SECURITY AND HUMAN RIGHTS MONITOR

Advisability and feasibility of establishing a complaints mechanism for minority rights

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Introduction

A number of experts, states and international bodies have frequently been alluding about the advisability of establishing an international complaints mechanism or procedure for strengthening the protection of national minorities.[2] While it is not surprising that the proposals for establishing a complaints mechanism for minority rights emerge from time to time, it must be emphasised that insufficient attention has been devoted to two basic questions which should be discussed and answered prior to any possible political decision on standard-setting.

The first is the question of the advisability or desirability of introducing such a far-reaching innovation in the international law on national minorities at a European level. A wide variety of problems and implications need to be examined, including those arising out of the experience accumulated by similar procedural arrangements in the broader field of the international law of human rights. Furthermore, minority rights and their sensitive political and security nature invite a question about the potential impact of a complaints procedure upon domestic and international stability, security and peace.

The second question concerns the legal and political feasibility of the proposal for a complaints mechanism. There is a set of dilemmas to be faced and tentatively resolved about choices concerning such fundamental questions as a model for a complaints system (autonomous or ancillary), individual or collective complainants, a classic or a simplified legal basis for introducing the mechanism, the legal modalities of the procedure, violations or non-compliance and the status of any final determinations.

The aim of the present article is thus to attempt to respond tentatively to the fundamental questions of the advisability and feasibility of such a complaints mechanism. In other words, the 'what' of these proposals is already known, but the time has now come to address 'whether and how' they can be accomplished. A reservation should be made at this introductory stage. For the requirements of this article, what I mean by a complaints system is a procedure or mechanism whereby an application (a petition or communication) can be lodged with an international body by a non-state entity (an individual, a group of individuals or non-governmental organisations) for the examination and possible redress of alleged violations of human rights standards. Consequently, inter-state complaints are beyond the scope of this study although a good part of the jurisprudence on minority rights has been developed in inter-state relations as is the case of the jurisprudence of the Permanent Court of International Justice, mainly through its advisory jurisdiction.

Advisability — experience of human rights complaints systems

The developments in international human rights complaints systems provide an enormous and rich variety

2 See, inter alia, J. Packer, 'Situating the Framework Convention in a Wider Context: Achievements and Challenges', in *Filling the Frame. Five Tears of Monitoring the Framework Convention for the Protection of National Minorities*. *Proceedings of the Conference held in Strasbourg, 30-31 October 2003,* Strasbourg: Council of Europe Publishing, 2004, p. 48; S. Breitemoser and D. Richter, 'Proposal of an Additional Protocol to the ECHR Concerning the Protection of Minorities in the Participating States of CSCE,' *Human Rights Law Journal*, 1991, Vol. 12, No. 6-7, pp. 262-265; and R.M. Letschert, *The Impact of Minority Rights Mechanisms*, The Hague: T.M.C. Asser Institute, 2005, pp. 235-236; there was also a draft protocol to the ECHR formally submitted by the Government of Austria to the CoE's Committee of Ministers on 26 November 1991; as for international bodies, see Recommendation No. 1201 (1993) and Recommendation No. 1492 (2001) of the Parliamentary Assembly of the Council of Europe (PACE), and the Venice Commission in *The Protection of Minorities. Collected Texts of the European Commission for Democracy through Law*, Strasbourg, Council of Europe, 1994, pp. 10-41.

of experience which serves as both an indication of the advisability as to whether to set up such mechanisms and as guidelines for their specific modalities. It must first be noted that for the last few decades we have witnessed an evolution towards strengthening the implementation standards of human rights. Proposals to that end have usually stemmed from conclusions pointing to progress recorded in recent decades in the field of the international law of human rights, notably in its standard-setting and interpretation. This trend has stemmed from an assumption that the established set of substantive rights, though requiring further development, offers a sufficient basis to focus on supervising the observance of human rights.[3] One of the consequences of this trend has been not only the strengthening and consolidation of the existing reporting procedures, but also the development of a variety of complaints mechanisms. We are thus concerned with endeavours to create and develop a number of complaints mechanisms within a broader tendency of strengthening the monitoring arrangements of human rights treaties. The symptoms of these trends have, however, found their different reflections in universal and regional organisations.

At the universal level (the UN) only four out of nine core human rights treaties were originally equipped with treaty-based optional complaints procedures, notably the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 1965, the Optional Protocol to the International Covenant on Civil and Political Rights (OP-ICCPR) of 1966, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment — CAT (1984) and the International Convention for the Protection of All Persons from Enforced Disappearance (2006).[4] Subsequently, two other core treaty complaints mechanisms have been added — the Optional Protocol to the International Convention on the Elimination of Discrimination against Women (OP-CEDAW) in 1999 and the Optional Protocol of the Covenant on Economic, Social and Cultural Rights (ICESCR-OP) in 2008. And, finally, a decision was taken to start negotiations on a complaints procedure for the Convention on the Rights of the Child of 1989. Altogether complaints mechanisms are available within the framework of six UN core treaties. On the whole, these developments confirm that in spite of difficulties in reaching a consensus at the universal level (192 states), the trend of establishing optional complaints mechanisms with a view to strengthening the supervision of the domestic implementation of human rights treaties has continued. It is even more significant that this evolution has proved to be progressing slowly albeit successfully in areas which for states are particularly sensitive (e.g. economic, social and cultural rights) or pose legal problems (e.g. non-self-executing provisions).[5]

As far as regional human rights frameworks are concerned, complaints procedures have been flourishing from their very beginning with particular emphasis in the field of civil and political rights. Within this group of arrangements the first and, to date, the most advanced system was established under the European Convention on Human Rights (hereinafter: 'ECHR') in 1950. This system has been based upon the following principles: rights for everyone within its jurisdiction, the right of individual application, the judicial character of the complaints proceedings before the European Court of Human Rights, the final and binding character

3 For more on this trend see K. Drzewicki, 'Internationalization of Human Rights and Their Juridization', in R. Hanski, and M. Suksi (eds.), *An Introduction to the International Protection of Human Rights. A Textbook*, Second, revised edition, Turku/Åbo: Institute for Human Rights, Åbo Akademi University, 1999, pp. 41-42.

4 For a critical assessment of UN monitoring systems see Ph. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring*, Cambridge: Cambridge University Press, 2001, pp. 1-12 and 501-525.

5 Self-executing provisions are those which are sufficiently clear and precise for their direct applicability by domestic bodies, notably the judiciary, and thus do not need to be first defined by legislation implementing the rules of international treaties.

of the judgments, and supervision by the Committee of Ministers of the execution of judgments.[6] In Europe a complaints system has also emerged within the political arrangement of the Organisation for Security and Co-operation in Europe. The OSCE texts have deliberately not created a court or other individual petition body to enforce the implementation of the OSCE commitments which are politically but not legally binding. Elements of complaints mechanisms thus operate politically and in the form of various institutional and procedural arrangements.[7]

The success of the Council of Europe's system resulted in other regions setting up their own similar human rights frameworks, like those based upon the American Convention on Human Rights of 1969 and the African Charter on Human and Peoples' Rights of 1981. This approach brought the European and American systems closer to the requirements reflected in the Roman law principle of 'ubi ius, ibi remedium' (where there is a right, there is a remedy). In all three regional frameworks it also appeared to be possible to extend, though to different degrees, complaints mechanisms to economic, social and cultural rights. The most advanced has appeared to be a system of collective complaints under the European Social Charter.[8]

There are a few lessons that one can learn from the operation of human rights complaints systems for a further examination of a similar arrangement for minority rights. The first observation is that, on the whole, there has been a slow but steady growth in complaints procedures within the frameworks of human rights treaties. This has become discernible within the broader trend of placing greater emphasis on the implementation of human rights. The traditional priority given to reporting procedures in universal systems is being gradually remedied by adding complaints mechanisms. The second lesson is that a clear priority for regional systems of complaints mechanisms, with the exception of the African model, contributed in the course of decades to the development of valuable human rights jurisprudence. The third relevant conclusion is that this success of regional complaints procedures turned out to be useful particularly in the field of civil and political rights, although experiments with economic, social and cultural rights equally proved their positive impact on the protection of human rights. And the fourth lesson confirms the observation that any complaints systems are more effective if the treaties upon which they operate are predominantly made up of self-executing rules.

Advisability — experience of minority-related complaints systems

The rights of persons belonging to national minorities are a part of the normative system of human rights. Thus individual persons belonging to national minorities enjoy and exercise all the human rights guaranteed by international and domestic law. However, these regulations have been recognised as being insufficient since the effective protection of minority rights requires, in addition to general human rights rules, more specific provisions to meet the particular needs of persons belonging to minorities. Such an understanding

6 For more see K. Drzewicki, 'European Systems for the Promotion and Protection of Human Rights', in C. Krause and M. Scheinin (eds.), *International Protection of Human Rights. A Textbook*, Turku/Åbo: Åbo Akademi University, Institute for Human Rights, 2009, pp. 365-371.

7 See *Individual Human Rights Complaints. A Handbook for OSCE Field Personnel*, Warsaw: OSCE/ODIHR, 2003, pp. 20-21. Specifically the mandate of the High Commissioner on National Minorities explicitly provides that he/she 'will not consider violations of CSCE commitments with regard to an individual person belonging to a national minority' (Para. (5c) of the CSCE Helsinki Document: The Challenges of Change, 1992).

8 On the modalities of these regional systems see O. De Schutter, 'The European Social Charter', C. Medina Quiroga, 'The Inter-American System for the Protection of Human Rights', and F. Viljoen, 'The African Regional Human Rights System', in C. Krause and M. Scheinin (eds.), both in supra note 6, pp. 425-442, 475-501 and 503-527, respectively.

has led to standard-setting called 'personalisation des droits de l'homme', in other words the adoption of more specific international standards with regard to vulnerable groups affected by an international normative deficit (refugees, women, children, national/ethnic minorities, migrant workers, etc.).[9] The normative deficit in question was particularly acute in the international law concerning national minorities after World War II.[10] This contrasts with the experience of the League of Nations which developed numerous arrangements through the Peace Treaties, bilateral conventions and other mechanisms. Among the last mentioned were the first complaints procedures devoted to minority issues, like a unique system established under the Polish-German Treaty on Upper Silesia in 1922.[11]

For these reasons it seems advisable to examine briefly the experience of a selected number of minority-related complaints systems. At the universal dimension the first optional treaty-based complaints procedures were established under ICERD and the Optional Protocol to the ICCPR. The latter has historically overcome the absence of minority rules in UN human rights law by introducing a specific provision on the rights of persons belonging to ethnic, religious or linguistic minorities (Art. 27 ICCPR). Nevertheless, the jurisprudence of both bodies has been emerging very slowly and these bodies need time to develop and improve their contribution to the interpretation of minority rights. To date, their jurisprudence is rightly perceived as 'confined to a scatter of leading cases (almost invariably involving members of indigenous peoples […]), while important areas of protection such as language, education and religious rights, remain unexplored or await further clarification'.[12]

Concerning the regional dimension, the most relevant for assessing the efficiency of minority-related complaints systems is the procedure of individual applications under the ECHR, the most sophisticated system of the international protection of human rights. Typical of the post-war period, however, the Council of Europe was not yet ready to take a step towards regulating minority issues. Up until the 1990s all the attempts undertaken to adopt a binding instrument invariably failed. Unlike the ICCPR, the European Convention did not provide explicitly for minority rights provisions with the exception of a reference to 'association with a national minority' among the grounds upon which discrimination is prohibited in the enjoyment of the rights and freedoms set forth in the Convention (Art. 14 ECHR). Only since the entry into force of Protocol No. 12 to the ECHR in 2005 has a general prohibition of discrimination on a number of grounds, including that of 'association with a national minority', become operative as an autonomous provision. It can therefore give rise to more case law on minority issues, but specifically from the perspective of the non-discrimination principle. In its adjudication, however, it is still the case that the European Court of Human Rights can only cover minority issues both partly and indirectly (through substantive rights) or through a non-discrimination clause. These two lines of jurisprudence of the European Court have produced numerous cases and various assessments.

9 K. Vasak, 'Le droit international des droits de l'homme', *Recueil des Cours de l'Academie de Droit International*, vol. IV (1974), pp. 388-391.

10 It was believed that universal respect for human rights, as designed by the UN Charter in 1945, would solve national minority problems by itself. In addition, there was an expectation that national minorities would in the long run be assimilated into societies — see more K. Drzewicki, 'Minority Protection within the OSCE', in *Managing Diversity. Protection of Minorities in International Law*, ed. by D. Thürer and Z. Kędzia, Zürich- Basel-Geneva: Schultens, 2009.

11 See G. Kaeckenbeeck, *The International Experiment of Upper Silesia*, London-New York- Toronto: Oxford University Press, 1942, and a broader assessment of pre-war endeavours by P. Thornberry and M. A. Martin Estébanez, *Minority Rights in Europe. A Review of the Work and Standards of the Council of Europe*, Strasbourg, Council of Europe Publishing, 2004, pp. 7-12, and G. Pentassuglia, *Minorities in International Law. An Introductory Study*, Strasbourg, Council of Europe Publishing, 2002, pp. 27-30.

12 See Pentassuglia, *ibid*., p. 211.

As far as practically resorting to these rules is concerned, one can perceive clear trends in the jurisprudence of the European Court. In addition to non- discrimination cases, the Court has examined a number of applications concerning minority issues in the context of the use of a minority language upon arrest (Art. 5/2 ECHR) and during a criminal trial (Art. 6/3a and e ECHR) and also with regard to the enjoyment of the freedom of religion, the freedom of association and assembly, the freedom of expression, the right to education, the recognition and registration of minority groups and effective participation. It has been concluded that the ECHR can protect certain aspects of minority rights, but it is not specifically designed to do so due to the fact that 'legal mechanisms to address minority rights issues will never be the complete answer'.[13] In its entirety, the case law of the European Court of Human Rights on the rights of persons belonging to national minorities addresses a variety of circumstances and although, on the whole, it is still fairly modest, its potentials are not yet exhausted by individuals and non-governmental organisations.

In conclusion one must first note that with its provision on minority rights (Art. 27) the ICCPR has produced neither an extensive nor an impressive case law on minority rights. In contrast, not being equipped with specific minority rights provisions but only with non-discrimination rules and general substantive rights, the European Convention has brought about more extensive and promising results for the effective protection of minority rights. Sharing similar characteristics, the European Court of Human Rights appears to be a promising body for some, but not all, possible ways of improving the protection of minority rights.[14] It may therefore be inferred that the stronger supervisory powers of treaty-based bodies offer a greater opportunity to develop jurisprudence on minority rights, even if they constitute merely an indirect task within broader treaty regulations on human rights. The overview of human rights complaints procedures which are relevant for minority rights demonstrates that the existing complaints systems have a visible degree of insufficiency. In developing jurisprudence in the field of minority rights the absence of effective remedies needs to be addressed.

Advisability — the choice of a complaints system

As a starting point a question should be posed about the choice of a complaints system and why such a choice can be seen as the better option when compared to other possible solutions. One idea which belongs to past experiences was to draw up a convention with supervisory procedures: a compulsory reporting procedure and optional inter-state complaints and individual petitions. This was exactly the model which was applied by the European Commission for Democracy through Law (the Venice Commission) which adopted a fully-fledged 'Proposal for a European Convention for the Protection of Minorities' on 4 March 1991 and submitted it to the competent bodies of the Council of Europe.[15] It was to be a model with an autonomous character with its own expert committee and with regular links to the Council of Europe's bodies and procedures (PACE, Committee

13 G. Gilbert, 'The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights', *Human Rights Quarterly* 24 (2002), p. 780. This author also submits that 'minority rights are a highly contentious issue which, in the first instance, should be addressed at the political level.' — G. Gilbert, 'Minority Rights under the Council of Europe', in S. Wheatley and P. Cumper (eds.), *Minority Rights in the 'New' Europe*, The Hague-Boston-London: Martinus Nijhoff Publishers, 1999, p. 64. See also P. Thornberry and M. A. Martin Estébanez, *supra* note 11, pp. 30-87.

14 Some authors have gone even so far to submit that the European Court appears to have 'imperceptibly' and 'indirectly' become the protector of national minorities — see F. Tulkens and S. Piedimonte, 'The Protection of National Minorities in the Case-law of the European Court of Human Rights', *Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN)*, 7th meeting, Strasbourg, 12-13 March 2008, p. 1.

15 See its text with explanatory report — 'Proposal for a European Convention for the Protection of Minorities', in *The Protection of Minorities*, supra note 2, pp. 10-34.

of Ministers, etc.). However, the potentials for this model were virtually exhausted — the Convention (FCNM) was finally adopted, but without a complaints procedure. It is not excluded, however, that there could be a return to some of the missing components in the Convention.

One can roughly distinguish two prospective responses to the question of the choice of an appropriate complaints system. The first possible model could be based upon resorting to the existing mechanism. This option has usually been seen in the form of an additional protocol to the European Court of Human Rights which would specify a cluster of substantive minority rights and thereby the whole instrument would automatically be subject to the procedural regime of the ECHR. The protocol would have to adjust the substantive minority rights to the demands of self-executing provisions. To date, this model has received the most support among individual proponents and international organisations.[16]

And the second model of a complaints mechanism might be set up anew, but within the existing organisational framework of the FCNM which operates within the broader setting of the Council of Europe. According to this model a newly introduced mechanism would be in the hands of the existing Advisory Committee of the Framework Convention (ACFC). In other words, an additional and thus optional protocol to the FCNM could establish a new procedure — a complaints mechanism — to be operated mainly by the existing Advisory Committee and the Committee of Ministers. Consequently, the envisaged protocol would be a purely procedural instrument since, unlike the above model, substantive minority rights provisions are those already set forth in the Framework Convention.

In conclusion it seems that the second model demonstrates more prospective aspects than the other. The ACFC option will be discussed more extensively below. Few arguments should be raised against setbacks of the ECHR model. Support for the 'protocol-to-ECHR' option has optimistically been stemming from a conviction that minority rights would be best protected by the system of individual applications to the European Court. One should however be aware that it would be legally difficult to render the whole Framework Convention susceptible to the procedure before the European Court. Among the provisions of the FCNM there are still many rules with insufficient legal maturity (non-self-executing rules) for direct applicability by the Court. It is therefore not surprising that the option one ('protocol-to-ECHR') resorted to drafting its own catalogue of substantive rights. After the adoption of the Framework Convention, a potential protocol to the ECHR would require a series of new negotiations to select those rules of the FCNM which could be regarded as self-executing and thus would amount to justiciable rights. This step would give rise to not only a lengthy drafting process but could also seriously undermine the authority of the Advisory Committee. Other setbacks of 'protocol-to-ECHR' option stem from the regular and increasing difficulties of the European Court with an ever-increasing inflow of applications, permanent reforms of the system since 1980s and the excessive duration of case processing (3-6 years) after the exhaustion of remedies at the national level. These and other arguments appear to be sufficiently discouraging to the 'ECHR' model so that one should reasonably turn attention to a mechanism within the Framework Convention system.

16 To mention but a few proponents of this model one should refer to PACE Recommendation No. 1201 (1993) and Recommendation No. 1492 (2001), Breitemoser and D. Richter, and R.M. Letschert – all of them referred to in supra note 2. Support for this option was also lent by Ch. Hillgruber and M. Jestaedt, *The European Convention on Human Rights and the Protection of National Minorities*, Cologne, Verlag Wissenschaft und Politik, 1994, pp. 100-103. See also the observations by G. Alfredsson, 'A Frame with an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures', *International Journal on Minority and Group Rights* (7), 4/2000, pp. 291-304, p. 291.

Advisability — normative quality of the FCNM and the experience of the ACFC

The preference for the Framework Convention and its Advisory Committee as a functional arrangement for establishing and organising the complaints mechanism needs a profound assessment of a variety of developments and arguments. A point of departure is that the Framework Convention is a reflection of a decades-long struggle with a normative deficit in the field of minority rights. Adopted in 1995, thus 50 years after World War II, the FCNM became the first comprehensive treaty exclusively devoted to the protection of national minorities. Prior to that date the development of rights of persons belonging to national minorities experienced substantial and regular impediments, notably due to the absence of a political will to create international standards in this field. Eventually, only as late as in the 1990s did a number of international organisations, including the OSCE, the Council of Europe, and the United Nations, start to remedy the resultant malaise of normative deficit.

The Framework Convention has become a victim of all political and legal problems pertaining to national minority standard setting. The FCNM created a binding 'mini-system' made up of an extensive catalogue of principles and rights of persons belonging to national minorities, and a modest implementation mechanism. The catalogue of rights and principles has been formulated with a diversified degree of legal maturity and precision. On the one hand, some of the rights have been expressed in a normative language which is typical of other human rights instruments because these well-established rights could not have been reduced as to their content.[17] On the other hand, specific formulations of minority rights have been provided with many vague qualifications and limitations which are unknown in other human rights treaties.[18] Traces of weaknesses in the implementation procedure are demonstrated by directly placing the Committee of Ministers as a monitoring body which is assisted by an advisory committee of experts. A periodic reporting procedure based on state reports has been designated as the only monitoring mechanism.[19]

This is why such a weak initial legacy encouraged a process towards attenuating the symptoms of inherent weaknesses by strengthening the position of the Advisory Committee and developing its jurisprudence. One may find that the whole mechanism is still in its formative period although it has advanced its third reporting cycle, thus contributing to the impressive development of desperately needed jurisprudence on minority rights in spite of vague formulations of their substantive provisions.

It is at this juncture that the monitoring system is in need of strengthening and a contribution thereto may be made by introducing a complaints mechanism. One must be aware that the proposed mechanism only has the possibility of becoming an effective tool if it can seriously be expected to improve the protection of minority rights. Above all, the initial reluctance of governments must be overcome. Firstly, there is thus a need

17 This is the case, for instance, of the right of equality before the law and of equal protection by the law (Art. 4) as well as the freedom of peaceful assembly, the freedom of association, the freedom of expression, and the freedom of thought, conscience and religion (Arts. 7-8).

18 Examples of such qualifications are: 'in areas inhabited by persons belonging to national minorities traditionally or in substantial numbers', 'if those persons so request', 'if there is sufficient demand', 'where such a request corresponds to a real need", "the Parties shall endeavour', 'in the framework of their legal system', 'where appropriate' or 'taking into account their special conditions' (see Arts. 10-11 or 14).

19 For more see E.J. Arnio, 'Minority Rights in the Council of Europe: Current Developments', in A. Phillips and A. Rosas (eds.) *Universal Minority Rights*, Åbo/Turku and London: Åbo Akademi University Institute for Human Rights and Minority Rights Group (International), 1995, pp. 123-133; and M. Weller (ed.), *The Rights of Minorities in Europe. A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford: Oxford University Press, 2005.

to convince governments, by political arguments, of the possible contribution of a complaints mechanism to the better protection of minority rights and stability in their countries. Secondly, they must be aware that a substantial part of the initial reluctance to allow for complaints mechanisms in the field of minority rights has resulted from the insufficient legal maturity of the treaty rules on human rights and particularly minority rights.

Since the entry into force of the FCNM in 1998 the Advisory Committee has examined over 80 state reports and has entered and advanced its examination of reports within the third reporting cycle. This provides an altogether impressive body of observations and interpretations on domestic minority issues. Dialogue with governments and with the involvement of NGOs has allowed the main issues and contentions to be largely identified and highlighted. Furthermore, the experience of the Advisory Committee which accumulated in the course of the reporting procedure provided the necessary basis for drawing up and adopting its first two sets of substantive or thematic commentaries (on education and participation).

All these and other symptoms prove that the Committee has reached a stage of elaborating and consolidating its jurisprudence which, to a large extent, remedies the initial vagueness and other weaknesses of the substantive standards. It cannot be overlooked that since 1998 the European Court of Human Rights has had its share of developing minority rights jurisprudence. This is a development which has a relevance for the principle of coherence which has envisaged a duty to ensure the conformity of the FCNM with the ECHR.[20] The Advisory Committee can safely develop its jurisprudence within the guiding interpretations of the Court. The increasing number of the Court's references to the jurisprudence of the ACFC (its opinions on state reports) is yet another symptom of the recognition of its growing authority. Furthermore, the principle of political coherence could be invoked to invite the Advisory Committee to refer, in a subsidiary way, to the commitments adopted by the OSCE and to sets of thematic recommendations endorsed by the High Commissioner on National Minorities as well as to the jurisprudence of the ICCPR's Human Rights Committee.

It can be concluded that there are sound reasons to stress that the normative quality of the FCNM has been substantially improved by the jurisprudence of the ACFC, and to some extent by the case law of the European Court. And this means that the condition whereby a more advanced supervisory mechanism, like a complaints procedure, can only be reasonably introduced if the jurisprudence has been sufficiently advanced is met. Thus developments in jurisprudence invite the strengthening of the development in monitoring. The principle of asymmetry suggests that well-developed jurisprudence risks remaining less influential if other monitoring procedures, notably those for the benefit of civil society, are not developed and made widely accessible.

No less important are other reasons underlying the advisability of the complaints mechanism. It has the possibility to play a role which is supplementary to the reporting. It may help to address problems to which the reporting procedure was unable to respond or it may solve conflicting interpretations. Such a mechanism can thus produce a wider feedback between the two procedures. A strong reason for advocating the complaints mechanism is also a legitimate expectation to identify violations of minority standards or rather situations in the law and practice which would not comply with the FCNM. The procedure should involve civil society and give the ACFC another incentive for dialogue-type relations with states parties through the Committee of Ministers. The experience of other treaty bodies has proved that the parties involved in the

20 It has been envisaged, as a guiding principle in Article 23 of the FCNM, that the rights and freedoms enshrined in the Convention must conform to the respective provisions of the European Convention on Human Rights. It means that they must also conform to the jurisprudence of the European Court of Human Rights stemming from both contentious and advisory cases.

complaints procedure gain a wider sense of procedural justice.

Feasibility — the legal basis for establishing a complaints system

Having opted for establishing a complaints mechanism which is proposed to be built into the existing setting of the FCNM and its Advisory Committee (ACFC), the appropriate options concerning the legal basis for the envisaged innovation need to be briefly examined. The introduction of a complaints mechanism will be tantamount to extending the powers of the Committee of Ministers and the Advisory Committee, and amending the regulations on the duties of the states parties, the rights of complainants and certain procedural issues. Such an overall reform means that a treaty-making approach appears to be indispensable. It can be claimed that all these matters have a 'constitutional' character for the whole system under the Framework Convention. The political sensitivity of the proposal strengthens the choice of the legal basis which is at stake.

Consequently, such amendments to the Framework Convention will have to be introduced by drawing up an additional protocol thereto. Recently, however, in the Council of Europe's discussion on the reform of the European Court of Human Rights other ideas for amending the ECHR have been under consideration. Within a possible simplified procedure a matter for further debate is to examine such concepts as a Statute for the Court and a new provision in the Convention similar to that found in Article 41 (d) of the Statute of the Council of Europe.[21] Importantly, if any of the proposed methods for a simplified procedure could be applied, it must anyway be first introduced through an additional protocol to the Framework Convention. It can be left to subsequent discussion whether one of these modalities would be convenient for the extensive regulation of the organisational and procedural issues of the future complaints mechanism.

Feasibility — an individual or collective complaints system

One of the most fundamental questions for any complaints mechanism is whether it should preferably be based on an individual or a collective complaints system. Under the Framework Convention this question appears to be even more significant. By virtue of Article 1 of the FCNM it is the individual rights of persons belonging to national minorities which are protected. Although the Convention then also deals with the protection of national minorities, it does not confer rights on collective entities. There is no conceptual conflict when the Convention further explains that persons belonging to national minorities may exercise the rights and enjoy the freedoms enshrined in the FCNM individually as well as in community with others.

These specific minority prerequisites indicate that both approaches nevertheless need to be considered. On the one hand, there are clear advantages of accepting an individual complaints mechanism. According to such a model those who would be entitled to submit complaints are persons, non-governmental organisations or groups of individuals. Under the international law of human rights this trend actually prevails, even in cases of treaties which, like the Framework Convention, are made up of fairly diversified provisions and not all of them containing self-executing rules (e.g. ICESCR or CEDAW). A setback of such an arrangement is that a link is established between a victim of an alleged violation and a complainant. Moreover, it is the experience of individual complaints systems that shortly after their institution they become flooded by waves of applications

21 See Paragraph G. of the Interlaken Declaration of the High Level Conference on the Future of the European Court of Human Rights, Interlaken, Switzerland, 18-19 February 2010 (available on the website of the Council of Europe: www.coe.int). For more on the concept of a statute see K. Drzewicki, 'Remodelling of the Treaty-Based System for European Human Rights Protection, in The European Court of Human Rights — Agenda for the 21st Century, Warsaw: Information Office of the Council of Europe, 2006.

and a frequent lack of immediate additional resources generates an excessive workload and a protracted consideration of cases. In the field of national minorities the risk of abusing the right to complain might arise when it takes the form of submitting complaints on a massive scale, an action which is potentially encouraged by kin-states.

On the other hand, one should examine the unquestionable virtues of a collective complaints procedure. Under this model a complainant is not or need not be regarded as a victim of an alleged violation of a treaty provision. Those entitled to submit a complaint are clearly defined national and international non- governmental organisations which show a degree of representativeness towards national minority communities or which deal with minority issues. It is a logical consequence of this model, delinked from the concept of a victim, that complaints may only raise questions concerning non-compliance by a state party's law and practice with a specific provision of a given treaty. These parameters prevent a consideration of individual situations. This does not mean that such a model ignores the concerns of individuals as beneficiaries of national minority rights and other regulations. These concerns are, however, part of a wider complaints procedure addressing the question of compliance with the law and practice. In other words, this model is designed to improve law and practice which may eventually exert its influence on the position of individuals. This is thus a model which is closer to the actio popularis, or class action, than to a classic pattern of the right to submit individual claims collectively.

It seems that an individual complaints procedure under the FCNM should be considered as proposal for a later stage. The monitoring system of the Convention should first be strengthened by introducing a collective complaints mechanism. Its model is rarely applied but is not unknown. Probably its best reflection is a system established by the Additional Protocol to the European Social Charter providing for a system of collective complaints (1995).[22]

Feasibility — basic procedural modalities

It is perhaps too early to discuss in some detail the procedural modalities for a possible collective complaints mechanism under the Framework Convention. Instead, however, some of the most important features of the mechanism should be highlighted as part of the overall characteristics of the procedure. It follows from the above comments that the mechanism in question will involve two existing bodies which deal, at present, with the reporting procedure — the Advisory Committee and the Committee of Ministers. The first body will thus be of a quasi-judicial but advisory nature, while the second will amount to a final determination at the political level.

The pivot of the mechanism will be the recognition by states parties of the right to submit complaints. Experience with other complaints systems suggests providing for the right to submit complaints without requiring an additional declaration of its acceptance. In itself, a protocol should have an optional character and this provides a sufficient guarantee to states parties if they are in doubt as to whether or not to ratify. More controversial problems will arise with regard to the definition of non-governmental organisations which

22 ETS No. 158. The Protocol has been in force since 1998 and 12 states parties to the Charter are bound by it. For comments on the Charter's supervisory system see O. de Schutter, *supra* note 8, pp. 433-436; R. Brillat, 'The European Social Charter', in G. Alfredsson *et al.* (eds.), *International Human Rights Monitoring Mechanisms*, The Hague-Boston-London: Martinus Nijhoff Publishers, 2001, pp. 601-606, and K. Drzewicki, 'L'activité pré- conventionnelle et para-conventionnelle du Conseil de l'Europe dans le domain des droits sociaux', in J.-F. Flauss (ed.), *Droits sociaux et droit européen. Bilan et prospective de la protection normative*, Brussels: Bruylant, 2002, pp. 118-123.

could assume the role of complainants. The solutions applied by the 1995 Additional Protocol to the European Social Charter are hardly adjustable to the needs of the Framework Convention mechanism because they heavily rely upon the concept of social partners and their 'representative organisations' in 'industrial relations'. It should be possible for governments to agree upon a definition of relevant non- governmental organisations that ensures that not only those enjoying consultative status with the Council of Europe but also others could be entitled to lodge complaints. It is of significance to ensure that such organisations would have particular competence in the field of national minorities as provided for by the Framework Convention. Such an approach usually contributes to ensuring the higher quality of the content of complaints because prior to their submission the complainants will consult their experts. This indirectly constitutes a first stage in the filtering of possible complaints with a view to rejecting those with reduced chances of success. This is probably one of the reasons why a collective complaints mechanism has not overburdened the Social Charter system and maintained its effectiveness within the standard of 'reasonable time'.

Without going into further procedural details two specific issues prompt further comments. One pertains to the status of final determinations. As noted above, it is in the nature of collective complaints that they represent a shift from a 'victim' approach to 'compliance with law and practice'. In the field of national minority issues this offers opportunities to challenge and receive quasi-judicial responses about the compatibility of a specific law and practice with the Convention's standards. In other words, a case is determined from the perspective of the compliance of a situation with the FCNM and not from the perspective of a violation. The model in question fits well with the legal and political specific aspects of minority rights problems. It avoids 'victimisation' and contributes to clarifying the meaning of minority standards.

The second issue concerns the relationship between the monitoring bodies. It will naturally be for the Advisory Committee to take the lead in the interpretation of minority standards while the Committee of Ministers will determine the case and take account of the public policy considerations and indicate, where appropriate, recommendations for legislators and policy makers. The Committee of Ministers will also continue its role in supervising the execution of its final decisions on collective complaints.

Conclusions

Bearing in mind the initial aims of this article it can be said that there is a sufficient argument for advocating the advisability of introducing a complaints mechanism for minority rights. Preference has been given to an arrangement within the Framework Convention as the only regional instrument comprehensively devoted to minority rights. This can ensure a proper focus on and specialisation in minority rights by the bodies monitoring the implementation of its provisions. The experience accumulated notably by the Advisory Committee has demonstrated a substantial improvement in the normative quality of the Convention. A complaints mechanism, if adopted, could safely operate according to well-developed jurisprudence, but with its feedback it can likewise strengthen the interpretations of the FCNM and the instruments of other regional frameworks and of the United Nations.

A dilemma as to an 'individual or collective complaints' model has been tentatively resolved by giving priority to the latter, while not discarding the former. The collective complaints model better fits the characteristics of minority standards and the need to finally determine not only the legal aspects of minority issues but also public policy considerations. What would thus be largely at stake is not a search for condemnatory violations, but identifying cases of the unsatisfactory application of or non-compliance with the Framework Convention.

This means that the project is a feasible venture.

All in all, arguments concerning both the advisability and the feasibility of a collective complaints system within the set-up of the Framework Convention are on the whole convincing. Any further detailed procedural and other arrangements can be worked out in expert and diplomatic negotiations. The time has come to test whether there is a sufficient willingness on the part of states to take yet another step to improve the effective enforcement of minority rights and contribute to gaining the loyalty of minorities and increasing stability and security in individual countries and the whole OSCE area.

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