Strengthening the impact of the Framework Convention for the Protection of National Minorities

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Conclusions

Giorgio Malinverni

The subject of the second workshop was "The Framework Convention and Other International Actors". We therefore discussed the influence of the Framework Convention on the activities of other international organisations, both regional and universal, in protecting minorities. Three reports were presented, all of which were of excellent quality. Instead of summarising them, I would like to make a number of observations on all of these reports and on the ensuing discussions.

Firstly: since the Framework Convention came into force ten years ago it has had a decisive influence on the protection of minorities. Although it is still a fairly recent Convention, it has so far been a "success story". The Framework Convention has been a driving force in improving the protection of minorities for a very simple reason: it is, to date, the only detailed text, at both regional and global level, on the protection of minorities.

This being said, the impact of the Framework Convention for the Protection of National Minorities on the activities of other international organisations depends to a large extent on the type of organisation concerned. The organisers of the seminar were therefore well advised to make a distinction between organisations which have some statutory authority in the field of minority protection (for example the OSCE at European level and the United Nations at international level) and those which do not, generally speaking, have any or only very limited competence in this field (for example the European Union). The final report concerned the influence of the Framework Convention within the walls of our common home, the Council of Europe, in other words on the different bodies of the organisation.

I

First of all, the organisations which have only limited competence in the field of minorities: the main organisation concerned here is the European Union. It has been said, quite rightly, that the Framework Convention can play an important role, particularly when it comes to fixing the conditions for membership of the European Union. However, it has far less influence once a state has become a member because the EU does not have any real jurisdiction in this field.

The Framework Convention plays an important role when the European Union decides whether a new state can be admitted as a member quite simply because there are no EU texts on this subject. It is therefore perfectly normal that it should make reference to the most detailed instrument in this field, in other words the Council of Europe Framework Convention for the Protection of National Minorities.

We were reminded of the various changes to the criteria used by the European Union to check whether a candidate country seriously seeks to respect its minorities. At the outset, the only criteria was whether or not the country had ratified the Framework Convention. This was a purely formal criteria. Then the EU took a further step and asked itself the following question: does the candidate country really comply with the requirements of the Framework Convention for the Protection of National Minorities? At this point, it was of course no longer sufficient to simply refer to the Convention. It was necessary to take account of the texts, opinions and reports produced by the Advisory Committee as they indicate the extent to which states really comply with the different provisions of the Convention.

Despite frequent references to the Framework Convention during the pre-accession stage, there is still profound scepticism as to the way in which the EU institutions, in particular the European Commission, have assessed candidate countries' performance in protecting minorities. Generally speaking, the Commission does not really seem to have taken account of the results of the monitoring mechanism of the Framework Convention to gauge their performance and more emphasis seems to have been placed on political criteria.

Once a country becomes a member of the European Union, the role played by the Community organs is less important, given that there are restrictions on the Community's action and powers of intervention. The Community bodies do not have a means of giving countries which fail to comply with the different articles of the Framework Convention a sharp rap over the knuckles. Nevertheless, there are encouraging prospects for the future. Firstly, the Fundamental Rights Agency in Vienna. We heard a statement by this Agency, which might one day be in charge of such problems. We also had a long exchange of views on whether the protection of minorities might become one of the more general principles of Community law, as set out in the caselaw of the Luxemburg Court.

As far as the Fundamental Rights Agency is concerned, we had the impression that its work is very complementary to the monitoring arrangements of the Framework Convention. The Agency is concerned mainly with analysing problems and providing advice but is not involved in "standard-setting" or "monitoring" work. It would benefit from guidelines as to what subjects it should examine and analyse, based on the results of the Framework Convention's monitoring process. The Council of Europe sits on the Agency's Committee and is involved in preparing its work programme and this should also ensure that there is no unnecessary duplication of activities.

There are some elements which suggest that in future the Framework Convention could have a slightly greater impact on EU member countries, in particular the entry into force of the Lisbon Treaty and the possibility that the ECJ might one day, in the light of the constitutional traditions of the member states of the enlarged EU, the caselaw of the European Court relating to applications by members of national minorities and member states' caselaw in this field, consider that minorities' rights should be included in the general principles of Community law.

From the standpoint of substantive law, there is sometimes a tendency to contrast the promotion of minorities' identity and minorities' rights with equal treatment and non-discrimination. Some people sometimes wrongly reduce the Framework Convention to the concept of the right to an identity and underestimate its contribution to equality and non-

discrimination, fields in which there have been many advances in Community law, in particular as a result of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

II

Then there are organisations whose competence in matters concerning minorities has been recognised. The first to come to mind is the United Nations, followed by the Organization for Security and Co-operation in Europe (OSCE). The Framework Convention's relationship to these two organisation is characterised by complementarity and mutual influence. The OSCE does not have any binding texts which are as detailed as the Framework Convention. It is therefore normal that it should take the Framework Convention as a point of reference. That is also the reason why a Co-ordination Group was set up in 2004. This interaction between the OSCE and the Council of Europe reflects the need for the two organisations to have a common denominator. It is, however, necessary within this second group of organisations to make a distinction between the OSCE and the UN.

The OSCE has a membership which is more or less similar to that of the Council of Europe. It is true that the OSCE stretches from Vancouver to Vladivostok, as we often say, and that it therefore has a larger number of members. However, both can be said to be European organisations. The UN, on the other hand, is an international organisation. Moreover the UN and the Council of Europe do not define the concept of minorities in quite the same way and their legal instruments are different. The United Nations has only one binding provision: Article 27 of the Covenant on Civil and Political Rights. Then there is also the 1992 declaration. The situation of each organisation is therefore relatively different. What is to be welcomed is that all of these organisations have acknowledged that the Framework Convention is a minimum standard and that it has become a reference even for States which have not ratified it. Consequently, despite the differences, the Framework Convention serves as a yardstick or benchmark for assessing whether national rules and regulations are in keeping with minority rights.

1. Co-operation between the Office of the UN High Commissioner for Human Rights (OHCHR) and the mechanism of the Framework Convention has to date been rather sporadic and references to the Framework Convention by the bodies of the UN's human rights treaties and its special rapporteurs have been few and far between.

In future, closer co-operation between the OHCHR and the Council of Europe, the principle of which has been validated by both organisations, is likely to lead to greater synergy. For example, the universal periodic review carried out by the UN Human Rights Council already provides the opportunity to take regular account of the results of the Framework Convention based on information from sources other than the states under examination. The thematic activities also provide a good opportunity to strengthen the complementarity of the UN mechanisms and that of the Framework Convention, particularly in respect of the theme that was the subject of the inaugural session of the UN Forum on minorities (the right to education). Finally, the co-operation established between the mechanism of the Framework Convention and the UN's Independent Expert on Minorities has already had positive effects and will also help strengthen complementarity, for example by helping the Expert to institute dialogue with European governments which have not ratified the Framework Convention.

2. There has for many years been close co-operation between the mechanism of the Framework Convention and the OSCE Office of the High Commissioner for National Minorities (HCNM). The very close complementarity of their roles can be seen from the fact that the OSCE foster political commitments, whereas the Council of Europe produces legally binding rules and carries out regular monitoring, on a country-by-country basis, through independent mechanisms such as that of the Framework Convention. Moreover, the political commitments of the OSCE clearly provided inspiration for the Framework Convention itself. Finally, the HCNM's mandate requires it to intervene when there is a serious threat to security or stability in a country, whereas the mechanism of the Framework Convention requires that each State Party be treated in the same way where monitoring is concerned.

The HCNM's freedom of action has enabled it to encourage numerous European states to ratify the Framework Convention. The HCNM has also, to a large extent, drawn on the principles

and rights enshrined in the Framework Convention in its numerous contacts with the countries of Central Asia, which is a good example of complementarity. The thematic work of the HCNM (education, language rights, participation and kin minorities) and the thematic work of the Advisory Committee (education, participation) have sometimes overlapped but they have also been of benefit to both sides, which have consulted each other on these subjects.

III

Third organisation: the Council of Europe. The report presented the different bodies of the Council of Europe which, to some degree or other, are concerned with the problem of minorities. First of all the European Court of Human Rights. It was pointed out that there are no provisions specifically concerning minorities in the European Convention on Human Rights itself. The only article which mentions national minorities is Article 14 of the Convention, which is very limited in scope. Protocol No. 12 which concerns the protection of minorities (principle of non-discrimination) is already in force but has only been ratified by a small number of states and the Court has not, to date, handed down any judgments based on this protocol. As a result, Article 14, very often taken in conjunction with Article 8 of the Convention, currently serves as a basis for the Court when handing down judgments on cases concerning the protection of minorities. We took a look back at the way the Court's caselaw has developed, beginning with the Belgian linguistics cases. Then we took a look at the protection of Roma in the judgments concerning the United Kingdom, for example the *Chapman* case, and finally at a recent judgment of the Grand Chamber, which will remain one of the Court's key judgments, i.e. *D.H.* against the Czech Republic.

Another welcome development is that the European Court of Human Rights is increasingly making reference to the Framework Convention and no longer hesitates to quote it's provisions and the opinions of the Advisory Committee. There is therefore a complementarity within the Council of Europe itself, between the Court and the other bodies that are concerned with human rights. This phenomenon of complementarity and convergence can be seen not only in respect of the Advisory Committee but also the activities of the Committee of Experts of the European Social Charter. In its judgments concerning trade union freedom, the Court frequently

refers to the work of the Social Charter's Committee of Experts. Very often, in cases concerning torture or ill-treatment, it refers to the activities of the CPT. There are therefore mutual references and a complementarity between the activities of the different bodies of the Council of Europe dealing with human rights protection and the Court's caselaw.

The second workshop then discussed the considerable work done by the Venice Commission in the field of minorities. Some years ago it published a noteworthy study on citizenship and the concept of minorities. A few years before that the study on "kin-states" and minorities received a great deal of publicity.

The third report concerned the possibility of an additional protocol to the European Convention on Human Rights on the protection of minorities. It also discussed the possibility that the European Court of Human Rights might in future be given competence to interpret the provisions of the Framework Convention, if consulted on the subject.

These ideas have already been proposed in the past but the idea of an additional protocol was set aside. On the other hand, I wonder if it would not be possible to give the Advisory Committee competence to receive individual communications. This idea was already put forward in the Venice Commission's project in 1991.

There have already been similar developments at the Council of Europe. For many years the European Committee on Social Rights only had competence to examine states' reports. Since the additional protocol on collective complaints came into force, the committee has an additional function, which might be described as settling disputes. The same thing is happening in the United Nations. At first, several "treaty bodies" had purely non-contentious jurisdiction and was subsequently, through additional protocols, given jurisdiction to settle disputes. The latest example to date is that of the United Nations Committee for Economic, Social and Cultural Rights: on 10 December 2008, the General Assembly of the United Nations adopted an additional protocol to the International Covenant on Economic, Social and Cultural Rights, opening the way for individual complaints to be brought before the Committee.

The question therefore arises as to whether, after ten years of monitoring compliance with the Framework Convention by purely non-contentious means, in other words reports, the time has not come to take a step further and move on to a quasi-judicial type of mechanism for settling disputes. It would, of course, be optional but would enable either individuals or groups to lodge individual or collective complaints alleging violations of the Framework Convention with the Advisory Committee.