Minority Rights: Political principles and Legal codification (development of European minority protection system in the 90s)

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Abstract: **The end of the Cold war came along with resurgent (ethno)national and minority controversies within and among the states of CEE. The increasing focus on the issues of rights reflects the upward tendency towards their legal codification. The criticism against the minority protection system includes the following points: documents concerning minority protection have only political but no legal force, legal state obligations are too vaguely formulated, the group dimension is not sufficiently recognized. The legally entrenched norms and rights are but a part of a whole system, which covers also political principle, enforcement, and monitoring principles and political practices.**

Keywords: **post-Cold war development, discrimination, minority rights and protection, legal codification, political dimensions**

I. INTRODUCTION

With the end of the Cold war, the (sense of) security within the Eastern bloc provided by the carefully preserved power equilibrium within the bipolar system was abruptly swapped by uncertainty and insecurity of various character and magnitude. In the sphere of geopolitics and international relations, the core of this new precariousness embodied national and minority issues in their multitude appearances. Post-Cold war political landscape of Europe has been marked by a strong rise of nationalist movements and tensions between groups of different cultural, national, ethnic, and/or religious affiliation.

The demise of the old system came along with resurgent (ethno)national and minority controversies within and among the states of CEE, both old and newly emerging ones. Most of the newly sovereign states born by the dissolution of Yugoslavia, the Soviet Union, and Czechoslovakia, carried the birthmark of ethnic/national heterogeneity, emblematic and endemic for the whole region; thus, newly emerging minorities were added to traditional ones.

In many places, grim historical inheritance and lack of democratic traditions joined transition hardships to produce strong nationalizing and state-consolidating policies directed against minorities inside the country and/or towards neighboring countries harboring co-nationals. Minority claims have been put forward, sometimes in the language of force. Newly emerging minorities unhappy with their new status evoked the principle of self-determination; existing minorities claimed compensation for past injustices and protection from present ones and called for minority rights or for more minority rights.

Thus, post-Cold war developments have topicalized minority issues inside the separate countries as well as in bilateral relations and at the regional and continental level. Forced to respond to the dynamics of transition processes, the international community in the face of a number of European and World organizations set to tackle - at political, as well as at legal level - the pending minority-related problems. It would be misleading, though, to conclude that it was only the transition exigencies, which brought the issues of minority rights and minority protection into the focus of international attention and endeavors.

In the post-WWII United Nation system the issue of minorities and minority rights were consciously avoided. Towards the end of the bipolar system, however, this generally agreed upon and imposed neglect had started to wither away. Starting from the Helsinki process on, minority issues have begun founding increasingly conspicuous place in the agenda of international forums. In this sense, transition developments can be said in a way to only intensify and reinforce processes and tendencies already under way.

Still, the interaction between the development of legal and political dimensions of minority protection and the post-Cold war processes in Central and Eastern Europe remains of primary importance. The impact of the latter on the former has brought in a new way the question of minority rights into the political, public and legislative focus on the domestic and international plane. Several important implications marked the return of the "new-old" minority issues in the agenda of international forums. No longer overshadowed by the question of human rights, the issue of minority rights has been increas-

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ingly emancipated and minority issues – tackled on their own. In contrast, while effectively releasing itself from the normative umbrella of human rights, the relationship between minority rights issue and some other pertinent to the field concepts (self-determination, autonomy) has become rather complicated both normatively and in terms of political practices.

The last decade of 20th century witnessed continuous attempts at building a congruous and yet working international system of addressing issues and responding to problems related to minorities. These processes have developed at three interrelated levels: normative standard-setting of political principles, legal codification of norms and setting up working mechanisms for their practical implementation. All three levels are indispensable for the establishment and sustaining of an adequate system of minority protection. Due to the intrinsic characteristics of the subject matter in question, the legal codification of minority rights is bound to never be able to fully conform the political standard-setting. Despite of this, however, the system of minority protection is often conceived in the predominantly legalistic terms of rights. The increasing focus on the issues of rights in the field (more rights or less rights, individual rights or group rights, etc.) reflects the upward tendency towards legal codification of minority rights. At the same time most of the criticisms against the current state of minority protection system are put forward in the language of rights, especially in terms of legally codified collective rights.

This is where the argument of the present paper stems from. Following the development of the relationship between legal norms and political principles in the sphere of minority protection throughout 90s, I argue that an adequate and working concept of minority protection (which is to be in the core of an effective minority protection system) should not be confined to a strictly legalistic understanding. In the ongoing debate around the fate of minorities and what should be done with them or for them, the emphasis quite often goes to the legal aspects of the issue. This legalistic focus makes the codification of minority rights to be seen as *the* aim of any minority protection endeavor, while it often forgotten that rights are a means towards another bigger and more important aim - successful accommodation of minorities within the countries and preservation of distinct identities if so wished. The concept of minority rights, the claim goes on, has to be conceived as an embodiment of a set of political principles, which are not necessarily codified in strictly legal norms and rights.

The structure of the paper follows the logic of the argument. The first part briefly presents the 'state-of-affairs' in the field towards and shortly after the end of the Cold war system, the attempt being to demonstrate the already increasing attention towards minority issues *before* the post Cold-war developments and the general direction of this attention. The second part touches upon the influence of the attempts to provide solutions to the Yugoslav crises on the issues of minority protection and the results of the increased entanglement of the issue of minority rights to that of a particular understanding of self-determination. The third part seeks to outline what is understood now under minority protection system in terms of codified legal norms and political principles that these norms build upon. Within this framework, I seek to justify the claim about the legal codification of minority rights.

II. MINORITY ISSUES AROUND THE END OF THE BIPOLAR SYSTEM: MOVING BACK INTO FOCUS

In the international legal and political system, established after the WWII, minorities were largely neglected. On the one hand, the international actors, considering the experience of minority protection under the League of Nations rather discouraging, were reluctant to make any commitments and provisions concerning minorities. On the other hand, there was an optimistic belief that the then established system of general human rights and in particular the principle of non-discrimination would adequately guarantee the protection of minorities (Lapidoth, 1997: 11; Thornberry cited in Miall, 1994: 14).

Consequently, the issues of minorities and their treatment and rights were largely left out from the UN human rights treaties and declarations.[1] A notable exception to this general trend constitutes, though not within the UN framework Art. 14 of the European Convention of Human Rights and Fundamental Freedoms of the Council of Europe (Thornberry in Miall, 1994). Within the UN, until the end of the Cold war the main burden of minority rights in terms of general international legal codification was carried by the much-cited Art. 27 of the 1966 International Covenant on Civil and Political Rights (ICCPR), which addresses minority rights in a rather limited and negative[2] way and provides for non-discrimination and equal treatment but not for positive state obligations.

A Sub-Commission on Prevention of Discrimination and Protection of Minorities was established within the UN Commission on Human Rights, but its initiatives for more attention and normative emphasis on minority issues remained largely low-profiled.[3] The same goes

1 Thus, there is even no reference to minorities in the UN Charter or in the Universal declaration of Human Rights. The term 'minority' was not included in the lists of prohibited grounds of discrimination.

2 Understood as rights of non-discrimination and equality granted to "the persons belonging" to minorities.

3 Provisions pertinent to minority issues appeared in some other human rights treaties, like International Convention on the Elimination of all forms of Racial Discrimination, Convention for the Prevention and Elimination of the Crime of Genocide (1960); Convention against Discrimination in Education

for the way the question of minorities was treated in the UN in general. It was not before the political climate began changing that the issues of minorities had slowly began to revisit the official international agenda.

Since its launching in early 70s, the Conference for Security and Cooperation (from 1995 the Organization for Security and Cooperation and hereinafter OSCE) has been increasingly involved in addressing minority issues. The protection of persons belonging to minorities appeared in already in the Helsinki Accords (Principle VII, § 4), though again in predominantly non-discrimination terms, under the umbrella of individual rights and still "obscured by the ideological and great power divide" (Zaagman, 1997: 248).

Following the momentous changes in the Eastern bloc, the organization succeeded in quickly transforming itself into a forum for comprehensive security discussions, conflict prevention and crisis management. Though proceeding from "security concerns," however, the approach of the organization to minority issues has lead to standard-setting and elaborating political principles in the field. The organization has been able to tackle minority issues not least because of the politically, but not legally binding character of its documents and the ensuing commitments for the countries. Because of this, it was exactly OSCE where the introduction of the collective perspective towards minority rights and minority protection was possible.

Already before the fall of the Berlin Wall, the Concluding Document of Vienna Meeting of January 15, 1989[4] added the collective protection and promotion of distinct identity of minorities to the individual rights of persons belonging to such minorities (Principle 19). Following the geopolitical changes, the emphasis on the collective protection and promotion was reaffiremd and further elaborated at a number of meetings of OSCE Human Dimension Conference. Among these the most significant one is the Concluding Document of the Copenhagen Meeting on the Human Dimension of 29 June 1990 (Art. 33[5]).

Two more OSCE documents should be mentioned here as exemplifying the upward trend – both in attention and in substance – of treating minority issues. The Paris Charter for a New Europe of November 16, 1990, reaffirmed the departure from the purely negative non-discriminatory approach and the shift towards the need for affirmative action. Acknowledging the need for a more comprehensive and in-dept consideration of issues of minorities, the Paris charter provided for convening a special meeting of minority experts. The meeting took place several months later and is known as the OCSE Geneva Meeting of Experts on National Minorities (July 19, 1991). A number of provisions in Chapter IV of the Geneva Report point at affirmative state action and special measures to ensure the members of minority full equality with other citizens.

The developments within the framework of OSCE prior to the Yugoslav crisis have received divergent interpretation. On the one hand, they are considered as continuation and extension of the principles of the 1975 Helsinki Declaration. Since the group rights dimension is not sufficiently covered, the OSCE activities at Vienna, Copenhagen, Paris, and Geneva are interpreted as showing an "intention not to go too far in the recognition of minority rights" (Lerner in Brolmann et al, 1993: 97). On the other hand, however, OSCE activities in the period under consideration are considered as trend-setting. The commitments under OSCE exemplify a crucial step forward in acknowledging the collective dimension of minority identity and in going beyond the negative and non-discrimination understanding of minority issues and introducing the ideas of affirmative state action and special treatment (Henrard, 2000).

Though the OSCE documents lack legal binding force and are no more than political declaration of intent, they are considered to have a high *de facto* authority (Henrard, 2000: 206). Commitments under OSCE had arguably highly effective influence as a "source of inspiration for the UN Declaration of Minorities" (Ibid.). 'Lagging behind,' it was only in 1992 when UN General Assembly finally adopted the Declarations on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, "the end product of 14 years of diligent work by the Special Working Group, established by the Sub-Commission on Human Rights" (Ibid.: 185). The Declaration interprets and elaborates the principles of Art. 27 of ICCPR.[6]

In the same period, a trend of increasing attention towards minority issues is observable also within EU. One can mention here the draft Charter of Rights for Ethnic Groups of 1988 prepared for the Committee of Legal Affairs and Citizens' Rights and the Austrian proposal for an Additional Protocol to the European Convention on human Rights of 1991, which aims at "securing the Protection of Ethnic Groups" (Nowak in Brolmann et all, 1993: 109).[7] While these two exemplify the 'internal' attention to minority issues within EU, the Union mainly confines its action regarding minorities and minority protection to the external level as revealed by the EU Guidelines for the Recognition of New States in Eastern Europe and the Soviet Union formulated by the Council of Ministers of the EU, December 1991 and the

(1960). A thorough and instructive account of the UN policy on minority issues is offered Inis I. Claude, National Minority, an International Problem, Harvard University Press, Cambridge: 1997, 144-176.

[4] OSCE (then still CSCE) Vienna Conference too place between 1986 and 1989.

[5] Article 33 of the Copenhagen document provides an explicit recognition of positive state obligations to protect and promote minority identity.

6 Since both Art. 27 of ICCPR and the 1992 UN Declaration on Minorities are important elements in the current system of minority protection, they will be addressed in more details in the third part of the paper.

[7] The Charter remained a draft. It contained far-reaching proposals for the collective protection of minority rights and because of this had little chances to be adopted by the EC.

establishment of the Arbitration Commission for Yugoslavia.

III. Perception of minority rights and the right of self-determination: the Yugoslav crisis

The account so far has attempted to show that the growing attention towards minority issues and minority protection accompanied the whole process of 80s and beginning of 90s geopolitical transformations. In the post-Cold war period "The rise of nationalism has brought the issue of minority rights to the top of the European agenda" (Miall, 1994: 11), but the issue had been already significantly sensitized.[8] As Rady puts it, "The reawakening of ethnic tensions in Eastern Europe precipitated a change in the approach of the international community towards minority rights" (Rady, 1993: 720). Rady apparently has in mind the shift in the international approach towards collective rights of minorities. However, in the context of the current paper at least two more implications of the Yugoslav crisis on the concepts of minority protection and minority should be mentioned.

The attempts to tackle the Yugoslav crisis demonstrated (in the weak version) or lead (in the stronger version) to a widening of the gap between norms and practice (Kovacs, 2000: 3). The distinction between ad hoc reactions and general implications was obfuscated. During the break-up of Yugoslavia, the international community acted out of need to manage a rapidly escalating crisis when it lowered the criteria for secession of separatist republics. However, at the same time, the international community was also offering its decisions as if they were based on more general norms with a possibility of wider application outside the Yugoslav context (Ibid.: 7).

The gap between norms and practice bears on and is exemplified by the unintelligibly blurred relationship between the concepts of self-determination and that of minority rights. It is true that, as Musgrave observes (1997: 126-127) there is a close link between self-determination and minorities in the sense that "when self-determination takes place it usually affects minorities in one sense or another." In this sense, protection of minority appears as a logical corollary of self-determination.[9] In the post-Cold war period, as in the post-WWI period, the principles of self-determination and international minority protection were implemented in conjuncture. However, while under the League of nations' scheme minority rights were meant to be compensations for the denial of self-determination to certain national groups, "In the international environment of the 1990s, this is obviously no longer the case, but what really is the case is not quite clear" (Kovacs, 2000: 6).

This led to a vicious circle. On the one hand, advanced in a situation of intensifying ethnic conflict, minority rights concept acquired strongly protective function under the assumption of highly intolerant, ill-intentioned, and aggressive towards minorities state. Accordingly, the concept of territorial autonomy, granting minorities strong legislative and executive powers, began being seen as the highest form of protection (Ibid.: 5). Thus in some cases (for some groups[10]) self-determination, was reduced in content to minority rights, equated now with the concept of autonomy. On the other hand, granting so great autonomies as the highest degree of minority rights and as a "limited right of self-determination" (Hannum, 1993: 85) raised apprehensions that these territorial autonomies may serve as a "springboard for further demands of self-determination, including the rights to secession" (Kovacs 2000: 5). In this way, minority rights became intractably entangled with self-determination with secessionist implications.

There was a paradox in the way in which the concept of minority rights correlated with that of self-determination. One the one hand, allowing a unit the right of self-determination entailed minority protection and full package of minority rights including autonomy for the smaller unit (group). On the other hand, the chain of claims for self-determination was not closed; minority rights understood as right to autonomy were perceived as leading to claims for self-determination. As a consequence, "the response of the international community to the disintegration if Yugoslavia and to the issue of collective rights are likely both to embolden minorities and to make the governments of Eastern Europe even more anxious to maintain the traditional unitary character of their states" (Rady, 1993: 728).

[8] It is true that both Copenhagen Conference and Geneva expert meeting were facing concrete problems emerging from the post-Cold war realities. Still, these gatherings and the appearance of minority issue on their agenda should be seen also as a continuation of a trend established towards the end of the bipolar system. It is also true that in general the 'swung of the pendulum' towards group and minority rights "has much to do with the increasing recognition - and guilt about - the destruction of traditional and indigenous cultured by Western societies and values. (...) It was certainly well under way before the collapse of the Soviet empire forced the issue of minority rights back into the forefront of the international political and human rights agenda" (Hadden in Miall, 1994: 24).

[9] For some authors minority rights exist in a continuum at the end of which is the right to self-determination, and in its ultimate expression, the right to secession. A strong opinion in this direction is expressed by Henrard, for whom "Minority rights are not only in themselves a form of internal self-determination but certain demands of minority rights would furthermore be enhanced by an appeal to a right of self-determination" (Henrard, 2000: 184-185). Still, the opinions on this point (both theoretically and in practice) vary significantly (see Hannum in Brolmann et al, 1993: 334-335).

[10] Particularly for Serbs in new successor states (Decision Nationalism 2 of the Badinter Commission).

In general, the overall impact of Yugoslav crisis on the issues of minority protection and minority rights was two-fold. On the one hand, there was an increasing international normative over-commitments leading to progressive difficulties in upholding its implications (Kovacs, 2000: 7-8). The language of collective rights of minorities and their entitlement to territorial autonomy became firmly rooted in political discourse at both a local and international level (Rady, 1993: 728). On the other hand, the implications of the normative and political answers to the Yugoslav crisis seriously influenced in a negative way the anyway-not-so-big chances for reaching agreement at international and European level for normative codification of a wider set of minority rights into a normative system of minority protection.

The attempts to solve the Yugoslav crisis has undoubtedly influenced the subsequent efforts at codifying minority rights and showed the limitations of its feasibility in an international system of minority protection.

IV. THE POST-COLD WAR SYSTEM OF MINORITY PROTECTION: LEGAL AND POLITICAL DIMENSIONS

The preceding sections briefly presented the developments and processes since the end of the Cold War system which had led to the appearance of the current system of minority protection with all its perceived and real deficiencies and flaws. This will briefly outline what is included in the current system of minority protection in terms of principles and rights. The issues of mechanisms for implementation are also briefly touched upon. Against this background, it will be seen why minority protection should not be confined to a strictly legalistic understanding and equated with minority rights. The normative aspect of the minority protection system understood in terms of "rights" cannot be and should not be put forward as the sole criteria for evaluating the system.[11]

The post-Cold war system of minority protection in Europe incorporates a number of legal and political norms, as well as mechanisms of implementation and monitoring. The elements of minority protection system are developed within several international and regional organizations, which at many instances work in conjuncture: United Nations, the Council of Europe, The OSCE and the EU. In terms of legally binding norms, Art 27 ICCPR remains the most universal norm related to minority treatment.[12] It is interesting to notice the evolution, which the interpretation of Art. 27 has undergone because it is indicative for a general trend in the normative development in the field of minority issues. In itself, art. 27 is a fairly modest provision of minority protection (Nowak in Brolman et al, 1993: 104), phrased with a typically negative formulation. It was conceived for a long time as a strictly non-discriminatory clause, without any implications for affirmative state action or special treatment of minorities.[13] Still, there has been an increasing tendency to recognize more strongly the existence of positive state obligations and gradual acceptance of the notion of special guarantees for minorities (Musgrave, 146). The need for further elaboration of the principles of Article 27 gave birth to long-prepared 1992 UN Declaration on Minorities, which should be considered as an "interpretive explanation of article 27" (Henrard, 2000: 185) and reflects an evolution in the UN since 1966.

The Declaration contains provisions going beyond article 27 and although it does not have a legally binding force, it "can be regarded as a new 'international minimum standard' for minority rights" (Thornbery quoted in Miall, 1994: 16).[14] One of the most laudable features of the Declaration is that it acknowledges that the state obligations regarding minority protection go beyond mere non-interference and that, unlike art. 27 it explicitly recognizes the right to identity of minorities (Henrard, 2000: 187-188).[15] Still, it is also reproached for being vague and containing a number of specific restrictions, which weakens the obligations of states and leaves them a wide margin of discretion (Ibid.; see also Nowak in Brolmann et al, 1993).

The post-Cold war system minority protection system is further elaborated in a number of European instruments, which compared to the international ones are more minority specific. The standard-setting and trend-setting role of OSCE in the first post-Cold war years has been already mentioned. The OSCE documents listed above contain explicit recognition of positive state obligations to protect and promote minority identity and to take various special measures so that to bring members of minorities in a substantially equal position to the rest of the population. Moreover, the Organizations works actively in building monitoring and evaluative mechanisms with conflict preventive and conflict resolution purposes. At the 1992 OSCE follow-up meeting in Helsinki, the High Commissioner on National Minorities was established. Further on, the Pact on Stability in

[11] See for example Henrard, the main thesis of whose otherwise worthy study is that an adequate minority protection system can be achieved by the combination of individual rights, minority rights and the right of internal self-determination.

[12] For Europe until 1998, when the CE Framework Convention for Protection of National Minorities entered into force.

[13] However, already in 80s, despite the individualistic formulation, the practice of the UN Human Rights Committee showed that the protection afforded by the Article 27 is not as week as often assumed (Nowak in Bromlann et al, 1993: 104).

[14] See also Henrard, who argues that "Although the Declaration is merely a soft law, it can nevertheless be argued to concern a universal standard" (Henrard, 2000: 186).

[15] In offering a broader interpretation of art. 27, the Declaration allows also for the collective element in the language of the provision (Nowak in Bromlann et al, 1993: 106). Combining both "national" and "ethnic," it aims the widest possible field of application (Henrard, 2000: 184).

Europe (launched by OSCE in 1995) provided, among other things, a mechanism for monitoring within the countries and mediation of bilateral problems where minority treatment is involved.

At the same time, OSCE contribution to the minority protection system is subjected to the same type of criticism as that against the 1992 UN Declaration. Many authors point out that the OSCE documents, though not legally binding are still formulated in such a cautious almost vague way and contain so many escape clauses that their effectiveness seem dubious (Henrard, 2000; Nowak, Lerner in Bromlann et al, 1993; Thornberry in Miall, 1994).

Though the standards set by the OSCE remain in their large part political, the progressive stance of the OSCE regarding minority protection "regularly serves as a source of inspiration for the development of standards within the framework of other international and European organizations (Henrard, 2000: 206), notably the Council of Europe. Thus, the aim of the Council of Europe Framework Convention for Protection of National Minorities was to translate the standards set by the OSCE into legal norms. The Convention "represents the first international treaty with a multilateral general protection regime for minorities" (Ibid.: 210). Among its advantages is that it implements the principle of positive state obligations. Under the Convention the contracting states accept a positive duty to ensure equality in fact as well as in law for the members of national minorities compared to the rest of the population (art. 4, ## 1 &2). That means, that the Convention allows for the adoption of special measures regarding minorities. Another important feature in this direction is that the Convention enshrines the obligation to protect the existence and identity of national minorities.

Still, the Convention is subjected to the main type of criticism as other documents in the field, namely, that the member states are given a wide measure of discretion; there are several escape clauses and as a whole the Convention is consider to consists of vague program declarations (cf. Henrard, 2000: 210-211; Nowak in Bromlann et al, 1993). Still, Henrard concedes that "program declarations, although providing only certain broad guidelines, are admittedly not *per se* negative because they allow the specific circumstances to be fully taken into account" (Ibid.: 211). Similar criticism is directed against the Council of Europe European Charter for Regional and Minority Languages (1992). The control mechanisms of the two conventions are "purely political" (Henrard, 2000: 277).

V. CONCLUDING REMARKS

The analysis hitherto begs a number of conclusions.

First, the post-Cold war system of minority protection builds on two main principles - non-discriminatory and substantial equality. There is a noticeable evolution from the former traditionally established and upheld principle to the latter. The latter principle relates preservation and promotion of the own, separate identity of minorities to an optimal extent entails special treatment and positive obligations on the part of the states, which is the second important point.16 Thus, departing from article 27 of ICCPR as initially interpreted, it is increasingly accepted that genuine non-discrimination might entail positive discrimination and affirmative action.

Second, the concept of individual rights remains the corner stone of the system. The standards of minority rights within the system presuppose and build extensively on relevant individual human rights, while tailoring them to the specific situation and needs of minorities. Even when the issues concerns are not explicitly addressed in general individual human rights (like those concerning language, for example) and/or have a marked collective dimension, the rights concerning minorities remain individual rights, i.e. they are rights of the members, not of the collectivities. As Thornberry writes (in Miall, 1994: 21) "Progress on the rights of minorities has been achieved more through the elaboration of a collective dimension to individual rights than through the growth of collective rights." The dominant approach of minority protection still focuses on the individual, as a member of a minority, and has in this respect a number of certain collective dimensions.

Third, the system exhibits a marked discrepancy between the development of concrete political principles and standards and their respective legal codification. The most elaborated so far standards of minority protection are politically binding. The attempts to translate them into legal obligations resulted in documents, which are weak in legal terms. As mentioned above, this discrepancy is among the major source of criticism to the contemporary system of minority protection.

In summary, the criticism against the minority protection system includes the following points. First, documents concerning minority protection have either only political but no legal force at all or they are of weak legal force and/or enforceability. The system has strong (or relatively strong) political principles and standards, which do not have adequate legal codification. Second, as a result of the above, legal state obligations regarding (the members) of minorities are too vaguely formulated, and accompanied by too many escape clauses, thus leaving too broad a discretion to the states. Third, the group dimension is not sufficiently, nut "only grudgingly" (Henrard, 2000: 277) recognized. Among these criticisms, the first two have a direct bearing on the arguments of the present paper, while the relevance of the

[16] See also Thornberry (in Miall, 1994: 20) who argues that the "core of the rights of minorities in international law is heir right to existence and identity. Special measures to favor the flourishing of this identity are not to be regarded as discriminatory."

third one is not immediate.17 The present argument is made partly in answer to those criticisms.

There is a widely shared view that the efficiency of the minority protection system "flow mainly from state fears concerning minorities" (Henrard, 2000: 278; see also Nowak, Lerner in Bromlann, 1999; Thornberry in Miall, 1994). This view is not unjustified as long as minority protection system is "produced" within international organizations by representatives of states. In this respect, the system is a product of negotiations among states and evolution in the state perspective towards minority protection. Given the developments in the Yugoslav crisis and the central role minority issue played in them, the apprehensive approach of state should be of no surprise. Yet, even though apprehensive, one cannot deny the visible trend towards acknowledging the rights of minorities to exist and to be different (Thornberry in Miall, 1994: 20-21).

Still, not only states' fears or unwillingness can account for the impossibility for full legal codification and strong legal documents within the system of minority protection. As Henrard acknowledges (2000: 13) the fact that the minority phenomenon has very different dimensions and proportions from state to state, which entails the need for tailoring as much as possible the precise combination of measures and techniques used to the concrete circumstances of the case. Consequently, the existence of escape clauses, vague formulation and conditional limitations in international documents on minority protection (mostly in the legal ones, but also in the politically binding) is also related to the need of flexibility of any general regulation of minority protection so that it can always be adapted to the specific circumstances (Hannum in Brolmann, 1993; Henrard, 2000).

The need for flexibility requires relinquishing the strictly legalistic approach to the concept of minority protection and opting for a more pragmatic one. The best proof for the mounting influence of that view offers the abandoning of attempts to elaborate a rigid legal definition of minorities and taking a pragmatic approach allowing for flexibility.18 Thus, what Hannum (in Brolmann et al, 1993: 334) calls "functional approach" to minority rights becomes increasingly adopted. The diversity of minority situations from one state to another means also that the most significant protection of minorities (in terms of efficiency and completeness) can be developed at the national level. In this sense, international mechanisms can only supplement national institutions and should be generally available only when domestic remedies have failed (Ibid.: 338). Efforts and work, therefore, should be concentrated at that level. Given the fact that the national implementation of international standards is crucial, and that national standards should be fully tailored to specific circumstances, the sensitization of states should be an important goal of any work on minority protection (Henrard, 2000: 241).

Two more points on why the emphasis on legal codification and legally binding documents enforcing positive state obligations and minority rights might be misleading. First, minority issues are not always a straight question of a need for protection from discrimination or persecution (Jennings19 in Brolmann, 1993: 342). In that sense, legal codification of minority rights designed to safeguard the minority from persecution and overt discrimination are not the same as rights related preservation and reproduction of distinct identity characteristics. The former would be too much for the latter, the latter would be not enough for the former. In cases of ethnic or nationalist conflicts purely legalistic approaches have little chances to succeed. As Nowak (in Bromlann et al, 1993: 118) aptly points "The conflict between Serbs, Muslims and Croats in Bosnia-Herzegovina, for example, cannot be solved by advocating increased protection of group rights but only by downplaying the nationality issue, advocating mutual respect and understanding and, if necessary, by international humanitarian intervention and deployment of peace-keeping forces." In such cases the question is not about the validity of the system, but rather about the adequacy to contemporary events of some of the answers the system yields (Jennings in Brolmann et al, 1993: 341).

This leads to the second important point. Problems with the post-Cold war system of minority protection are not so much related to the insufficient legal codification of minority rights in international documents. The problem is not in further codification and forcing the adoption of legally binding documents but in narrowing the gap between norms and principles (existing, adopted) and political practices, while at the same time remaining aware about the importance of the distinction between legal and political decision and action. Jennings emphasizes that "Legal decisions and actions (...) ought not to be taken without some regard to its political results, for a solution that appears to be a scientifically elegant one cam turn out to be a political folly"

[17] There is a huge debate around the topic of individual vs. group or collective rights regarding minority protection. In the present context it suffices to mention that the problem is not so much that the rights are not recognized as group rights than "with the lack of explicit obligation of affirmative state action and above all, a lack of efficient prevention and enforcement measures" (Nowak in Brolmann et al, 1993: 103). Nowak made the point already in early 90s, i.e. before the two legally binding documents of CE. Yet, to a large extend the essence of his argument is still valid - whether rights are formally recognized as group rights or not is not so important if the respective state undertakes and accomplish an obligation regarding affirmative action and if there are monitoring and controlling mechanisms.

[18] The activities and documentation of the working group on Minorities of the UN Sub-Commission (active since 1995) evidence this. Furthermore, the same pragmatism marked the elaboration of the CE Framework Convention (see point 12 of the explanatory report), as well as the OSCE activities, where the mandate of the High Commissioner on National Minorities lacks definition of minorities (see Henrard, 2000: 24, 28-30).

[19] President of the International Court of Justice, the Hague.

(Hannum in Brolman et al, 1993: 342).

The emphasis on the inefficient legal codification and legal force of minority protection system has probably much to do with the fact that most of the analysis of the system are done by lawyers, who are naturally inclined to pay more attention to the legal aspects. Yet, this is not so simple and there is a deeper problem. As Jennings, himself a high-ranked international lawyer writes "there is always a great temptation to international lawyers to try to work legal principle, rather as a potter works clay, in order to produce a desired political result in the guise of s requirement of the law [thus] expecting from the law what it is sometimes not able satisfactory or properly to deliver" (Jennings in Brolmann et al, 1993: 343).

This last point aptly and concisely presents the core of the present argument - legal codification and the elaboration and adoption of legally binding international documents is not a panacea for addressing minority situations. The legally entrenched norms and rights are but a part (besides far the most important one) of a whole system, which covers also political principle, enforcement, and monitoring principles and political practices. In many places putting forward minority rights and minority protection schemes without working at a deeper level for strengthening of the democratic framework and confidence building measures would be in effective or even counterproductive. In order to be successful and efficient a minority protection system should be build in legal terms on what Jennings (Ibid.: 344) describes as "the now respectable notion of 'soft law.'" This notion erodes the sharp edges, which used to exist between law and proposal and allows for flexibility. Given the nature of minority issues and the character of the international system, the universal international commitments are bound to remain of predominantly political character.

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