten nicht in ihrer Existenz bedroht sind, muss die ungestörte Entwicklung der Identität von Gruppen und deren Mitglieder gefördert werden. Identität kann unterschiedlichste Aspekte wie Sprache, Religion oder kulturelle Praktiken umfassen; diese identitätsstiftenden Aspekte können auch in der Gruppe gelebt werden.

Die Schweiz ist auch offen für Menschen aus anderen Minderheiten Europas und der Welt, z.B. im Zusammenhang mit dem Kosovo. Die Schweiz hat immer betont, dass das Land bei seiner Unabhängigkeit darauf aufbauen muss, dass die Rechte der verschiedenen Gemeinschaften eingehalten werden. Aus diesem Grund hat sie sich bemüht, auf die Sorgen der nichtalbanischen Minderheiten einzugehen, indem sie Vertreterinnen und Vertreter der verschiedenen Minderheiten in Kosovo oder in der Schweiz traf und anhörte.

Vor kurzem haben wir zudem die parlamentarische Kommission der Versammlung des Kosovo eingeladen, um darüber zu diskutieren, wie ein multiethnischer Staat aufgebaut werden könnte. Dabei wurden wir von der Stiftung CONVIVENZA unterstützt, die ja auch den heutigen Anlass organisiert hat.

Ähnliche Anstrengungen unternehmen wir übrigens auch im Rahmen der Beziehungen zu weiter entfernten Ländern, so z.B. Sri Lanka.

Machtteilung ist der Grundpfeiler der schweizerischen Gesellschaft: Unsere mehrstufige direkte Demokratie ist zwar komplex, hat sich aber beim Aufbau unserer Identität und unserer gemeinsamen Werte bewährt.

Minderheiten schützen heisst, sich für ihre Rechte einzusetzen – insbesondere, wenn die Minderheiten ausgegrenzt sind – und sie für die aktive Mitwirkung am Staat zu gewinnen. Die Schweiz unterstützt mehrere Initiativen, um

darauf hinzuwirken, dass die öffentlichen Behörden die Rechte der Minderheiten achten und schützen: Die politische Partizipation steht hier an erster Stelle.

Wie wir gesehen haben, ist das Zusammenleben nicht immer einfach. Gleichzeitig sind diese Schwierigkeiten der Preis für die Mobilität, die wir heute für selbstverständlich halten. Spannungen zwischen Mehrheit und Minderheiten sind in unserer Gesellschaft ein normales Phänomen. Sie können nur im Dialog entschärft werden.

Ziel dieses Dialogs ist es nicht, endlose Diskussionen zum Thema nationale Identität zu führen. Es geht gutschweizerisch darum, pragmatisch und konsensorientiert zu bleiben.

Es scheint mir wichtig, dass wir uns bei der Lösungssuche von diesem überholten Konzept befreien, das auf Identität und der Unterscheidung zwischen „dem Schweizerischen“ und „dem Anderen“ beruht, und einen neuen gemeinsamen Nenner finden: die Vielfalt.

Vielfalt bedeutet nicht eine „Verwässerung“ der verschiedenen Identitäten. Vielfalt bedeutet, dass Personen sich nicht mehr nur durch ihre Unterschiede gegenüber den anderen definieren, sondern als Teil einer Vielheit. Sie akzeptieren, dass ihre Identität zum Teil durch andere Kulturen beeinflusst wird. Sie sind auch bereit zur ständigen Auseinandersetzung: auf andere zuzugehen, zu versuchen, sie zu verstehen und sie zu akzeptieren – und nicht sie zu assimilieren.

Alle sollten etwas zu dieser Debatte beitragen können, so wie wir es im Rahmen unserer Entwicklungspolitik tun, wo wir die verschiedenen Akteure an einem Tisch zusammenbringen, um über gemeinsame Probleme und Projekte zu diskutieren.

Diese Debatte muss unter Berücksichtigung der Grundrechte erfolgen, und natürlich braucht es dazu einen klaren politischen Willen. Denn wir müssen nicht nur die Minderheiten und andere gefährdete Gruppen auf ihre Eigenverantwortung und ihre Pflichten aufmerksam machen, sondern wir müssen auch unsere Pflichten ihnen gegenüber wahrnehmen.

Zum Schluss noch ein Hinweis: Die Mehrheit der 101 Millionen Kinder, die nicht zur Schule gehen, und der 776 Millionen Erwachsenen, die weder lesen

noch schreiben können, gehören ethnischen, religiösen oder sprachlichen Minderheiten an.

Im politischen und sozialen Kontext von Transitionsländern ohne demokratische Tradition trägt das Bildungssystem zur Bekämpfung des Rassen- und Fremdenhasses bei. Es leistet einen wesentlichen Beitrag an die Förderung von Minderheitensprachen und hilft gewissen Gruppen, den Weg aus Armut und Isolation zu finden.

Zudem spielt Bildung eine entscheidende Rolle als Mittel zur Verbreitung von Werten wie Toleranz und einem besseren Verständnis zwischen Mehrheit und Minderheit.

Diskriminierung stellt den Begriff der Menschenrechte an sich in Frage. Der Kampf – unser Kampf – gegen Diskriminierung ist grundlegend für das ausenpolitische Engagement der Schweiz im Bereich der Menschenrechte.

Auch 2010 sind die öffentlichen Diskussionen immer noch von Vorurteilen, Missverständnissen oder groben Vereinfachungen geprägt. Deshalb können die Menschenrechte nur dank Bildung und Sensibilisierung geschützt und respektiert werden.

Heute, an diesem Ort des Wissens, an der Universität Zürich, möchte ich es noch einmal sagen: Bildung ist das beste Mittel zur Entwicklung einer sozial integrativen Gesellschaft mit einem guten Zusammenhalt. Auch in der Schweiz.

Zurich Declaration

International Experts gathered at the Seminar “From Minority Protection towards Managing Diversity”, hosted by the Foundation Convivenza, the Federal Department of Foreign Affairs, the Swiss Institute of International Studies and the Europa Institut at the University of Zurich on 29-30 April 2010 in Zürich

Having discussed the impact of variously motivated migrations, enhanced by the processes of globalization, on the phenomenon of the so called new minorities present in many countries of the world and affecting millions of people, underscore that the respect for human dignity and international standards of human rights as proclaimed in the 1948 Universal Declaration of Human Rights should be the yardstick for addressing related problems,

Emphasize, recognizing the particular vulnerability of new minorities, the need for special measures of protection by Governments to ensure the enjoyment of human rights by the affected persons, as well as for the acceptance of newcomers as full-fledged members of the community by the civil society,

Also emphasize the responsibility of the persons belonging to new minorities to fulfill their duties vis-à-vis the host state and society, as well as to contribute to the well-being of the society as a whole,

Believe that such a double-track approach will benefit not only new minorities but also the rest of societies,

Stress the fundamental importance of international and regional standards of the protection of national minorities and of the rights of persons belonging to minorities as laid down, in particular, in the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the relevant provisions of the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, as

well as in the Council of Europe Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages;

Call on relevant stakeholders to accept and benefit from the concept developed by the Advisory Committee under the European Framework Convention on National Minorities according to which a measure by measure approach, applied with the emergence of new minorities, may help to ensure optimal protection commensurate with the evolving situation of a specific new minority; this approach leaves room for the necessary flexibility without questioning the essential principle of minority protection,

Also call for the development of coherent, based on international human rights standards, specific guidelines concerning the protection of the so called new minorities at the international, regional and national levels.

Request the organizers to approach the Swiss authorities and other stakeholders with a view to promoting the elaboration of the guidelines and presenting them to the international community.