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Standards
for the Protection
of National Minorities



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Liana Kalčina, uni. grad. ped. – Director, Information and Documentation Centre on the Council of Europe, Ljubljana
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Lidija Šega

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Mitja Žagar

SOME NEWER TRENDS IN THE PROTECTION AND (SPECIAL) RIGHTS OF ETHNIC MINORITIES: THE EUROPEAN CONTEXT¹

I. INTRODUCTION: ARE THERE ANY SPECIAL RIGHTS OF (ETHNIC) MINORITIES?

Recent historic developments, especially the tragic wars in the territory of the former Yugoslavia in the 1990s or current events in the Middle East, show the possible impact of (inter)ethnic relations and conflicts on peace and stability in individual pluralistic societies and in the world. The actual situation and/or the perception of the position, protection and special rights of national and other minorities can play crucial roles in this context and can contribute to the escalation of conflicts in pluralistic societies.

The reports (opinions) of the Badinter Arbitration Commission (in 1991 and 1992) established the dissolution of the former Yugoslavia.² These opinions determined also the principle that the adequate protection of national minorities is one of the criteria for a modern democracy and a precondition for the international recognition of new states.³ This principle is (more or less) generally accepted in Europe by now. In the European context, other major turning points include the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages, prepared and adopted within the Council of Europe. In my opinion, these legally binding international documents mark the beginning of a new era in the international protection of national minorities. At least in Europe, there should be no doubt that the special rights of national minorities do exist.

¹ This text is based on: Mitja Žagar (1997), "Rights of ethnic minorities: Individual and/or collective rights? Some new(er) trends in the development and the (universal) nature of human rights - The European perspective." *Journal of International Relations*, Vol. 4, No. 1/4, pp. 29-48.

² For more on the legal issues of the dissolution of the former Yugoslavia, see, e.g., Roland Rich (1993), "Recognition of States: The Collapse of Yugoslavia and the Soviet Union." *European Journal of International Law*, Vol. 4, No.1, <http://www.ejil.org/journal/Vol4/No1/art4.html#TopOfPage> (12 December 2001); Danilo Türk (1993), "Recognition of States: A Comment." *European Journal of International Law*, Vol. 4, No.1, <http://www.ejil.org/journal/Vol4/No1/art5.html#TopOfPage> (12 December 2001); etc.

³ See, e.g., Alain Pellet (1992), "The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples." *European Journal of International Law*, Vol. 3, No.1, <http://www.ejil.org/journal/Vol3/No1/art12.html#TopOfPage> (12 December 2001). For the texts of Opinions 1-3, see: Alain Pellet (1992), "The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples - Appendix: Opinions of the Arbitration Committee." *European Journal of International Law*, Vol. 3, No.1, <http://www.ejil.org/journal/Vol3/No1/art13.html#TopOfPage> (12 December 2001); for the texts of Opinions 4-10, see: Danilo Türk (1993), "Recognition of States: A Comment. - Annex 3: Opinions No. 4-10 of the Arbitration Commission of the International Conference on Yugoslavia." *European Journal of International Law*, Vol. 4, No.1, <http://www.ejil.org/journal/Vol4/No1/art5.html#TopOfPage> (12 December 2001); etc.

This contribution briefly presents some controversies that exist regarding the protection of national minorities and the special rights of persons belonging to national minorities and/or national minorities as collective entities. It begins with a presentation of some definitions of ethnic and national minorities and discusses different concepts of the protection and (special) rights of national minorities and persons belonging to them. Here the issue of the individual or collective nature of these rights deserves special attention.

The following sections present the historic development of the protection of ethnic minorities, its main turning points, changing concepts and the main characteristics of different phases. This is the basis for the discussion of the possible future (trends of) developments concerning the special rights and the protection of minorities.

The concluding section offers a few possible scenarios for future developments and some practical proposals for the promotion and development of Human Rights and the protection of ethnic minorities. It reflects my belief that there is a need for the promotion of the ideology of Human Rights and for the existence and development of the special protection and rights of (ethnic and other social) minorities. In other words, I am an advocate of the special rights of (ethnic) minorities that should be in their nature both individual and collective.⁴

II. DEFINITIONS OF ETHNIC/NATIONAL MINORITIES AND SOME KEY CONCEPTS

There is no generally accepted legal definition of ethnic minorities.⁵ International political and legal documents, constitutions and the (internal) legislation of different

⁴ I believe that scholars should do more than just research all different dimensions of Human Rights as objective and passive observers. Most of all, they have to inform the public about their research and views – especially about their critical observations. However, in my opinion scholars should be actively involved in the promotion and development of Human Rights and the ideology of Human Rights.

⁵ It is extremely difficult to build a necessary consensus concerning the politically sensitive and tricky issue of the acceptable definition of “ethnic minority”. Among many attempts, I am citing Article 1 of the proposal for the Additional Protocol to the European Convention on Human Rights for the Protection of Human Rights and Fundamental Freedoms, concerning persons belonging to national minorities that defines a **national minority** as:

“...a group of persons in a state who: (a) reside on the territory of that state and are citizens thereof; (b) maintain long-standing, firm and lasting ties with that state; (c) display distinctive ethnic, cultural, religious or linguistic characteristics; (d) are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state; (e) are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language”. (Article 1 of the proposal for an additional protocol to the Convention for the Protection of Human rights and Fundamental Freedoms, concerning persons belonging to national minorities, in Recommendation 1201 (1993) on an additional protocol on the rights of minorities to the European Convention on Human Rights, adopted on 1 February 1993.)

Although probably this text (prepared by the Parliamentary Assembly of the Council of Europe) will not be accepted anytime soon and it is not yet legally binding, this definition indicates certain newer trends in the theory of international law. (See also: “Report on an additional protocol on the rights of minorities to the European Convention on Human Rights” (1993), Rapporteur: Mr. Worms, France Socialist; Parliamentary Assembly, Council of Europe: ADOC 6742, 1403-15/1/93-2-E, 19 January 1993, pp. 4-5.)

(nation-)states have traditionally avoided this issue for a number of reasons.⁶ On the other hand, social scientists and (legal) theoreticians developed several definitions of ethnic and/or national minorities. These definitions that were developed for the purpose of their research usually focused on different aspects of these ethnic communities. Although they have many similar elements, they might differ in certain specific elements considering the specific interests or approaches of every author. Most frequently cited is the definition of Professor Francesco Capotorti, who describes (ethnic) minority as a group:

- ... numerically inferior to the rest of the population of a state;
- in a non-dominant position;
- whose members — being nationals of the state — possess ethnic, religious or linguistic characteristics differing from those of the rest of the population; and
- show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.⁷

However, for the purpose of this contribution I have developed the following working definitions that distinguish among different types of (ethnic) minorities. In framing these definitions I considered especially a specific legal status of diverse minority communities. The broadest is the definition of an **ethnic minority** that is defined as:⁸

- (a) a specific and formed - distinct - group of persons
- (b) that is (usually) numerically smaller than the rest of the population of a state⁹ and
- (c) lives as a distinct community in a non-dominant position within a certain society.
- (d) Persons belonging to this distinct community are citizens of the state on which territory they reside.¹⁰
- (e) They possess ethnic, religious, cultural and/or linguistic characteristics differing from those of the rest of the population of the state.
- (f) They developed a distinct (ethnic) identity and are motivated to preserve together their common identity, religion, culture, traditions and language.

⁶ See, e.g., Florence Benoit-Rohmer, Hilde Hardeman (1994), *The Minority Question in Europe: Towards the Creation of a Coherent European Regime*. CEPS Paper No. 55. Brussels: Centre for European Policy Studies, 1994, pp. 25-29.

⁷ Francesco Capotorti (1991), *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*. New York: United Nations, 1991, p. 96.

⁸ See, e.g., Mitja Žagar (1995), "Ali so Slovenci na Hrvaškem narodna manjšina: Splošna terminološka vprašanja in pravna zaščita." ("Are Slovenes in Croatia a National Minority? General terminology and legal protection.") – in Vera Kržišnik-Bukić, ed., *Slovenci v Hrvaški. (Slovenes in Croatia.)* Ljubljana: Inštitut za narodnostna vprašanja (Institute for Ethnic Studies), 1995, p. 334.

⁹ When a distinct group, although numerically larger, is in a non-dominant position and/or oppressed we could describe it as a "social minority". In such cases a numerically inferior group in power usually monopolizes and (mis)uses the nation-state and its mechanisms of repression to rule and suppress numerically superior groups. A situation in the South African Republic during the era of Apartheid could be mentioned as a typical example.

¹⁰ This is the main characteristic that differentiates between persons belonging to ethnic minorities and (im)migrants. Recent immigrants usually do not have the citizenship of the country where they reside with the legal status of resident aliens.

- (g) Such a community became an ethnic minority as a consequence of a specific historic (political and administrative) development in the territory/region of their traditional settlement.¹¹

The analysis of different national (constitutions, laws) and international legal documents shows that certain additional criteria (characteristics) are required before minority protection is granted to a certain distinct ethnic community.¹² Special rights and the protection are usually granted to persons belonging to **“typical (traditional) national minorities.”**¹³ Deriving from the above (working) definition of an ethnic minority, the following three elements should be added to the definition of a typical (traditional) national minority:¹⁴

- (h) This distinct community autochthonously lives (usually condensed) in a certain territory of its traditional settlement.¹⁵
- (i) A typical national minority ethnically belongs to a “kin-nation” that has a nation-state of its own.¹⁶ This is usually a neighboring country to the country of citizenship of persons belonging to a typical national minority.¹⁷

¹¹ There are also ethnic minorities whose members (persons belonging to these distinct communities) live dispersed in the whole territory or several regions of a state. Jewish communities in European and American cities could be mentioned as examples of such minorities.

¹² The Students’ Research and Training Project “Democratization and ethnic relations: Management of ethnic relations and conflict”, cosponsored by the US Congress /USIS - Small Grants for Democracy Program, analyzed more than 130 constitutions of countries of the world regarding the regulation of ethnic relations and the protection of (ethnic/national) minorities. (On this project and its results see, e.g., Mitja Žagar (1996a), “Exploring Ethnicity: Constitutional Regulation Of (Inter)Ethnic Relations - New Approaches to Multicultural Education.” <http://www.unisa.edu.au/lavskis/zagar/detail.htm> (12 December 2001); Mitja Žagar, Aleš Novak (1999), “Constitutional and international protection of national minorities in Central and Eastern Europe.” – in Mitja Žagar, Boris Jesih, Romana Bešter, eds., *The constitutional and political regulation of ethnic relations and conflicts: Selected papers*, Ethnicity 2. Ljubljana: Institute for Ethnic Studies, 1999, pp. 177-214.) The research project “Ethnic dimensions of integration processes and tolerance in multiethnic societies: Management and resolution of conflicts” analyzed several documents of the UN, CSCE/OSCE, Council of Europe, European Communities/European Union, documents of other regional organizations, more than thirty bilateral treaties and more than a hundred constitutions of the countries of the world. This research project was financed by the Ministry of Science and Technology/Ministry of Education, Science and Sport of the Republic of Slovenia (See, Mitja Žagar (1996), “Evolving concepts of the protection of minorities: International and constitutional law.” *Razprave in gradivo / Treatises and Documents*, No.31/1996, pp. 143-164.)

¹³ See, Ernest Petrič (1977), *Mednarodnopravno varstvo narodnih manjšin*. (The Protection of Ethnic Minorities by International Law.) Maribor: Založba Obzorja, 1977, pp. 89-92.

¹⁴ See, Žagar (1995), pp. 334-335.

¹⁵ Autochthonous settlement indicates a considerable duration of settlement of a distinct ethnic community in a certain territory and its integration in a pluralistic society. Usually, autochthonous communities contribute to the cultural, social and economic life of their environment. However, there are no objective criteria to establish the autochthonous settlement of a certain community. In particular, there are no objective criteria to determine the required considerable duration of the settlement. The decision on the necessary duration of settlement is always primarily a subjective and political decision. The Minority Rights Group, for example, decided for national/ethnic minorities that two generations of permanent settlement (40 to 50 years) should be enough to consider a certain group an autochthonous (ethnic) community. (See, *World Directory of Minorities*. (1990) Longman international reference. Edited by: Minority Rights Group. UK: Longman, 1990, p. xiv.)

¹⁶ Sometimes the terms “mother-nation” and “mother-state” are used as synonyms for the terms “kin-nation” and “kin-state”.

¹⁷ The term “kin-nation” (or “mother-nation”) refers to a nation (ethnic community) with which a

- (j) A typical national minority has several (cultural, social, economic, political) links with a kin nation and its nation-state. Protection of ethnic minorities and cooperation between a national minority and its kin-nation could become important issues in bilateral relations between a country of citizenship of persons belonging to a certain ethnic minority and a neighboring nation state of their kin-nation.¹⁸

Especially the criterion of the autochthonous settlement in connection with the citizenship of the country of permanent residence might be problematic. In some cases we might find the second, third or (even) fourth generation of immigrants who were born in the country of their permanent residence, but are still citizens of the country of origin of their parents or predecessors. There could be different reasons why they do not have the citizenship of the country of their permanent residence (e.g., laws on citizenship/nationality, tradition, ownership of property in the country of origin of their parents, etc.).¹⁹ In any case, immigrants who are not citizens of the country of their residence are excluded from the political process (even if they are the third generation in a certain country), and they could not obtain the status and protection guaranteed for persons belonging to traditional ethnic/national minorities.

In addition to typical national minorities, we could also define "*atypical traditional national minorities*". These minorities live as distinct communities autochthonously in a certain territory (criterion h). However, these minorities do not have *kin-nations* outside the country of their permanent residence or their *kin-communities* do not have nation-states of their own (criterion i).²⁰

Typical and atypical traditional national minorities account for only a small fraction of all distinct ethnic (cultural, linguistic) communities in existing pluralistic societies. However, these are the only distinct ethnic minority communities whose members according to international law enjoy certain minority protection and special minority rights. Usually, states do not want to grant minority status to diverse immigrant communities. Consequently, persons belonging to these immigrant communities who are not citizens of the states of their permanent residence in most cases do not enjoy minority rights or special minority protection.

¹⁸ Cultural, linguistic, educational, social, economic, etc. links, contacts and cooperation of ethnic minorities with their *kin-nations* and states have to be peaceful and should not infringe the principles of territorial integrity and sovereignty of states.

¹⁹ See, e.g., Eric Bockstael, Otto Feinsein (1991), "Ethnic Conflict and Development: A Belgian Case Study," United Nations Research Institute for Social Development - UNRISD; photocopied paper for the "Workshop on Ethnic Conflict and Development", Dubrovnik (Yugoslavia, Croatia), 3-6 June 1991.

²⁰ Some authors argue that atypical traditional ethnic minorities should be treated as equal constituent nations of states where they live, regardless of their size, in order to assure their equality. This would require the transformation of concerned (one/single) nation-states into multi-national-states. (See, e.g., Bojko Bučar (1994), "Co-operation on Culture and Education and the Problem of Minorities." Photocopied paper for The 6th European Conference of Frontier Regions, Council of Europe, Parliamentary Assembly, Congress of Local and Regional Authorities of Europe, Ljubljana (Slovenia), 13-15 October 1994.)

II.2. Minorities in Pluralistic Societies: Nation-states and National Minorities

States are usually very reluctant when they have to officially recognize the existence of ethnic pluralism and minorities within their borders. In every country the decision to grant a formal (national minority) status, legal protection and special rights to a certain distinct ethnic community and/or its members (persons belonging to this distinct community) is always – and above all – a complex political decision. This is conditioned also by the perception of the concept of modern nation-states.

Nation-states are products of a very specific historical development in Europe that was enabled by the introduction and rapid development of capitalism (capitalist ways of production). European nation-states have developed simultaneously with the formation of modern (ethno)nations²¹ since the sixteenth and seventeenth century on.²² In this process states acquired their ethnic dimension and identity: Dominant ethnic communities (nations) within certain territories usually determined the ethnic identity of nation-states.²³ They became nation-states.²⁴ States are understood as specific or (even) the only means and mechanisms that can assure the realization of the specific (national) interests of

²¹ A **nation** is "a stable, historically developed community of people with a territory, (specific) economic life, distinctive culture, and language in common". (*Webster's New Universal Unabridged Dictionary*, (1983) Deluxe Second Edition. USA: Dorset & Baber, 1983, p. 1196.) The existence of a specific "national identity", as one of the strongest collective (group) identities, shall be added to this definition: the consciousness and will of an individual shall exist to be a member of a certain nation, and an individual shall be recognized by other members of such an ethnic community as its member. (See, e.g., Philip Schlesinger (1987), "On National Identity: Some Conceptions and Misconceptions Criticized," *Social Science Information/Information sur les sciences sociales* (London, Paris), Vol. 26, No. 2, 1987, pp. 219-264.) The formation of **modern nations** or **ethno-nations** was possible with the introduction of capitalism. The emergence of modern nations as specific ethnic communities was often conditioned on the existence of nation-states, and sometimes *vice versa*. (See, e.g. Ernest Gellner (1983), *Nations and Nationalism*. Ithaca & London: Cornell University Press, 1983, pp. 6-7, 53-58.)

²² The turning points in this process were the (Peace) Treaties of Westphalia of 1648 that laid foundations for a new international (European) community, the legal status of states and principles of relations among them.

²³ Definitions of a (nation)-state in international law do not include its ethnic dimension and nature. (E.g. L. (Lassa Francis Lawrence) Oppenheim (1948), *International Law: A Treatise, Vol. I: Peace*; 7th edition edited by H. (Hersch) Lauterpacht. London, New York, Toronto: Longmans, Green and Co., 1948; J. G. Starke (1989), *Introduction to International Law*, 10th edition. London: Butterworths, 1989.) Article I of The Montevideo Convention on Rights and Duties of States (of 1933) provides the classic legal definition of states as persons of international law: "*The State as a person of international law should possess the following qualifications: a) permanent population; b) defined territory; c) government; and d) capacity to enter into relations with other states.*"

²⁴ The fact that the process of formation of modern nation-states in Europe went hand in hand with the process of formation of modern European nations has produced and still is reflected in a terminological problem in some languages. The same term "**nation**" is used to describe **a specific ethnic community** and **a state** as a specific social organization and structure. I use the term "nation" only to describe a specific ethnic community.

(ethno)nations.²⁵ European states were established and are still perceived as nation-states of certain nations - we could say "*single-nation-states*."²⁶ This concept could be explained by a simple equation: "*State = nation = people*".²⁷

Following this logic, nation-states and their populations were believed to be ethnically and culturally homogenous entities. As the result, a myth of ethnic homogeneity was born that strengthened the belief that a nation-state belonged to a certain (ethnic) nation. The myth of ethnic homogeneity was a powerful force in building a common collective, ethnically based identity in the territory of a certain state. This myth is the basis for the political ideology of nationalism and often exploited by nationalist movements and politicians.²⁸ However, as is often the case with myths, the myth of ethnic homogeneity of nation-states does not correspond to reality.²⁹ ethnic plurality has always been the reality of most territories and states.³⁰ Furthermore, a general trend in the Twentieth Century is increasing ethnic, cultural, linguistic and social diversity. Intensified communication, (economic) cooperation and interdependence in the world, developed transportation and increased mobility of population are some key factors further contributing to this increasing diversity.³¹ However, constitutions and political systems of nation-states

²⁵ A state is not just a form of organization of a society, but as Max Weber pointed out, a state is (above all) an agency within society, which possesses a monopoly over legitimate violence. (E.g., Max Weber (1989), *The Protestant ethic and the spirit of Capitalism*. Translated by Talcott Parsons; introduction by Anthony Giddens. London: Unwin Paperbacks, 1989; Max Weber (1922), *Wirtschaft und Gesellschaft*. Bearbeitet von Max Weber. Tübingen: J. C. B. Mohr / P. Siebeck, 1922.) On the other hand, a modern state in the European tradition of the twentieth century became also a (public) service of its citizens that should provide certain necessary social infrastructure and assure the realization of certain social needs of its citizens (e.g. education, social security, health care and services, etc.).

²⁶ Sometimes also the term "*one-nation-state*" is used to describe this model and concept. (For more on nation-states see, e.g., C. A. Macartney (1934), *National States and National Minorities*. London: Oxford University Press, Humphrey Milford, 1934; Hough Seton-Watson (1977), *Nations and States*. London: Methuen / Boulder, Colorado: Westview Press, 1977; Rudolfo Stavenhagen (1990), *The Ethnic Question: Conflicts, Development, and Human Rights*. Tokyo, Hong Kong: United Nations University Press, 1990, p. 31, 20-35; Mitiža Žagar (1995a), "Constitutions in Multi-Ethnic Reality," *Razprave in gradivo / Treatises and Documents*, No. 29-30/1995, pp. 144-157.)

²⁷ Eric J. Hobsbawm (1990), *Nations and Nationalism since 1789: Programme, Myth, Reality*. Cambridge, London, New York, New Rochelle, Melbourne, Sydney: Cambridge University Press, 1990, p. 23.

²⁸ As a political ideology and principle, **nationalism** demands that members of a certain nation have "the political duty... to the polity which encompasses and represents... (this) nation." This political duty "overrides all other public obligations, and in extreme cases (such as wars) all other obligations of whatever kind." In this context, nationalism is the most demanding form of ethnic or group identification. (Hobsbawm, 1990, p. 9.) Nationalism, by definition, is exclusive and/or hegemonic, and is usually hostile to others. Hostile to diversity and pluralism, nationalism is **incompatible with democracy**.

²⁹ See, e.g., Gellner (1983), p. 1; Anthony D. Smith (1991), *National Identity*. Harmondsworth, London: Penguin, 1991, p. 49-98.

³⁰ A certain level of ethnic plurality (diversity) has always existed also in countries that were traditionally perceived as ethnically homogenous nation-states (e.g., France). Factors, such as natural disasters, including climate changes, diseases and famine, economic underdevelopment and hardship, the faster economic development of certain regions, administrative changes in the territory and borders of nation-states, wars, etc. have contributed to the ethnic diversity and changing ethnic structure of the population in its history.

³¹ See, e.g., Gerold Ambrosius, William H. Hubbard (1989), *A Social and Economic History of Twentieth-Century Europe*. Translated by Feith Tribe and William H. Hubbard. Cambridge, Mass., London, England: Harvard University Press, 1989, pp. 28-42, 84-86.

Following this logic, nation-states and their populations were believed to be ethnically and culturally homogenous entities. As the result, a myth of ethnic homogeneity was born that strengthened the belief that a nation-state belonged to a certain (ethnic) nation. The myth of ethnic homogeneity was a powerful force in building a common collective, ethnically based identity in the territory of a certain state. This myth is the basis for the political ideology of nationalism and often exploited by nationalist movements and politicians.²⁸ However, as is often the case with myths, the myth of ethnic homogeneity of nation-states does not correspond to reality:²⁹ ethnic plurality has always been the reality of most territories and states.³⁰ Furthermore, a general trend in the Twentieth Century is increasing ethnic, cultural, linguistic and social diversity. Intensified communication, (economic) cooperation and interdependence in the world, developed transportation and increased mobility of population are some key factors further contributing to this increasing diversity.³¹ However, constitutions and political systems of nation-states are still based on the concept of a single-nation state and people still believe that the myth of ethnic homogeneity is true.³² Furthermore, they believe that this myth is consistent with (the concept of) modern democracy.

The existence of pluralism is a precondition of democracy. Everybody agrees that permanent political monopolies and unjust forceful limitations of political pluralism are incompatible with the modern understanding and concept of democracy. To prevent the possible abuse of democratic principles and institutions, democratic constitutions introduced different safeguards in the form of democratic procedures and different limitations on simple majority rule.³³ However, people do not realize that ethnic pluralism is just one segment of social diversity and pluralism in modern societies.³⁴ They do not perceive the existing ethnic diversity as a possible comparative advantage; much less do they see the recognition of ethnic pluralism as a precondition of developed democracy in a pluralistic society. Believing in the myth of ethnic homogeneity, they consider the existing ethnic diversity a problem and a possible obstacle to the successful functioning of democratic

³² Children in schools all over the world are still taught this myth. It is being promoted also by the mass media, which are presenting it to their audiences in almost all countries. We have to recognize that the myth of ethnic homogeneity is a powerful force in modern societies. Even in countries where ethnic plurality is recognized (constitutionally and legally) and the existence of ethnic diversity is accepted by the official policy and most politicians, many politicians and state authorities often see the existing ethnic diversity rather as a problem than as a normal situation or even a comparative advantage.

³³ These democratic procedures, limitations and mechanisms include free democratic elections that should offer equal opportunities to the (political) opposition, democratic procedures, institutions and mechanisms, systems of checks and balances, voting by qualified majority, etc. (See, e.g., Norberto Bobbio (1989), *Democracy and dictatorship: The nature and limits of state power*. Oxford: Polity Press, 1989; Norberto Bobbio (1987), *The future of democracy: A defence of the rules of the game*. Oxford: Polity Press, 1987; Robert A. Dahl (1989), *Democracy and its Critics*. New Haven & London: Yale University Press, 1989; Giovanni Sartori (1987), *The Theory of Democracy Revisited. Part one: The Contemporary Debate; Part two: The Classical Issues*. Catham, N.J.: Catham House Publishers, Inc., 1987.)

³⁴ Pluralism in modern societies exists in all spheres of our life: economics, politics, culture, language, ethnic and social structure of population, etc. Its expression is the existence of (social) diversity. In this context, most often the discussed political pluralism - usually reduced to the existence of several political parties that represent different political options - represents only a specific dimension and a small fraction of the present (social) pluralism.

institutions and systems. Because of this myth sometimes they cannot even realize the existence of ethnic pluralism in their societies. For this reason they also do not see the myth of ethnic homogeneity and the concept of nation-states based on this myth as possible forceful limitations of ethnic pluralism. In this context, the concept of single-nation-states as tools for the realization of the national interests of dominant (ethnic) nations, often at the expense of other distinct communities (minorities) in a state, has not been seriously challenged and/or changed.³⁵

However, present models of nation-states could and should be observed (also) as possible generators of nationalism and ethnic conflict in modern plural societies.³⁶ They could generate conflicts between ethnic communities that dominate (or are believed to dominate) states and ethnic groups that do not want to accept such domination.³⁷ In such situations distinct ethnic communities that are unhappy with arrangements within the existing states often seek solutions in the secession and creation of their own nation-states. This shows the importance and power of the existing concept of nation-states in the present international community and in the perception of people worldwide.³⁸

III. CONSTITUTIONAL, LEGAL AND INTERNATIONAL PROTECTION OF NATIONAL (ETHNIC) MINORITIES: HISTORIC DEVELOPMENT AND PRESENT SITUATION

National (ethnic) minorities as we know them today are a consequence of the formation, development and existence of modern nation-states and borders between them. Developed communication, increased mobility and migrations are factors that continue to increase ethnic diversity in modern societies and contribute to the emergence of migrant communities and new ethnic (immigrant) minorities. From a historical perspective, the development of the (constitutional, legal, international) protection of national minorities was a long, slow and often painful historical process. The adequate protection of migrants and immigrant communities has yet to be developed.

³⁵ For more on the concept of nation-states see, e.g., Michael MANN, ed. (1990), *The Rise and Decline of the Nation State*. Oxford, Cambridge (Mass.): Basil Blackwell, 1990.

³⁶ See, e.g., Gellner (1983), pp. 3-5; Hobsbawm (1990), pp. 9-12.

³⁷ It is not necessary that domination actually exists in a pluralistic society. The mere perception of domination or of a subordinate (unequal) position of a certain distinct community could provoke different conflicts (that could turn into ethnic conflicts) and their possible escalation.

³⁸ Even minorities in the existing states perceive the model of a "nation-state" as the only proper tool for realizing the national interests of the dominant (ethnic) nation. That is why they often demand the creation of a nation-state of their own - to realize their own specific national interests. (See, e.g., Michael Keating, John McGarry (2001), *Minority Nationalism and the Changing International Order*. Oxford, New York: Oxford University Press, 2001; James G. Kellas (1998), *The Politics of Nationalism and Ethnicity*. 2nd revised and updated edition. Basingstoke, London: Macmillan; New York: St. Martin's Press, 1998; Stavenhagen, (1990).) Although they are deprived of distinct communities (minorities) in the existing nation-states, their nationalist politicians in their (political) programs demand the formation of their ethnically homogenous nation-states. In this context, they consider the possible ethnic minorities and other distinct communities in their future state a serious problem. These possible future minorities are often used as scapegoats when they encounter problems in the realization of their (nationalist) programs. On the other hand, politicians of the existing minorities do not pay much attention to the (constitutional/legal) status and protection of possible ethnic minorities in their future nation-state.

When we analyze the historical development of the protection of national (ethnic) minorities we could divide it into **three main phases**:

- (1) from the Peace Treaties of Westphalia (of 1648) to WWI;
- (2) from WWI to WWII; and
- (3) after WWII – with a specific sub-phase after 1989.

III.1. From The Peace Treaties of Westphalia to WW I

The first phase in the historic development of the protection of traditional (national) minorities lasted almost three hundred years.³⁹ The development was slow and often partial. The main characteristics of this phase were:

- (i) The protection of minorities was limited only to religious minorities. It was especially concerned with religious freedom and equality. In some cases it also included a certain level of religious and local self-government. It was only in one case that the protection of an ethnic minority was explicitly mentioned but not precisely regulated.⁴⁰
- (ii) The protection of minorities was proclaimed by a few international agreements and documents, but there was no international mechanism that would have assured the realization of existing provisions.⁴¹ The realization of rights of minorities was usually left to individual sovereign states themselves.
- (iii) Existing provisions on the protection of minorities were very seldom realized in practice.⁴²

³⁹ Although a few international documents had included provisions on religious freedom before (e.g., the Peace Treaty of Vienna of 1609, which guaranteed religious freedom to Protestants in Transylvania), the Peace Treaties of Westphalia of 1648 marked the beginning of this phase of the modern development of rights of religious and ethnic minorities. (Petrič (1977), p. 24.) These treaties introduced the principle of freedom of conscience and religion and established the obligation of states to grant toleration and self-government to distinct religious communities. States, as the high contracting parties, recognized the existence of religious minorities and stipulated granting of a certain level of (initially religious and later also local) self-government to Protestants in Catholic states and to Catholics in Protestant states. These principles replaced the previously existing principle "*cuius regio, eius religio*" that determined (automatically) the religion of the population on a certain territory by the religion of its ruler. (Salo W. Baron (1985), *Ethnic Minority Rights: Some older and newer trends*. The tenth Sacks Lecture delivered on 26th May 1983. Oxford, England: Oxford Centre for Postgraduate Hebrew Studies, 1985, p. 3)

⁴⁰ Although the Final Document of the Congress of Vienna of 1815 mentioned Poles as an ethnic minority, it did not establish any kind of (special) protection. The high contracting parties, Austria, Prussia and Russia agreed to grant certain ethnic rights (that were not specified) to Poles who lived under their jurisdiction.

⁴¹ In addition to the Peace Treaties of Westphalia, in Europe there were several documents assuring also the protection of religious minorities, e.g., the Oliva Peace of 1660, the treaties of Nijmegen (1678), Rijswijk (1697) and Vienna (1815). We could mention also the Paris Peace of 1763 between France and the United Kingdom, which regulated the protection of Catholics in Canada. In the time of the decay of the Turkish Empire a certain protection of religious and ethnic minorities was established by the treaties of Paris (1856) and Berlin (1878). (E.g., Petrič (1977), pp. 24-27; Petra Roter (1995), "Razvoj mednarodnopravnega varstva manjšin od 17. stoletja do obdobja Društva narodov" ("The Development of the International Protection of Minorities from the 17th Century until the League of Nations' Period"). *Razprave in gradivo / Treatises and Documents*, No. 29-30/1994-1995, pp. 194-202.)

⁴² See, e.g., Petrič (1977), pp. 24-28; Roter (1996).

- (iv) There was no specific constitutional protection of ethnic minorities, except for a general proclamation of equality and in some cases, the prohibition of discrimination on grounds of race or religion.⁴³

III.2. From WW I to WW II

This phase was much shorter and characterized by a rather dynamic development. The following characteristics marked the second phase:

- (i) The concept of the protection of minorities expanded and included also the protection of racial, ethnic and linguistic minorities in addition to religious minorities. "Special" rights of persons belonging to ethnic, racial, linguistic and religious minorities were added to the general concept of human rights.⁴⁴
- (ii) The protection of minorities was regulated by international agreements and documents, within and outside the League of Nations as the central institution at the level of the international community. The Peace Treaties after WWI were central documents in this context that served as the basis for all other documents.⁴⁵

⁴³ This conclusion was confirmed by preliminary findings of the "Constitutional Project" within the Students' Research and Training Project: "Democratization and ethnic relations: the management of ethnic relations and conflict." (See also: Albert P. Blaustein, Jay A. Sigler, ed. (1988), *Constitutions That Made History*. Edited, compiled and introduction by: A. P. Blaustein, J. A. Sigler. New York: Paragon House Publishers, 1988.)

⁴⁴ Professor Petrič (1977, pp. 37-38) lists the following nine (groups of) rights of minorities that were guaranteed to persons belonging to ethnic minorities by international documents:

- (1) The right to the citizenship of the state where persons belonging to a certain ethnic minority live. In some cases when the administrative status of a certain territory was changed, the inhabitants were given the right to opt for the citizenship of their choice;
- (2) the right to life, liberty of person, and freedom of religion;
- (3) the right to equality before law, and equality in civil and political rights;
- (4) the right to equal access to public services and offices, honors and functions, and equality at (professional) work;
- (5) the right to establish, manage and maintain their religious and social associations and institutions, schools;
- (6) the right to free use of their language;
- (7) the right to use their language before courts;
- (8) the right to education in their language in primary schools in the communities where a considerable proportion of persons belonging to a minority live. The official language of a state should also be taught compulsorily;
- (9) the right to adequate participation in public finances for educational, religious and similar purposes in the communities where a considerable proportion of persons belonging to a minority live.

⁴⁵ The issues of the right of peoples to self-determination and protection of ethnic, linguistic and religious minorities were raised already during WW I. New principles started to emerge in this context that were further developed after WW I, especially within the League of Nations (e.g., resolutions of the Council of the League of Nations based on the special report on **Protection of Linguistic, Racial or Religious Minorities**, the so-called Tittoni's Report adopted by the Council on 22 October 1920). In this context we should mention the Peace Treaties after WW I that bound the states defeated in the war and new states to respect certain rights of minorities, e.g., the treaties of: Saint-Germaine with Austria of 10 September 1919 (Art. 54-60); Neuilly with Bulgaria of 29 November 1919 (Art. 49-57); Trianon with Hungary of 4 June 1920 (Art. 54-60); Sevres with Turkey of 10 August 1920 (Art. 37-45), etc. (See, e.g., Petrič (1977), pp. 28-49)

- (iii) The second phase marked the beginning of the modern constitutional protection of minorities, and set certain standards by adopting some solutions from the existing international documents and practice.⁴⁶ However, most constitutions, based on the concept of (single) nation-states, did not include provisions on the protection of minorities.
- (iv) There was no adequate and efficient mechanism at the international level or within individual states that would have assured the realization of the existing constitutional/legal protection of minorities.
- (v) There were several problems in the realization of the protection of minorities and the "special" rights of persons belonging to minorities provided by international law and a few constitutions⁴⁷; nevertheless the protection and position of minorities improved in comparison with the previous phase.⁴⁸

III.3. After WW II

The third phase of the historic evolution of the protection of ethnic minorities has been and is the most dynamic so far. In this process we should especially stress the importance of several international organizations and integrations, such as, for example, the United Nations,⁴⁹ The Council of Europe,⁵⁰ the Conference/Organization on Security

⁴⁶ The following constitutions should be mentioned in this context: the Constitution of the Russian Socialist Federal Soviet Republic of 1918, the German (Weimar) Constitution of 1919, and the Constitution of the Estonian Republic of 1920, which established the highest standards of the protection of ethnic minorities. (See, e.g., Blaustein, Sigler, ed. (1988), pp. 337-398.)

⁴⁷ The first Soviet Russian, Estonian and German constitutions were all short lived and abolished in practice soon after WW I. (E.g., Blaustein, Sigler, ed. (1988).)

⁴⁸ More on these issues, see, e.g., Capotorti (1991), p. 25; Inis L. Claude (1955), *National Minorities: An International Problem*. Cambridge: Cambridge University Press, 1955, pp. 17, 35-36; Petrić (1977), pp. 32, 44-49; Roter (1995), pp. 208-209.

⁴⁹ The Charter of the UN (1945) and the Universal Declaration of Human Rights (GA Res. 217 A(III) of 10 December 1948) do not provide any special protection for minorities directly, but they define the framework of UN Human Rights regulation. The most important UN documents regarding ethnic minorities are, e.g.: the resolution "The Fate of Minorities" (GA Res. 217 C (III) of 10 December 1948); International Covenant on Civil and Political Rights - Article 27 (GA Res. 2200 A (XXI) of 16 December 1966; entered into force on 23 March 1976); the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (GA Res. 47/135 of 18 December 1992); The Vienna Declaration and Programme of Action of the World Conference on Human Rights adopted on 25 June 1993 - Paragraph 19 (*World Conference on Human Rights: The Vienna Declaration and Programme of Action, June 1993*. (1993) With the Opening Statement of the United Nations Secretary-General Boutros Boutros-Ghali. New York: UN Department of Public Information, 1993, pp. 34-35); etc.

⁵⁰ The main documents of the Council of Europe regarding ethnic minorities are: recommendations and decisions of the Parliamentary Assembly and the Committee of Ministers, the declaration of the Heads of State and Government of the member States of the Council of Europe at the Vienna summit conference (8-9 October 1993), but especially the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages presented in this volume. (See also, e.g., Benoît-Rohmer, Hardeman (1994).)

Although the European Convention on Human Rights of 4 November 1950 (with the official title The Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force in 1953) and the European Social Charter of 18 October 1961 (which came into force in 1965) did not establish any special rights and protection of minorities, they laid the foundations of the European system of Human Rights. From the perspective of the protection of minorities we should mention Article 14 of the European Convention on Human Rights, which prohibits any form discrimination in the exercise of human rights and fundamental freedoms guaranteed by this treaty. (See, *Human Rights: A continuing challenge for the Council of Europe*. (1995) Strasbourg: Council of Europe Press, 1995, p. 5, 20.)

and Cooperation in Europe,⁵¹ European Communities/Union,⁵² sub-regional integrations,⁵³ etc. The protection of minorities remained also an important content of multilateral and bilateral treaties.⁵⁴ This period was characterized also by the process of decolonization that was based on the realization of the principle of self-determination that is in many ways controversial.⁵⁵ The creation of new (nation) states in Africa and Asia after the collapse of colonial Empires changed the world's political map. This process resolved certain minority problems that existed within the colonial Empires, but - at

⁵¹The main CSCE/OSCE documents regarding the protection of ethnic minorities are, e.g.: The Helsinki Final Act (Principle VII of the "Declaration on Principles Guiding Relations between Participating States, Para. 4) of 1975; the Copenhagen Document (Part IV) of 1990; the Vienna Human Dimension Mechanism of 1989; etc. CSCE/OSCE documents are usually political documents that are legally non-binding. Most attempts to develop measures and mechanisms to improve the implementation of CSCE commitments concerning minorities have failed to produce adequate results. The office of the **CSCE/OSCE High Commissioner on National Minorities** as a specific early-warning instrument for the prevention of conflicts that involve national minorities at the earliest possible stage was established in 1992 to improve the situation. This institution offered a common ground for cooperation in promoting human rights and the protection of minorities in Europe. (See e.g., Benoît-Rohmer, Hardeman (1994), pp. 6-9.) The High Commissioner on National Minorities authorized the Foundation on Inter-Ethnic Relations, a nongovernmental organization established in 1993 to support the activities of the High Commissioner, to prepare recommendations that would improve the position and protection of national minorities. This resulted in the Hague Recommendations regarding the Educational Rights of National Minorities (1996), the Oslo Recommendations regarding the Linguistic Rights of National Minorities (1998) and the Lund Recommendations on the Effective Participation of National Minorities (1999). (See, e.g., <http://www.osce.org/hcnm/documents/recommendations/index.php3> (15 January 2002).)

⁵²The EC/EU has failed to create a binding legal instrument on the protection of ethnic minorities. Nevertheless, several EC/EU documents underline the importance of minority rights (e.g., the Badinter report, resolutions of the European Parliament). The protection of minorities is present also in the EC/EU international relations as an important political issue or a yardstick of democracy. (See also, e.g., Benoît-Rohmer, Hardeman (1994), pp. 16-19.)

⁵³In response to existing problems in the Baltic region, the Council of Baltic Sea States (CBSS) decided in March 1993 to establish the office of a CBSS Commissioner for Human Rights and Minority Questions. (See e.g., Benoît-Rohmer, Hardeman (1994), pp. 21-22.)

The Central European Initiative (CEI), founded in 1989, adopted its Instrument for the Protection of Minority Rights in 1994, which establishes principles for the protection of national minorities in member states. (At present the CEI comprises the following 17 Member States: Albania, Austria, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Hungary, Italy, Macedonia, Moldova, Poland, Romania, the Slovak Republic, Slovenia, Ukraine and the Federal Republic of Yugoslavia.) Although this document is not a binding international document, it represents an important step in the (sub)regional development of the protection of minorities. (See, http://www.ceinet.org/view/01/01_01.htm (20 January 2002).)

The Alps Adriatic Working Community has a Working Group on Minorities within its Commission III on Culture and Society. This Working Group is responsible for the collection of data concerning ethnic minorities in the region, for the creation of a map of minorities, for the stimulation of communication and cooperation between minorities and especially for the promotion of youth contacts between minorities. (See, e.g., http://www.alpeadria.org/attivita/attivita_e.htm (20 January 2002).)

⁵⁴In this context I should mention: the Gruber-Gasperi Agreement of 1946 (annexed to the Peace Treaty of 10 February 1947) between Austria and Italy, which guarantees a range of minority rights and broad autonomy to the German-speaking (Austrian) minority in South Tyrol; the quadripartite memorandum of agreement, the so-called London Memorandum, concerning the Territory of Trieste, signed by the governments of Italy, the United Kingdom, USA and Yugoslavia on 5 October 1954, which was replaced by the Treaty of Osimo of 1976 between Italy and Yugoslavia succeeded to by Slovenia and Croatia after its disintegration; the agreement between the Federal Republic of Germany and Denmark of 1955; a number of bilateral agreements concluded after the collapse of Communist regimes and disintegration of multiethnic states in Central and Eastern Europe, such as: treaties on neighboring relations that Germany concluded with Poland (in 1991), Hungary (in 1992) and with Czechoslovakia (in 1992); treaties between Hungary and Ukraine (of 1991), Hungary and Slovenia (1992), etc.

⁵⁵See, e.g., Morton Halperin, David J. Scheffer, Patricia L. Small (1992), *Self-Determination in the New World Order*. Washington, D.C.: Carnegie Endowment for International Peace, 1992.

the same time - it created or transformed these problems in new states. The principle of and right to self-determination were called upon and used again in the beginning of the 1990's when new states emerged from the former (communist) multiethnic states/empires in Central and Eastern Europe (Czechoslovakia, the Soviet Union, the former SFR Yugoslavia).⁵⁶

The post WW II period also brought substantial (national, regional) diversity in the perception and regulation of the (national and international) protection of rights of minorities.⁵⁷ The following main characteristics describe this phase:

- (i) The concept of human rights has further developed in this phase, which influenced also rights and protection of ethnic minorities. Some new special rights have emerged, and a dual, both individual and collective, nature of minority rights is slowly being recognized.
- (ii) The rights and protection of minorities are regulated by a number of international documents, with the UN and other international organizations playing a central role in the development of the international law. A new concept for the protection and rights of minorities has slowly been established by new international documents. Besides binding treaties and international agreements, there are also legally non-binding documents (resolutions and declarations). Some principles proclaimed by these documents have become or might become customary international law based on the practice of the international community and states⁵⁸ and/or *ius cogens* when they are included in new international treaties.⁵⁹ In most cases so far, the realization of minority rights provided by international documents depends only on the political commitment of states to respect the provisions of these documents.
- (iii) The reluctance of governments of modern states that at least subconsciously still perceive their countries as ethnically homogenous (single) nation-states, has often slowed or even blocked further development of the protection and rights of minorities in international law. Due to the reluctance and opposition of some states, it is rather unlikely that already existing international standards for the protection of minorities will be translated into the national legislation of these states anytime soon.

⁵⁶ E.g., Mitja Žagar (1994), "National Sovereignty at the End of the Twentieth Century: Relativization of Traditional Concepts; The Case of Slovenia" - in Bojko Bučar, Stein Kuhnle, eds., *Small States Compared: the Politics of Norway and Slovenia*. Bergen: Alma Mater, 1994, pp. 243-248.

⁵⁷ E.g., Stavenhagen (1990), pp. 129-141; Patrick Thornberry (1990), *International Law and the Rights of Minorities*. Oxford, England: Clarendon Press / New York: Oxford University Press, 1990; Patrick Thornberry (1991), *Minority and Human Rights Law* (1991), A Minority Rights Group Report. London: MRG, 1991; *World Directory of Minorities* (1990); etc.

⁵⁸ This is the case with the Universal Declaration of Human Rights and some other UN documents.

⁵⁹ See, e.g., Starke (1989).

- (iv) Although there was certain progress in the field of the constitutional protection of minorities, most constitutions, still deriving from the concept of (single) nation-states, did not include special provisions on the rights and protection of minorities. Some newer constitutions have followed international standards of minority rights and the protection of minorities, but standards of constitutional protection are still lower than existing international standards in most cases.⁶⁰ This gap is to a certain extent bridged by the legislation in some countries, but this legislation is often inadequate.
- (v) Different mechanisms at the international level (mostly within existing international global and regional organizations) or within individual states that should assure the realization of the rights and protection of minorities are being established (and have already been mentioned in the footnotes). Beside the protection of rights before the courts within the state, different international institutions and courts exist that can be addressed also by affected individuals and minority organizations/associations concerning the violation of minority rights as provided by international treaties.⁶¹
- (vi) There are still several problems in the realization of the protection of minorities and the "special" rights of persons belonging to minorities provided by international law and constitutions. This is sometimes conditioned also by the "ethnic policies" of states that fail to recognize even the very existence of ethnic pluralism within their borders.

Within this phase we can also detect a special sub-phase that began in 1989-1990 and continued into the 1990s. After the collapse of the former communist regimes in Central, Eastern and South Eastern Europe countries from this region expressed their interest in joining the (Western) European integration (the EU) and started their transitions from communism. In this context, also following the mentioned recommendations of the Badinter commission, the adequate protection of minorities became an important criterion for accession. Simultaneously, in the 1990s an important development took place at the international level with the adoption of several international documents, including the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages that represented the first two specific legally binding international documents on the protection of (national) minorities.

⁶⁰ See, e.g., Baron (1985); Catherine Brolmann, Rene Lefeber, Marjoleine Zieck, eds. (1992), *Peoples and Minorities in International Law*. Dordrecht, Boston: M. Nijhoff, 1992; Thornberry (1990); Ben Whitaker, ed. (1984), *Minorities: A Question of Human Rights?* Oxford, New York, Toronto, Sydney, Paris, Frankfurt: Pergamon Press, 1984; Žagar, Novak (1999); etc.

⁶¹ E.g., such a system is provided by the European Convention on Human Rights. If their rights are violated, individuals could bring – in accordance with the European Convention on Human Rights – complaints and their cases before the European Commission on Human Rights, which screens most complaints, and before the European Court of Human Rights. (See, e.g., A. LeRoy Bennett (1995), *International Organizations: Principles and Issues*. Sixth Edition. Englewood Cliffs, N.J.: Prentice Hall, 1995, pp. 209-210)

IV. INDIVIDUAL AND/OR COLLECTIVE RIGHTS: DO MINORITY RIGHTS EXIST AT ALL?

The concept of (**special**) **rights of ethnic minorities** has often been disputed. Some authors and politicians deny the very existence of special minority rights. In their view, special rights are a form of unacceptable legal discrimination. They insist on absolute formal equality of everyone before the law and consider so-called, "positive discrimination" with measures of "affirmative action" an unacceptable violation of the principle of the equality of everyone before the law. They usually reject also the existence of collective rights and claim that all rights are exclusively individual.⁶²

On the other hand, international law, the official documents of most states, most politicians and scholars recognize the existence and importance of the special rights of (national) minorities.⁶³ Nevertheless, there are several differences regarding the understanding, interpretation and nature of these special rights.

Special minority rights⁶⁴ were developed to assure equality of rights and opportunities for individuals belonging to distinctive groups and/or in some cases for these distinctive groups (as collective entities) who are objectively in a less favorable position in a certain society. Therefore, these special rights should be aimed at enabling these individuals and groups to realize their constitutionally guaranteed rights. Usually defined as individual rights, with their realization special minority rights also establish the protection of minority communities.⁶⁵ I think that rights of minorities have a **dual nature** - they are at the same time both **collective** and **individual** rights. If we analyze the rights of national (ethnic) minorities in their complexity, we discover that as collective rights they belong to ethnic minorities as distinct communities, and as individual rights they belong to every member of a certain ethnic minority.⁶⁶

⁶² Tibor R. Machan (1989), *Individuals and their rights*. La Salle, Illinois: Open Court, 1989.

⁶³ See, e.g., Capotorti (1991); Iván Gyurcsik (1993), "The New Legal Ramifications to the Minority Question." Paper for the 12th Annual Conference of the Institute for East-West Studies "Minority Rights and Responsibilities: Challenges in a New Europe": Lake Bled, Slovenia, May 21-23, 1993; Will Kymlicka (1999), *Multicultural Citizenship: A liberal theory of minority rights*. Reprinted in paperback. Oxford: Clarendon, 1999; Will Kymlicka, ed. (1996), *The Rights of Minority Cultures*. Oxford, New York: Oxford University Press, 1996; etc.

⁶⁴ Some authors use the phrase "rights of minorities" in the context of "equality of rights and opportunity for individuals belonging to minority groups", and the phrase "minority rights" to refer "to the rights of minority peoples (*as groups - M.Ž.*) who wish... to cultivate their own culture and control their schools, welfare agencies, and other communal institutions." (Baron (1985), pp. 3-4) I use both terms as synonyms.

⁶⁵ See, e.g., Vernon Van Dyke (1985), *Human Rights, Ethnicity, and Discrimination*. Westport, Conn.: Greenwood Press, 1985, pp. 14-15, 44-45.

⁶⁶ E.g., the right of minorities to education - in languages of minorities, about the culture and history of these minorities - is realized as a collective right of a certain minority by establishing adequate autonomous educational systems and programs; as an individual right it is realized by giving every individual belonging to a minority community the possibility of attending a bi-lingual school or educational program in the language of a certain minority.

The concept of collective rights is becoming more acceptable, but most official documents and politicians still perceive minority rights as individual rights of members of certain distinct ethnic communities.⁶⁷ There are only a few national and/or international documents and/or constitutions that explicitly define the rights of minorities also as collective rights of these distinct ethnic communities.⁶⁸

This dispute regarding individual and/or the collective nature of the rights of (ethnic) minorities could be observed as a reflection of the Western – more specifically, European and North American – culture and ideology based on individualism, Christianity and the concept of (liberal) democracy that have dominated the development of the international community and law in the past centuries. Often, the Western culture and ideology differ substantially from traditional local cultures and ideologies that are usually less individual and more collectively oriented. Not only do traditional local cultures recognize the existence, specific social roles and importance of the collective subjects (collectivities) within every society, they often put collective interests and needs of diverse communities before the specific interests and needs of individuals. The currently existing international system of human rights simply follows the Western traditions and somehow ignores the mentioned cultural differences. This practice could lead to severe problems endangering the (general) acceptance and respect of human rights and respective standards defined by international law in certain societies when certain human rights conflict with traditional and/or generally recognized concepts and values.

⁶⁷ E.g. Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities (A/RES/47/135) adopted by the General Assembly of the United Nations on December 18th, 1992 defines the rights of persons belonging to minorities mostly as individual rights, although it stresses that "(p)ersons belonging to minorities may exercise their rights, including those set forth with the present Declaration, individually as well as in community with other members of their group, without any discrimination." (Article 3/1.)

⁶⁸ E.g. the Constitution of the Republic of Slovenia (of 1991) defines the rights of traditional ethnic minorities as collective and individual rights of autochthonous ethnic communities and their members. (E.g. Article 65) It is interesting to mention, that the Constitution of the Republic of Slovenia (of 1991) on the initiative of representatives of ethnic minorities in the Constitutional Commission replaced the term "ethnic/national minority" with the term "autochthonous national communities" to avoid the possible negative connotations of the term "minority". The Council of Europe's Framework Convention for the Protection of National Minorities states in its Article 1: "*The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation.*" Nevertheless, the framework convention guarantees rights and freedoms explicitly to persons belonging to minorities. The dual nature of minority rights is - somewhat - more present in the European Charter for Regional or Minority Languages. (For more detailed information on these issues see also, e.g. Romana Bešter (2001) *Primerjava nekaterih vidikov ustavne zaščite manjšin v državah članicah Sveta Evrope: Manjšinsko varstvo v Svetu Evrope in ustavna ureditev manjšinskega varstva v državah članicah Sveta Evrope. (Comparison of some aspects of the constitutional protection of national minorities in Member States of the Council of Europe: Minority protection of the Council of Europe and the constitutional regulation of the minority protection in Member States.)* Magistrsko delo. Ljubljana: Univerza v Ljubljani – Fakulteta za družbene vede, 2001.)

However, also in these cases the existing minimal international Human Rights standards should not be abolished and/or violated. All necessary attempts should be made that these standards be observed and realized. On the other hand, the further development of human rights and especially the special protection and rights of (ethnic and other) minorities should take into account specific traditions, concepts and cultures in every society and the traditional position of distinct communities within it. In my view, this would often lead to the strengthening of the collective dimension(s) of human rights, especially the (special) rights of (ethnic) minorities without reducing or endangering their individual dimension.

IV.1. Concepts of the Protection of Minorities

Following Jellinek's classification of human rights⁶⁹, the rights of minorities could be defined usually as "rights of negative status" (negative rights). In this context I would describe the existing concept of the protection of minorities and the prevailing practice in the world as the "**negative concept of the protection of minorities.**" When states guarantee certain minority rights they usually define and establish them as individual (negative) rights of persons belonging to minorities. States do not have a direct obligation to assure their realization. They react only when these rights are (directly or sometimes indirectly) violated – usually upon the request of members of minorities. Individual persons belonging to minorities and, in some cases, minority organizations (associations) can sue violators before courts and request that states prevent further violations of minority rights.⁷⁰

The alternative concept that has been developed mainly as a theoretical model could be the "**positive concept of the protection of ethnic minorities.**"⁷¹ This theoretical

⁶⁹ Based on status, Georg Jellinek classified human rights into four groups:

- **negative status rights:** the state should not interfere unless they are violated (basic rights and liberties of an individual, e.g. personal rights, privacy, etc.);
 - **positive status rights:** an individual, usually the citizen has the right to demand a certain activity by the state (cultural, social and economic rights);
 - **active status rights:** political rights and liberties, that enable democratic participation of a citizen;
 - **passive status rights:** the state (society) can demand that an individual citizen perform certain public functions (e.g. an obligation to perform an elected or public function).
- (Georg Jellinek (1963/1905), *System der subjektiven öffentlichen Rechte*. (Reprint of the 1905 edition.) Darmstadt: Wissenschaftliche Buchgesellschaft, 1963, pp. 86f.)

⁷⁰ In my view, constitutional/legal systems should establish the general obligation of the state to prevent violations of human rights as a general principle that applies also for the special rights of ethnic minorities: such provisions could be – at least in some cases – interpreted as the obligation of the state to undertake certain preventive activities before the actual violation takes place.

⁷¹ When presented in public, the positive concept of the protection of ethnic minorities is accepted well and advocated by most members and representatives of ethnic minorities, organizations (associations) of ethnic minorities, some experts and scholars. On the other hand, this concept provokes usually negative reactions of (official representatives of) states and different politicians – especially members of nationalist political parties.

model developed in the early 1990s:⁷²

- (i) establishes minorities (as distinct communities) and their members (as individuals) as active and equal subjects in a pluralistic society and its political system. It provides for their participation and decisive role in political decision-making;
- (ii) requires the active role of the state in the protection and realization of the (special) rights of minorities.⁷³ The very fact that the state would not act would establish a violation of the constitution and law by the state and its moral and legal responsibility for consequences.

Although this concept has been developed mainly as a theoretical model, the Republic of Slovenia declared this model to be the basis for its regulation regarding the protection of national minorities and to a large extent introduced it with its constitution in 1991.⁷⁴ This was not surprising considering that some elements of this model had existed already in the former Yugoslavia and that certain elements were preserved also in some other successor states. However it is more important that some elements of the positive concept of the protection of minorities have been fragmentally introduced in the legal systems and practice of some other states.⁷⁵

V. INSTEAD OF CONCLUSION: POSSIBLE SCENARIOS OF FUTURE DEVELOPMENT

The historic evolution of minority rights was characterized by the gradual expansion and introduction of new rights, although there were several setbacks and even occasional reverse trends. Minority rights have become an important segment of human rights. International law has established some general principles and (minimal) standards. Although there was recognition that the obligation of states to protect ethnic minorities was established by international law, there was hardly anything done to countries that violated it. Minority policies and the protection of ethnic minorities

⁷² See, e.g., Mitja Žagar (1990), *Sodobni federalizem s posebnim poudarkom na asimetrični federaciji v večnacionalnih državah.* (Modern Federalism and Elements of Asymmetrical Federation in Multi-Ethnic States.) Doktorska disertacija (Ph.D. Dissertation). Ljubljana: Univerza Edvarda Kardelja v Ljubljani, Pravna fakulteta, 1990; Mitja Žagar (1992), "Position and Protection of Ethnic Minorities in the Constitution of The Republic of Slovenia: Basic information." *Razprave in Gradivo/Treatises and Documents*, No. 26-27/1992, pp. 10-11.

⁷³ In this context states should: prepare and adopt the appropriate legal regulation of minority rights; assure their realization and protection; prevent the violations of minority rights, establish appropriate mechanisms for the prosecution of their possible violators; provide for necessary (pre)conditions, including the necessary finances, and infrastructure for the realization of minority rights in education, culture, publishing, etc.

⁷⁴ See, e.g., Article 64 (Special Rights of the Autochthonous Italian and Hungarian National Communities in Slovenia) and Article 65 (Status and Special Rights of the Romany Community in Slovenia) of the Constitution of the Republic of Slovenia (1991). For more on these issues, see also in the contribution of Miran Komac.

⁷⁵ Some elements of this concept have been introduced in legal systems and in political practice in Belgium, Canada and Spain. Some other states might sometimes use certain elements of a "positive concept" in their minority policy - mostly in the field of the education of members of minorities (in their own language in order to preserve and develop their distinctive culture). We could also mention the "affirmative action" legislation and programs in the USA as possible specific cases of the use of certain elements of this concept. (See also, e.g., *World Directory of Minorities*, 1990.)

have been generally considered internal affairs of every state. States are still reluctant to expand the existing rights and/or to introduce new minority rights, although they often do not meet the international standards. They claim that such an expansion would be costly and would further complicate the existing political systems.

Although the Badinter Commission stressed the importance of the adequate protection of national minorities for modern democracies and established it as a criterion for the EU accession of new states, the protection of national minorities remains in the sphere of the internal affairs of modern states. The very existence of the concept of (single) nation-states that dominates the present international community sets the limits. In this context states and many of their citizens perceive minorities and the existing ethnic diversity rather as a problem than the normal state of affairs and possible comparative advantages. However, we can still expect that in cases of major humanitarian crises and gross violations of minority and other human rights, the possibility of humanitarian intervention exists, especially if certain interests of great powers are threatened simultaneously.⁷⁶ For this reason it is extremely important that information on violations of human rights, including rights of minorities, in a specific environment exists. If there are intense public reactions, outrage and demands to stop such crimes the likelihood of international humanitarian interventions also increases. Hopefully, the fear of international humanitarian intervention and possible prosecution of perpetrators of such crimes before international courts can put pressure on political regimes in all countries to refrain from genocidal policies and "ethnic cleansing."

Considering everything that has been said, we can not expect that any time soon the existing (single) nation-states will transform into ethnically neutral "bodies politic" with political systems built on the principles of inclusion, tolerance, cooperation, and the recognition of the ethnic, cultural and social plurality and diversity of its population. However, people have to be informed about the multi-ethnic and multi-cultural structure and nature of their societies. They have to know as much of different cultures as possible, and they should especially be taught to acknowledge and respect differences. It is important to create channels and ways of communication and cooperation among different distinct communities that will take into account cultural differences and the specific nature of every individual culture. This includes the creation of informal mechanisms for the management and resolution of conflicts.

I know that it is very difficult or impossible to predict future developments; social scientists and politicians often fail in such attempts. However, our future is an important and attractive subject that we cannot avoid. This is why I have chosen a more literary approach and developed three hypothetical scenarios of the future developments of the protection of

⁷⁶ For some critical accounts see, e.g., William J. Buckley, ed., (2000), *Kosovo: Contending Voices on Balkan Interventions*. Grand Rapids, MI, Cambridge: Wm. B. Eerdmans Publishing Co., 2000.

minorities – as I see them considering the present situation, its complexity and diversity, and detected (sometimes conflicting) present trends of development. I am taking into account also the events of the 11th September 2001, which could have negative and restrictive effects on the future development of minority protection if we judge first reactions. On the other hand, the future might be brighter if people realized that the promotion of multiculturalism and interculturalism, democratic inclusion, the introduction and realization of the adequate protection of minorities could improve ethnic relations and contribute to stability in pluralistic societies thereby strengthening democracy and reducing tensions that could lead to terrorism.

V.1. Scenario 1: “Status Quo” – Nothing New on the Front

In my view the most likely scenario, at least in the near future, predicts no major developments that would lead to the better and more comprehensive protection of (national and other) minorities. The international community, still the community of (single/one) nation-states, will continue to underline the importance of the existing standards for the protection of ethnic minorities, but there will be several problems concerning their realization. New rights and higher international standards will not be introduced, because states will block such attempts. They will consider the further development of minority rights too costly and unrealistic in given circumstances.

If the economic situation does not improve soon, politicians and people might continue to see the existing multi cultural reality and ethnic diversity as an obstacle to the successful development of their country.⁷⁷ In such a situation it might become difficult to preserve even the existing level and standards of the protection of ethnic minorities, although states would want to avoid the negative international publicity caused by the possible reduction of minority rights. However, certain reductions of the existing minority rights are not impossible.

I hope that gross violations of human rights, including minority rights, in individual countries will continue to generate protests by the public and international community. The “humanitarian intervention” is a threat to the possible perpetrators of such criminal activities, but I expect that the international community will use it very selectively. The international community will react when this might seem necessary and convenient to the large powers. Additionally, limited practical results of such attempts and the general lack of determination to execute proclaimed principles and policies can put the credibility of such measures, and of the international community, at stake.⁷⁸

⁷⁷ This is happening in many countries, but especially Belgium and Canada could be cited as examples. Such problems led even to the disintegration of certain multiethnic states, e.g., the former Czechoslovakia, Soviet Union and Yugoslavia.

⁷⁸ See, e.g., Koen Koch (1993), “Not a Deus ex Machina, but a Baron Von Munchhausen: Some Thoughts About the Instruments of the International Community and Forms of Intervention in the Field of Minority Rights Protection.” Paper for the 12th Annual Conference of the Institute for EastWest Studies “Minority Rights and Responsibilities: Challenges in a New Europe.” Lake Bled, Slovenia, May 21-23, 1993, pp. 3-5.

Although immigrants and immigrant communities in many ways resemble traditional national minorities, there is hardly any protection of these individuals and groups that represent new immigrant ethnic minorities. The existing international standards and level of their protection are rather low, and states are rather reluctant to implement even these standards.⁷⁹ It is not likely that the existing minority protection will include also these categories. Taking into account some recent developments, the practice of states, and growing xenophobia in several countries, one might fear that the situation and protection of immigrants in these countries might even worsen.

V.2. Scenario 2: The “Dark” Scenario – the Victory of Xenophobia

If the negative perception of “others” intensifies (which might be a consequence of September 11th in some environments) and if the economic and social situation further deteriorates in the world, xenophobia will increase in many countries. Everyone who is different, especially ethnic minorities, migrants and immigrant communities, could easily be made scapegoats. Politicians will be tempted to use nationalism to generate public support for their political options and to promote hatred against “them” who are different and should be blamed for “our problems”. Such a new political climate might lead to the reduction or even abolition of some minority rights or the existing model of minority protection. Additionally, there might be no guarantees and will that the existing minority protection is enforced.

Should such a development happen in just individual countries, there is the possibility that the international community would react to prevent the violation of the existing international principles and minimal standards. Gross violations of human rights might even provoke humanitarian intervention in a certain country. A global political, security, economic and/or social crisis, on the other hand, could paralyze the international community. Unable to intervene in such a situation, the international community would not be able to prevent the reduction and/or abolition of minority rights. The reduction of minority rights would become a trend in such a phase of development.

The impact of such a development would be universal: nationalism(s) and xenophobia could become the characteristics in several societies. This would influence the international community and we could expect initiatives to reduce the existing protection of ethnic minorities and immigrants in almost every country. We could expect that minority protection would decrease in almost every country in such a situation. The

⁷⁹ See, e.g., Jacqueline Costa-Lascoux (1990), “Anti-Discrimination Legislation: Belgium, France, Netherlands, Committee of Experts on Community Relations.” (MG-CR (90) 2), (Report prepared by Jacqueline Costa-Lascoux.) Council of Europe / Conseil de l’Europe, Strasbourg 9 January 1990.

consequences of such a development could not be predicted, but we could expect that it would lead to ethnic conflicts. The idea of the "final solution" might become attractive in certain multi-cultural environments, which might lead to the discrimination or "ethnic cleansing" of these territories and/or genocide.

Although I do not like this scenario, it is not completely impossible. We could detect at least certain elements of this scenario in several countries. We should be especially aware that no society is immune to nationalism and xenophobia.

V.3. Scenario 3: The "Positive" Scenario – "All Different - All Equal"

I would hope for a positive scenario that would continue the further development and expansion of minority rights and the protection of minorities. Taking into account the impact of existing nationalism and xenophobia, the present social and economic situation in the world, this development could be slow - both at the national and international level. It will take some time and a lot of effort (of minorities, social activists and favorable public, nongovernmental organizations, public institutions, etc.) to translate the already existing international standards into the national legislation on the minority protection in several states. It will take even longer before states are willing to further develop and increase the international standards.

Multiculturalism, as an ideology based on tolerance, peaceful and equal cooperation is slowly being developed. This will require the active involvement of all relevant factors, including schools and educational systems, public institutions and services, mass media, associations and social movements, ethnic minorities and their organizations, immigrants, immigrant communities and their organizations, etc. The existing model of nation-states will need to be transformed in this context: The nation-state should become a state, an ethnically neutral "body politic" that recognizes and promotes the existence of ethnic and cultural pluralism. Its political system should be built on the principles of inclusion, tolerance, cooperation, and the recognition of ethnic, cultural and the social plurality and diversity of its population. Such a political system should recognize the possibility of different conflicts, and provide channels for expression, coordination and the realization of different specific interests. This political system should provide mechanisms for the protection and participation of distinct communities. It also has to develop different institutions, mechanisms and procedures for the prevention and management of possible conflicts (including ethnic conflicts), and offer different peaceful and democratic means and ways for the resolution of existing conflicts.⁸⁰

⁸⁰ Mitja Žagar (2000). "Ali je možno razkleniti začaran krog? Strategije in koncepti za upravljanje in razreševanje etničnih konfliktov." ("Breaking the Vicious Circle: Strategies and concepts for the management and resolution of ethnic conflicts.") *Razprave in gradivo / Treatises and Documents*, No. 36-37/2000, pp. 11-32.

We can only hope that - at least - some rights that the international law and national legislation already provide for traditional ethnic (national) minorities will be granted to **other distinct communities** and minorities, such as immigrant communities.⁸¹

In any case, the future development of human rights and the protection of ethnic minorities will have to consider the existing diversity and different historical and cultural traditions in the world. The collective nature of minority rights will have to be strengthened in this context without reducing or endangering their individual dimension.

V.4. What can be done?

Although I am not able to predict the future and was only able to present three - in my view - possible scenarios of the future development of the protection of minorities, I do have some ideas what can be done to promote and improve human rights and the protection of minorities. I argue that we need to promote knowledge of human rights, including the (special) rights of minorities, the existing ethnic and cultural diversity, tolerance, mutual understanding, coexistence and cooperation, etc. in modern pluralistic societies. We should realize that myths of ethnic homogeneity contradict the existing ethnic and cultural diversity that can also be a comparative advantage and not just a problem. We should be shown that the existing concept of (single) nation-states is not just an ideal goal of every distinct ethnic community, but also a possible source of ethnic conflicts. People should be convinced that the best way to realize their specific interests and to preserve our own identities is equal cooperation with others. We need to develop the ideology of equal cooperation that will supplement and in some cases replace the prevailing ideology of competition. The basis of such an ideology and the adequate protection of minorities should be human rights, cooperation and democracy. However, we have to also take into account the different content and nature of these concepts in different cultures present in a certain society. Therefore we have to find the common and universal elements of these cultures, and build on consensus and compromise to prevent even the feeling and fear of inequality and domination. Hopefully, not only the protection of national minorities will be improved, but also adequate protection of migrants and immigrant minorities will be developed that will follow the mentioned principles.

⁸¹ E.g., new standards for the **protection of migrant workers** and immigrant communities are being developed (at the international level, especially within the European Community/Union). Some questions in this context include problems of the integration of migrants in an immigrant community, citizenship and the political participation of migrants at least at a local level, the special collective rights of migrant communities as groups to enable them to preserve their culture and identity, etc. (See e.g. Costa-Lascoux (1990); Žagar (1990), pp. 292-294.)

However, before such goals are realized reactions and protests of people and the international public against violations of human rights, the rights of ethnic minorities and immigrants can be powerful factors in the process of the formulation of democratic and inclusive ethnic policy based on equality in every state. Additionally, public pressure for the collective international humanitarian intervention in the case of gross and systematic violations of human rights might at least in some cases deter governments and regimes from nationalistic policies hostile to minorities. The fear of international intervention and increased likelihood that perpetrators of genocidal policies and "ethnic cleansing" would be prosecuted can put pressure on political regimes, xenophobic and nationalist politicians to refrain from such practices.

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