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What Role for Future Thematic Commentaries?
A Comment on the report by Asbjørn Eide on thematic commentaries of the Advisory Committee
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The views expressed are those of the author only

I. To start with, I fully share one of the major points in the report, namely, that the ACFC thematic commentaries on educational and participation rights respectively laid down some solid foundations for the future development of the ACFC jurisprudence. Given that minority situations vary not only terms of historical and cultural context, but even more so regarding the level and nature of inter-communal conflicts, the commentaries faced and managed to a great extent the difficult task of mapping the patterns of compliance with the FCNM for different types of situations. To say with A. Eide, these commentaries "identified the contours and content of specific minority rights". I would add that it remains for the new thematic commentaries to turn the contours into a more comprehensive framework, and the content into more developed normative meanings of minority rights as an indivisible part of international human rights canon.

The report also forcefully shows the key breaking-through achievements of both commentaries, since – as it is said - "conceptual work also includes that new grounds have to be broken to a considerable extent". I would like to build on this and ask: *What new grounds still wait to be broken by future FCNM thematic commentaries?* More to the point: *There still remains a need for innovative and more contextualized approach when interpreting the* Convention. *This is a condition sine qua non in order to better sustain a fundamental, universal nature of MR*. Whether the ACFC will pursue its ten-year proactive interpretation, and continue to boldly develop normative content of the FCNM, will not depend on the expertise level and good will of the members of the ACFC. Here I would fully agree with B. Cilevics when he points at the problem of failed mainstreaming and warns of States' reluctance to guarantee full and effective equality to the national minorities. Today, - he said at the Conference *10 years of Protecting National Minorities and National and Regional languages*- "we are facing perhaps even more difficult stage of the FCNM implementation". Although integral part of universal human rights, minority rights are often handled as a sort of "special" rights, different and completely isolated from the "general" human rights[1]

II. The today's challenges for the full and effective compliance by the State Parties with their obligations under the present Convention are obviously far-reaching and systemic. The ACFC should proactively face this challenge and start as soon as possible a thematic commentary on articles 4-6. There are paramount reasons to do so: The third monitoring cycle has been going on and a growing difference in opinion between the CM and ACFC on the scope of application has been going on. More importantly, the Commentary on Participation demonstrates that no other set of articles can better give a critical normative substance to Article 1, which obliges State Parties to treat the rights of persons belonging to minorities as an integral part of the international protection of human rights. It is of the utmost importance to further identify underlying aims and the core considerations for full and effective equality also in terms of (group) cultural identity on one side, and a direct relation of such equality for achieving the necessary level of tolerance against "otherness" on the other side. This would set the standards not only for a constitutional basis, but also for a direct effect of constitutional protection of minority rights, albeit the advantages of a codified act at a statutory level.

[1] B. Cilevics, member of the Parliamentary Assembly of the Council of Europe, at the Conference **10 Years of Protecting National Minorities and Regional and Minority Languages**, Strasbourg, March 2008.

Those who would undertake this great challenge can heavily build on the two thematic commentaries that make the background of our discussion today. On the other hand, they would face considerable difficulties, which go far beyond already enough difficult tasks to do something anyway complex and controversial, as the report puts it: i.e., a) to outline normative content, and b) to identify ways by which these norms can be monitored. The "added difficulties" lie in a number of reasons. My understanding is that some of them are indeed systemic. That should additionally justify giving priority to this thematic commentary. My four-year experience makes live and tangible the report's remarks on the conceptual work within the ACFC. The consensus required two equally important but in most cases not necessarily compatible conditions, i.e., conceptual agreement, and a position "reasonably acceptable to the State parties and to the minorities".

II.1 I shall now turn to what I understand under "added difficulty" in the interpretation of articles 4-6 of the FCNM. It is first and foremost *the ambivalence in the very nature of minority rights*. The first formal recognition by international hard-law human-rights document of a political dimension as legitimate in minority demands made transparent the tension in defining the bearer of MR. I am not going now into the debate whether or not, modern individualism has much to offer to minorities, since we should stick to the FCNM as it is and not as it should be. I understand that the FCNM builds on liberal foundations of tolerance, which is eminently that of individual freedom. However, individual freedom has been simultaneously flagged and challenged - it is the participation rights which should mediate between individual and a group.

Notwithstanding the Explanatory Report, according to which the Convention "does not imply the recognition of collective rights", the ambivalence between the individual and the collective in MR remains. It played a significant role in the work of the ACFC, notably in its conceptual discussions. The "founding fathers" of the FCNM did put this ambivalence aside, since no consensus within the international setting seemed feasible in near future. As a consequence, the Explanatory Report draws a clear line, almost in a manner of antinomy, between individual and collective rights. In spite of that I see a demonstration of an immanently collective nature of MR in the following: *First*, the FCNM for the first time recognizes a political dimension in minority demands while avoiding to set standards that could lead to the aspirations for self-determination or encourage secession (arts. 2 and 21). Secondly, the FCNM principles for accommodating political demands of minorities convincingly testify of a linkage between MR, one side, and state-design and its decision-making processes, on the other. *Thirdly*, another important indicator for a structural tension between collective exercise of some of MR and the definition of their individual bearers can be seen in the fact that the problem of "representativeness" of consultation mechanisms still waits to be sufficiently underscored in the ACFC opinions. Here, the ambiguity is obvious: "Representativeness" is the question about representing authentic interests of a given minority group. How far are we then to recognize that in order to have at least some of the minority rights effectively guaranteed, it is also the group who should be the bearer of the rights? *Last but not least*, the-article-by-article approach of the ACFC and its interpretation of Art. 3 can also be seen in this context. The underpinning complexities and contradictions here are far from being only conceptual. Minority rights as fundamental do not belong to the reserved domain of the states. According to the PACE

Recommendation 1623 (2003)[2] "the states parties do not have an unconditional rights to decide which groups within their territories qualify as national minorities in the sense of the framework convention". Nevertheless, states practically remain sovereign in deciding whom they will guarantee minority protection. Why? Minority rights are in most cases conditioned by citizenship. The states jealously keep for themselves the discretion to decide who will be the member of polity. This is a constitutive principle of modern nation-states. Moreover, if radicalised, minority problem can hardly be accommodated only with a human rights strategy, let alone individual human rights.

It will remain an inherent challenge for a commentary on art.4-6 to demonstrate this ambivalence in MR nature and to promote as good practice the cases that already solved this problem in favour of minority rights protection. Here, Hungary is a very good example. Given the Constitution defines minorities as "state- building elements", collective rights accommodation seemed as the only logical consequence. Nevertheless, the ACFC had to stress in its 1st opinion on Hungary that such constitutional status of minorities must be accompanied with effective implementing electoral law[3]

II.2 *What should be done that thematic commentaries of the ACFC provide even more convincing argumentation for a fundamental nature of human rights?* Having read the report my spontaneous reaction would be to draw to the utmost importance of a two-fold targeted contextualisation. Thematic commentaries should draw more on related international discourse. To start with, the PACE Resolution 1735/2006 on multicultural citizenship calls for further developing this element of democratic participatory governance as critically conducive to fundamental, universal nature of MR. In the same sense I agree with Eide that government responses should play a much more important role in thematic commentaries. They provide a differentiated context for both setting the standard and monitoring the FCNM in a given case. Here the contextualization will help better understand the backgrounds against which also balancing between the rights should be done. Let me give an example. During the 1st monitoring cycle the Swiss Government defended territoriality principle for compulsory schooling as aimed at essentially preventing the Germanisation of the traditionally French-speaking part of Bern canton through the creation of German-language private schools[4]

In some cases, the ACFC jurisprudence already considerably builds on contextualisation. When balancing in case of decentralization between autonomy and menace for political unity, social cohesion and tolerance, especially in post-conflict state-reconstruction, the ACFC also used the participation rights argument in order to warn against the "reinforcing ethnic lines as the main pillar of state action"[5] This is an important lesson learnt for international development policy. For the ex-communist countries in particular it uncritically flagged one-to-one relationship between decentralisation and successful minority accommodation.

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[2] *"Any decision of the kind must respect the principle of non-discrimination and comply with the letter and spirit of the framework convention."*

[3] Paragraph 48 of the Opinion from 9 December 2004.

[4] Traditional linguistic identity as a condition for inter-communal peace has in this case of multicultural society a higher value than individual freedom.

[5] 1st opinions on Bosnia and Herzegovina (2005) and FYR of Macedonia (2004)