Bilateral Protection Agreement(s) in Minority Rights: History, Current Position, and Perspectives*

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When considering international minority rights, one primarily thinks of multilateral instruments with varying degrees of binding obligations (international agreements, as well soft law instruments). Bilateral agreements appear to belong to the past. However, this impression is far from correct. In fact, bilateral agreements are instruments that further refine and implement multilateral agreements.

Recently, this type of instrument has been criticized due to the related 'protective function' of kin states. However, this article shows that such criticism is in many cases unwarranted. It also shows that bilateral and multilateral protective approaches can complement each other very well, in line with the protective mission of the UN system.

1. Introduction

As in the case of human rights, minority rights require international safeguards. This fact is generally undisputed, and in reference to the protection of human rights it has become formative for the comprehension of modern international law, and it paved the way for the establishment of the United Nations. International provisions can take many forms in terms of the extent to which the instruments are binding and also in regard to the number of parties involved. It will be shown below that effective minority rights protection has to pursue a broad, diversified approach whereby the bilateral agreements are assigned particular significance. On the one hand, the particular features of individual minorities' situations require recourse to this type of instrument, but on the other hand, there is the necessity to create a clear and detailed regulatory framework (beyond the more general and open formulations in multinational instruments).

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2. The League of Nations Minority Protection System

It is well known that the history of minority rights has a long legacy; it began, at least to some extent, when international law came to life. At that time, for example, the Peace of Augsburg in 1555, bilateral minority protection regulations were put in place. Numerous treaties of this kind ensued in the following years. At first, attention was directed towards religious minorities and then increasingly attention was directed at linguistic and ethnic-national minorities.[1] After WWI there was an urgent demand to develop comprehensive minority protection instruments in a desperate attempt to alleviate at least some of the many contradictions that marked the post-war order; for example:

- The war against the central powers was waged under the banner of freedom and self-determination, but once again it led to oppression and the denial of self-determination.
- The suppression of multi-ethnic states along ethno-nationalist lines proved to be an illusion in light of the mélange of settlement structures in central and Eastern Europe.
- It was not the fate of the people, but the pursuit of gaining territory and silencing the defeated that dictated the form of peace.

Minority protection instruments ought to be able to absorb the consequences of borders shifting for groups that are subjected to a new regime, whereby the former masters of a country become the servants who then attempt to reverse these roles, thereby creating an eternal cycle of violence and hate.[2]

The character of the instruments was, in the past, a central question: should these instruments be grounded as multilateral agreements in the Covenant of the League of Nations or in single bilateral treaties? In the early 1920s there was an intensive discussion about this question. The arguments that were invoked are still valid. It was rightly recognized that a foundation of general minority protection obligations in the Covenant of the League of Nations would grant a significant amount of protection and would also contribute to the formation of a unitary standard of protection.[3] However, the flip side of such a foundation would have

1 See in detail E.H. Pircher, *Der vertragliche Schutz ethnischer, sprachlicher und religiöser Minderheiten im Völkerrecht* (Stämpfli, Bern, 1979).

2 On the theme of the League of Nations minority laws, see P. Hilpold, 'Minderheitenschutz im Völkerbundsystem' in C. Pan and B.S. Pfeil (eds.) *Zur Entstehung des modernen Minderheitenschutzes in Europa* (Springer Verlag, Wien/New York, 2006), p. 156.

3 See Art. VI of the third draft by US President Wilson for a Covenant of the League of Nations: 'The League of Nations shall require all new States to bind themselves, as a condition precedent to their recognition as independent or autonomous States, and the

been a far-reaching restriction of sovereignty; to many states, this would have unacceptable to many states, especially also considering the absence of a general human rights protection system at that time. In addition, it was evident that a regulatory system conceived on a purely bilateral basis, as much as it seemed suitable to best accommodate individual situations, would run into danger and result in vulnerable groups becoming victims of power politics.

In the end a compromise was reached: the protective regulations remained bilateral and no minority protection obligations were incorporated into the Covenant of the League of Nations. However, the various bilateral instruments were guaranteed by the League of Nations. A right of appeal was provided by the League of Nations, through the League's Council and the Permanent Court of International Justice. Furthermore, individuals were granted the right to inform the court about the (imminent) threat to or violation of minority rights. Although it was exercised in a very cautious manner and in conformity with sovereignty rights, this control mechanism had a significant influence on the formation of the principles of minority rights in the League of Nations.[4] The knowledge that respect of individual obligations was subject to review by international entities contributed to ensuring the effectiveness of the obligations.

The effectiveness of these rules was, for better or worse, connected with the destiny of the international institution with which they were coupled. With the League of Nations' increasing loss of authority and the strengthening of the various nationalist spirits throughout Europe by the beginning of the 1930s, the League of Nations minority protection system lost much of its effectiveness.

This development produced a further lesson: the failure of the minority protection system within the League of Nations was also due to the lack of its foundation within a generally established human rights protection system. From these experiences, important knowledge was acquired for a new concept of a protection mechanism after WWII.

Executive Council shall exact all States seeking admission to the League of Nations the promise, to accord to all racial or national minorities within their several jurisdictions exactly the same treatment and security, both in fact, that is accorded the racial or national majority of their people.' Quoting H. Kraus, *Das Recht der Minderheiten: Materialien zur Einführung in das Verständnis des modernen Minoritätenproblems* (Berlin, 1927), p. 40.

4 See, in detail, P. de Azcarate, *League of Nations and National Minorities: An Experiment* (Carnegie Endowment for International Peace, Washington DC, 1945).

3. Bilateralism and Multilateralism in the Early Post-WWII Period

In the early years after WWII exclusive attention was directed at the formation of a general human rights protection framework. The minority problem was largely ignored. Interestingly, two instruments were signed at this time: the Gruber–De Gasperi Agreement (Treaty of Paris) on 5September 1946 and the Bonn–Copenhagen Declaration in 1955 – two unilateral but interrelated governmental declarations. This breakthrough contributed to the subsequent development of minority rights.

Tremendous progress was achieved universally with the inclusion of Article 27 in the International Covenant on Civil and Political Rights. Although this agreement is deemed to be rudimentary, it recognizes the fact that the protection of minority rights under the spectrum of human rights is not obsolete, but rather that minority rights constitute a stable component within the human rights framework. However, it would take many years until the terms of this instrument materialized. Meanwhile Article 27 of the Covenant, which was refined and amended by the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 18 December 1992,[5] was viewed as the fulcrum for a quasi-universal international network for minority protection regulations. The United Nations Commission on Human Rights qualified and analysed the manifold kinds of minority questions across various regions around the world, thus substantially clarifying these issues, but also encouraging the acceptance of minority protection concepts.

Just as universal instruments in general human rights protection endeavours do not supersede regional laws, regional and universal instruments relating to minority rights protection are mutually fruitful and reinforce each other.

As a result of the collapse of the communist regimes in Eastern and central Europe in 1989–90, minority protection became a concern at European level. In connection with the Council of Europe and the Conference on Security and Co-operation in Europe (CSCE)/Organization for Security and Co-operation in Europe (OSCE) a legal framework was established that is viewed,worldwide, as exemplary.

The existing bilateral protection agreements did not lose their force with this development; instead they facilitated qualified protection in relation to very specific challenges. Since the collapse of the Soviet Block numerous bilateral agreements have been concluded, particularly in central and Eastern Europe.

5 See P. Hilpold, 'Minderheitenschutz im Rahmen der VN – Die Deklaration vom 18. Dezember 1992' (1994) 1 *Schweizerische Zeitschrift für internationales und europäisches Recht*, p. 31.

4. The Current Protection Framework: A Multilayered Order

The current international minority protection framework is represented as a multilayered body of rules with one general minority protection norm, which is quasi-universally valid – Article 27 of the International Covenant on Civil and Political Rights – integrated into various regional and bilateral instruments. By the process multilateralism is also applied at the regional level. In fact, the adoption of the European Framework Convention for the Protection of National Minorities in 1995 was a unique historical step: a multilateral, internationally binding agreement was created, which was exclusively dedicated to minority protection. It is interesting to observe that as a result bilateral agreements did not lose their relevance. In turn, different groups of such agreements can be distinguished.

4.1. Historical Bilateral Agreements

Many historical agreements survived over times of unrest and are proof of the fact that minority protection can exist on a long-term basis if the parties involved act in good faith. For example, the 1921 protective instruments in favour of the Swedish-speaking population on the Åland Islands;[6] the Gruber–De Gasperi Agreement of 1946[7] concluded in the interest of the German-speaking population of South Tyrol; and the Bonn–Copenhagen Declaration in 1955,[8] aimed at the protection of the minorities living on both sides of the German–Danish border. Since minority protection has once again become important, especially since 1989, these instruments have become in many respects a source of inspiration for the creation of new ad hoc instruments in both the bilateral and the multilateral contexts. However, these approaches were not simply transposed into a completely different context, but instead the instruments were used much more as

6 See M. Suksi, 'What Can We Learn from the Åland Islands Case?' in D. Thürer and K. Zdzislaw (eds.) *Managing Diversity: Protection of Minorities in International Law* (Schulthess, Zürich, 2009), p. 147.

7 See, as fundamental references: A. Fenet, *La question du Tyrol du Sud – Un problème de droit international* (Pichon&Durand, Paris, 1968) and P. Hilpold, 'Der Südtiroler Weg völkerrechtlicher Stufenlösung im europäischen Vergleich', in S. Clementi and J. Woelk (eds.) *1992: Ende eines Streits. Zehn Jahre Streitbeilegung im Südtirolkonflikt zwischen Italien und Österreich* (Nomos, Baden-Baden, 2003), p. 109.

8 See K. Ipsen, 'Minderheitenschutz auf reziproker Basis – die deutsch-dänischeLösung' in H.-J.Heintze (ed.) *Selbstbestimmungsrecht der Völker – Herausforderung der Staatenwelt* (Dietz, Bonn, 1997), p. 327; and J. Kühl, 'Ein nachhaltiges Minderheitenmodell – Deutsche und dänische Minderheiten beiderseits der Grenze' (2004) 47 *Aus Politik und Zeitgeschichte*, p. 22–27.

reference points in the search for practical solutions, and also as empirical proof of the feasibility of sustainable long-term minority rights protection.

4.2. Bilateral Minority Protection Obligations After the Fall of the Iron Curtain 1989–90

In light of the complexity of the minority situation in central and Eastern Europe, the use of bilateral agreements was demonstrated to be an ideal approach for clarifying particular minority problems, which in a broader context often stood in the way of the development of neighbourliness and friendly relations between states. Typically, such agreements are contained in treaties of good neighbourliness and friendly cooperation.[9] These kinds of agreements, which have been concluded, in particular, between some central and Eastern European states and Western European states,[10] refer to multilateral standards as elaborated in the framework of the Council of Europe and the Conference on Security and Co-operation in Europe/Organization for Security and Co-operation in Europe that consolidate and specify current specific demands.[11]

4.3. Reference to Bilateral Agreement Instruments in Multilateral Agreement Instruments

The most convincing evidence that bilateral minority protection instruments are not only tolerated but also explicitly desired, despite the formal establishment of

9 See A. Bloed and P. van Dijk (eds.) 'Foreword', *Protection of Minority Rights Through Bilateral Treaties* (Brill, The Hague, 1999).

10 Compare, for example, the relevant agreements between the USSR and the Federal Republic of Germany, on 9 November 1990, and between Poland and the Federal Republic of Germany, on 17 June 1991, and between Hungary and the Federal Republic of Germany, on 6 February 1992.

11 For the implementation of these obligations – especially in reference to the dispute resolution mechanism within the stability packets – compare the Venice Commission report about preferential treatment of national minorities by their kin state. 'Report on the Preferential Treatment of National Minorities by their Kin State', CDL-INF (2001), 19–20 October 2001. On the protective function by the kin state, see P. Hilpold and C. Perathoner, *Die Schutzfunktion des Mutterstaates im Minderheitenrecht* (NWV/Ahtesia/BWV/Stämpfli, Berlin *et. al.*, 2006); P. Hilpold and C. Perathoner, 'Die Schutzfunktion Österreichs gegenüber der deutschen und ladinischen Minderheit in Südtirol – eine völkerrechtliche und rechtsvergleichende Analyse' in P. Hilpold, W. Steinmair and C. Perathoner (eds.) *Rechtsvergleichung an der Sprachgrenze* (Peter Lang, Frankfurt, 2011), p. 197–223; as well as F. Palermo and N. Sabanadze, *National Minorities in Inter-State Relations* (Brill/MartinusNijhoff, Leiden, 2011).

a multilateral framework, can be found in the multilateral European conventions set out below.

Article 14 of the European Charter for Regional or Minority Languages states:

> The Parties undertake:
> to apply existing bilateral and multilateral agreements which bind them with the States in which the same language is used in identical or similar form, or if necessary to seek to conclude such agreements, in such a way as to foster contacts between the users of the same language in the States concerned in the fields of culture, education, information, vocational training and permanent education;
> for the benefit of regional or minority languages, to facilitate and/or promote co-operation across borders, in particular between regional or local authorities in whose territory the same language is used in identical or similar form.[12]

The European Framework Convention for the Protection of National Minorities, 1995, refers to the meaning of bilateral agreements for the promotion of minority protection concerns in Article 18:

1. The Parties shall endeavour to conclude, where necessary, bilateral and multilateral agreements with other States, in particular neighbouring States, in order to ensure the protection of persons belonging to the national minorities concerned.
2. Where relevant, the Parties shall take measures to encourage transfrontier co-operation.

Bilateral agreements could also be useful instruments for the implementation of Article 17 of the Framework Convention, which states:

1. The Parties undertake not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage.

12 See, in detail, P. Hilpold and K. Rier, 'Kommentar zu Art. 14 der Charta der Regional – oder Minderheitensprachen' in S. Boysen *et al.* (eds.) *Europäische Charta der Regional – oder Minderheitensprachen* (Dike/Facultas/Nomos, Zürich/Wien/Baden-Baden, 2011), p. 349.

2. The Parties undertake not to interfere with the right of persons belonging to national minorities to participate in the activities of non-governmental organisations, both at the national and international levels.[13]

Compliance with these provisions is ensured by the respective monitoring bodies of both instruments. It is often suggested that these instruments be used to offer protection to vulnerable groups such as the Roma.[14]

5. The Role of CSCE/OSCE

Very early on the CSCE/OSCE recognized the impact of bilateral agreements on the development of effective minority protection. The conclusions reached at the Meeting of Experts on National Minorities, in Geneva in 1991, were pivotal. Point III, paragraph 2, of the report of this CSCE meeting contains the following observation:

> They [the participating States] consider that special efforts must be made to resolve specific problems in a constructive manner and through dialogue by means of negotiations and consultations with a view of improving the situation of persons belonging to national minorities. They recognize that the promotion of dialogue between States, and between States and persons belonging to national minorities, will be most successful when there is a free flow of information and ideas between all parties. They encourage unilateral, bilateral and multilateral efforts by governments to explore avenues for enhancing the effectiveness of their implementation of CSCE commitments relating to national minorities.

In June 2008, the Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations confirmed this objective in point 18:

> States are encouraged to conclude bilateral treaties and make other bilateral arrangements in order to enhance and further develop the level of protection for persons belonging to national minorities. These mechanisms offer vehicles through which States can share information and concerns, pursue interests and ideas, and further support

13 See on both provisions, J. Jackson-Preece, 'Commentary to Art. 17 and Art. 18' in M. Weller (ed.) *The Rights of Minorities* (Oxford University Press, Oxford, 2005), p. 487.
14 See Hilpold and Rier, *supra* note 12.

minorities on the basis of friendly relations. A bilateral approach should follow the spirit of fundamental rules and principles laid down in multilateral instruments.

6. Conclusion

It can be concluded that, overall, the bilateral approach to modern minority rights protection is vital and essential. Multilateral standards for regional and local levels can be adapted and refined through bilateral instruments. Conversely, experience gathered regionally and locally can be used also at the multilateral and the universal levels. At present, the bilateral approach is still managed rather cautiously, although fears regarding its use are overexaggerated. It is unlikely that these instruments will grant overextensive rights and privileges, as some commentators and politicians fear. It is instead the contrary that is to be feared: bilateral agreements often provide for fewer and lower standards, thus undermining and diluting previously established multilateral achievements. This danger can be efficiently counteracted only if multilateral standards are considered as the absolute minimum level of protection which has to be respected in any case.

It is an unrealistic assumption that bilateral treaties could result in excessive side-taking in favour of single minorities or pose a threat to the sovereignty of participating states.[15] The relevant treaties are concluded by mutual agreement, and thus voluntarily, and if individual minorities are granted special, preferential legal treatment, these rules are an expression of the fact that protection is an urgent necessity.

Another aspect to be taken into account is that what is in the beginning perceived as a point of conflict between individual states can often become a vehicle for mutual rapprochement. The international treaties are ideal instruments to create a broad basis upon which to build trust and mutual understanding. A minority problem solved can constitute the basis for a comprehensive dialogue about issues that concern neighbouring states. An agreement might be followed by the necessity to establish regular contact, thus offering a further opportunity for a comprehensive rapprochement.[16]

Within the League of Nations minority protection framework – being in many aspects a very progressive set of instruments – the demand for protection could

15 It seems that Max van der Stoel placed too much emphasis on these aspects. See M. van der Stoel, 'Minority Rights, Participation and Bilateral Agreements', speech made on 4 December 2000 in Zagreb (Croatia), (manuscript).

16 In this context, joint commissions, which are not only responsible for the implementation of these agreements but are also commonly involved in leading trust-building processes, are regularly assigned to bilateral agreements.

not be effectively met as the many bilateral agreements were inadequately rooted in a broad framework. Luckily, the requirements under which modern minority rights are applied are now completely different.

In 2005 the General Assembly of the United Nations explicitly approved the Responsibility to Protect (R2P) concept. On the one hand, the primary responsibility of the state to protect its population (and also its minorities)[17] was emphasized and, on the other hand, the responsibility of the community of states was also stressed, even though this responsibility is of a subsidiary nature.[18] The concluding of bilateral protection agreements is an ideal method for the implementation of such R2Pstandards.

17 See para. 130 of the outcome document of the 2005 World Summit of Heads of State and Government, in which the meaning of minority protection for the international community of states is emphasized: 'We note that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to political and social stability and peace and enrich the cultural diversity and heritage of society.'

18 For the concept of Responsibility to Protect, see: P. Hilpold, 'The Duty to Protect and the Reform of the United Nations – A New Step in the Development of International Law?' in A. von Bogdandy and R. Wolfrum (eds.) *Max Planck Yearbook of United Nations Law*, Vol. 10 (Brill/MartinusNijhoff, Boston/Leiden, 2006), pp. 35–69; P. Hilpold, 'From Humanitarian Intervention to Responsibility to Protect: Making Utopia True?' in U. Fastenrath *et al.* (eds.) *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press, Oxford, 2011), p. 462; as well as P. Hilpold, 'Die Schutzverantwortung im Recht der Vereinten Nationen (Responsibility to Protect) – auf dem Weg zur Etablierung eines umstrittenen Konzepts?' (2011) 21 *Schweizerische Zeitschrift für internationales und europäisches Recht* 2, p. 231; and P. Hilpold, 'Intervening in the Name of Humanity: R2P and the Power of Ideas' (2012) 7 *Journal of Conflict and Security Law* 1, pp. 49–79.