

The League of Nations and the Protection of Minorities – Rediscovering a Great Experiment

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Abstract

After World War I the far-reaching border changes in Europe created a large number of new minorities. As a consequence, special protection measures had to be introduced. With the League of Nations' minority protection system an extraordinary experiment was started. After World War II this system was largely ignored and fell into oblivion.

In the past all too easily the minorities themselves were held responsible for the failure of this system. In this context it is often said that minorities behaved in a disloyal manner and therefore it was at least understandable that minority states over the years treated their minorities badly and finally denounced their obligations. In reality, however, such an attitude rests on a radical misinterpretation of the loyalty principle and on a denial of historic facts. All in all, the ideas and concepts of these times live on and are shaping modern human rights thinking.

Keywords

Minority Protection; League of Nations; Human Rights; Kin-States; Paris Peace Treaties

I. Introduction

Nearly a century ago an extraordinary experiment¹ was undertaken in Europe to solve an acute human rights problem and to overcome the

¹ See the sub-title of the book by P. de Azcárate, *League of Nations and National Minorities – An Experiment*, 1945. On this experiment see further H. Kraus, *Das Recht der Minderheiten*, 1927; A. v. Balogh, *Der internationale Schutz der Minderheiten*, 1928; H. Wintgens, *Der völkerrechtliche Schutz der nationalen, sprachlichen und religiösen Minderheiten*, 1930; J. Stone, *International Guarantee of Minority Rights*, 1932; C.A. Macartney, *National States and National Minorities*, 1934; J. Robinson et al., *Were the Minorities Treaties a Failure?*, 1943; I. Claude, *National Minorities – An International Problem*, 1955. A ground-breaking analysis, that brought this system back to international attention, was published by Ch. Gütermann, *Das Minderheitenschutzverfahren des Völkerbundes*, 1979. Now and then academic interest returns to the League of Nations as a whole and in this

nationalistic spirit which had become rampant as a consequence of the Great War.

In 1919 and the immediate aftermath a series of instruments for the protection of persons belonging to minorities was set in motion. Within a few years a sophisticated edifice of norms was built up which suggested that a new era of relations between state and individuals had begun. The whole experiment lasted about two decades. Most minorities that had temporarily benefitted from this system suffered a tragic fate so that in hindsight one may be tempted to say that it would have been better for them if they had never been involved in this project at all. It is surprising to see that after 1945 this whole system fell almost entirely into oblivion and also that academic interest in this subject, so high in the interwar period, sharply declined not to say almost evaporated.

Even more distressing is the fact that the protected minorities, in a cynical move, were themselves accused of having destroyed this system by bringing forward exorbitant demands or by behaving in a disloyal manner. When this criticism was levelled most minorities which were the subject of these accusations no longer existed. Nonetheless, as will be shown, this whole experiment was not in vain. First of all, human rights thinking in the second half of the 20th century was very much influenced by the gained experience even though these foundations often

context the minority protection system of this order is also regularly treated; see, for example, R. Veatch, "Minorities and the League of Nations", *The League of Nations in Retrospect*, 1983; C. Brölmann, "The PCIJ and International Rights of Groups and Individuals", in: Ch. Tams/M. Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice*, 2013, 123 et seq.; E.K. Jenne, "Nested Security and the League Minorities Regime: Lessons from Conflict Management in Interwar Europe", in: *Towards a New History of the League of Nations* (to be published). See further S. Sierpowski, "Minorities in the System of the League of Nations", in: P. Smith et al. (eds), *Ethnic Groups in International Relations*, 1990, 13 et seq.; R. Jaworski, *The German Minorities in Poland and Czechoslovakia in the Interwar Period*, 1990, 169 et seq.; N. Berman, "But the Alternative is Despair: European Nationalism and the Modernist Renewal of International Law", *Harvard Law Review* 106 (1993), 1792 et seq.; P. Hilpold, "Minderheitenschutz im Völkerbundsystem", in: Ch. Pan/ B.S. Pfeil (Hrsg.), *Zur Entstehung des modernen Minderheitenschutzes in Europa*, 2006, 156 et seq.; C. Schmid, "The Minority Protection System of the League of Nations and the Central and Eastern European States", *Baltic Yearbook of International Law* 7 (2007), 35 et seq.; A. Meijknecht, "Minority Protection System between World War I and World War II", *Max Planck Encyclopedia*.

remained unacknowledged. Second, this two-decade long practice offers a wealth of insights into the intricacies of minority and human rights protection that are still of relevance for modern day situations. Therefore, renewed academic interest in this episode could be highly rewarding. A thorough study of the historical and legal circumstances of this experiment is required to do justice to the victims of its demise who were primarily the minorities themselves. As will be shown, hypocrisy still obfuscates the sight on this period thereby also hampering the development of an effective minority protection system up to the present day.

II. The Coming into Being of the League's Minority Protection System and the Problem of its Selective Nature

Viewed from hindsight it seems almost unbelievable that such a sophisticated minority protection system as that of the League of Nations could come into existence almost casually and by way of accident. The higher moral ground of the Entente's fight against the Middle Powers, and in particular of the decisive side-taking in this struggle by the United States, was found in the quest for self-determination of European nations.² During after-war peace negotiations it became clear, however, that a re-drawing of European borders according to the nationality principle was not feasible. Not only were the various nationalities too intermingled for objective elements for clear border lines to be found but also the concept of national belonging proved to be heavily influenced by subjective considerations and open to conflicting definitions. Furthermore, peace negotiations were characterized much more by the traditional *vae victis*-principle than by the pursuit of bringing to life a new objectively-fair self-determination principle.³ If the victorious

² This was made evident by U.S. president Wilson's fourteen points proclaimed 1918, even though the term "self-determination" was not used in the respective text, see P. Hilpold, "Self-Determination in the 21st Century – Modern Perspectives for an Old Concept", *Isr. Y.B. Hum. Rts* 36 (2006), 247 et seq.; P. Hilpold, "The Right of Self-Determination: Approaching an Elusive Concept through a Historic Iconography", *Austrian Review of International and European Law* 11 (2006), 23 et seq.

³ Personal biographies may have further influenced this specific development of peace negotiations. As is known, at the beginning of the Paris Peace

states were not to totally betray their officially declared principles they had to impose some guarantees on those states that had gained territories with larger populations that pertained ethnically, culturally or linguistically to the defeated states.

With regard to Poland, minority protection assurances became a condition *sine qua non* for its constitution. The Treaty between the Principal Allied and Associated Powers and Poland signed at the Peace Conference of Paris on 28 June 1919 became the blueprint for the Minority Treaties to be concluded, with the Serb-Croat-Slovene state (10 September 1919), Czechoslovakia (10 September 1919), Romania (9 December 1919) and Greece (10 August 1920). With regard to some states minority obligations were inserted in the General Peace Treaties, e.g. with regard to Austria (St. Germain-en-Laye, 10 September 1919), Bulgaria (Neuilly-sur-Seine, 27 November 1919), Hungary (Trianon, 4 June 1920) and Turkey (Lausanne, 24 July 1923).

In other cases minority protection obligations were accepted outside the Peace Treaties, as in two special Conventions (Part III German-Polish Convention relating to Upper Silesia of 15 May 1922 and the Convention concerning the Territory of Memel of 8 May 1924) and in a series of unilateral Declarations made by several states (Albania 2 October 1921, Estonia 17 September 1923, Finland 27 June 1921, Latvia 7 June 1923, Lithuania 12 May 1922) to the Council of the League of Nations.⁴ In 1932, Iraq, at the moment of joining the League of Nations accepted minority obligations. This was the only case where the League's minority protection system took effect, at least theoretically, outside Europe.⁵

Assuming minority obligations as a prerequisite for international recognition could have constituted an important precedent. In reality, it remained a rare exception.⁶ Observance of this whole system was very uneven, from its inception until its end, in the obligated states.

Conference of 1919 U.S. President Wilson became ill and was side-lined by his European counterparts, in particular by French President Clemenceau who was more driven in his attitudes by the intent to obtain the utmost of reparations from Germany (not to say by the spirit of revanchism, very strong at that time in France), than by the will to implement American ideas of democratic self-determination.

⁴ For a system of these obligations see Hilpold, see note 1, 160 et seq.

⁵ In practical terms, this obligation had no actual relevance.

⁶ On the assumption of minority obligations as a prerequisite for recognition see H. Lauterpacht, *Recognition in International Law*, 1948, 357 et seq.; J.

This was already the case with the Treaty with Poland of 1919. The Polish Prime Minister *Paderewski* had opposed the assumption of minority protection obligations and he had to be convinced by the French Prime Minister *Clemenceau* that this limitation of Polish sovereignty was unavoidable. The arguments expressed in the context of a famous exchange of letters say much about the attitude taken by Governments towards minority rights, as well as about the general political framework within which such provisions had to operate. While *Paderewski* deplored the, according to his view, one-sidedness of these obligations and the undue limitation of the newly gained sovereignty, *Clemenceau* clearly spelled out that Poland had to make concessions for the benefit of the overall European security. He tried hard to demonstrate that international minority protection provisions such as Poland had to assume were not as new and as singular as *Paderewski* wanted to portray.⁷ What was new, rather, was the fact that an international institution like the League of Nations assumed the obligation to control the implementation of these obligations. *Clemenceau* very lucidly portrayed the advantages of this new system in an analysis that could be transferred point by point to the modern international human rights system.⁸

This international guarantee, called also the “League of Nations’ Guarantee” was an unique achievement as it endowed an international institution with a supervisory role for a human rights issue. At the same time it marked a new state of development of international law by attributing new powers to an international organization previously held only by sovereign states.⁹

The relevant stipulation usually took the following form,

Crawford, *The Creation of States in International Law*, 2006, 545; P. Hilpold, “Die Anerkennung der Neustaaten auf dem Balkan. Konstitutive Theorie, deklaratorische Theorie und anerkennungsrelevante Implikationen von Minderheitenschutzfordernissen”, *AVR* 31 (1993), 387 et seq.

⁷ In fact, already at the Conference of Berlin of 1878 obligations of this kind were imposed on a series of countries newly constituted in the Balkans.

⁸ “Under the older system the guarantee for the execution of similar provisions was vested in the Great Powers. Experience has shown that this was in practice ineffective, and it was also open to the criticism that it might give to the Great Powers, either individually or in combination, a right to interfere in the internal constitution of the States affected which could be used for political purposes. Under the new system, the guarantee is entrusted to the League of Nations.”

⁹ See on this development M. Hudson, *Progress in International Organization*, 1932.

“... agrees that the stipulations in the foregoing Articles, so far as they affect persons belonging to racial, linguistic or religious minorities, constitute obligations of international concern and shall be placed under the guarantee of the League of Nations.”

Two important advantages should be associated with this new system,

- Unilateral interferences by kin-states should be rendered unnecessary if not outright excluded.
- Supervision and implementation of minority rights should become more effective as they were to be exercised by an impartial institution which should not make action dependent upon political considerations which had been of great importance in the past when states had to decide whether to criticize human rights abuses in foreign jurisdictions.

As will be shown below, these hopes could be fulfilled only in part. The League of Nations, although being a genuine international organization, had not emancipated itself sufficiently from the sovereignty of its Member States. It was often also the mentality of its officials, caught as it was by a thinking which paid extreme tribute to the traditional concept of state sovereignty, that prompted the League to act overcautiously and even display bias towards state interests.

It is also interesting to note that *Clemenceau* tried to justify the introduction of minority obligations by pointing at the benefits it provided for state security and not at the advantages it entailed for minorities,¹⁰ a move that could appear cynical from a present-day perspective but which can be explained as a diplomatic expedient when the difficult situation in the immediate after-war period is kept in mind.

One central justification why minority obligations were so much resented by states being obligated with such duties rested on the fact that the burden was considered to be distributed unevenly. And in fact, attempts to create general minority protection rules were made already at the birth of this system and they continued until its death. Some of these attempts were undertaken in true faith and having in mind a genu-

¹⁰ Clemenceau wrote the following: “Unfortunately, the races have been estranged by long years of bitter hostility. It is believed that these populations will be more easily reconciled to their new position if they know that from the very beginning they have assured protection and adequate guarantees against any danger of unjust treatment or oppression.”

ine improvement of the system. In other cases the purpose was of the opposite nature.

In the opinion of U.S. President *Wilson* a minority protection clause should already have been inserted in the text of the League of Nations Covenant, binding, however, only new states seeking recognition and admission to the League. These proposals were first formulated as a general prohibition of discrimination of racial and religious minorities and later restricted to the protection of religious minorities. Both proposals were rejected as they were perceived to be discriminatory for introducing a two-class international society where only newly created states should be burdened with minority protection obligations.¹¹ Some seventy years later this discussion had a sequel in the EC context when Member States had to resolve how to deal with the quest for recognition by a series of newly constituted states in Eastern Europe and in the Soviet Union. In this context they have requested “guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE” as a pre-condition for recognition.¹²

Furthermore, on this occasion the criticism voiced in 1919 was echoed and it was deplored that the EC used a different yardstick to assess the constitutional orders of states inside and outside the Community and that conditions were to be imposed on newly constituted states that the Member States were themselves not prepared to fulfil. A closer look, however, shows that the two situations of 1919 and 1991 were quite different. Contrary to the time after World War I, towards the end of the 20th century in Europe a system of fundamental rights protection, both nationally and via international obligations, was in place. Several EC Member States had made pivotal contributions for the further development of minority law¹³ and even those, such as France, which rejected the concept of minority protection had a strong fundamental rights protection in place that excluded any form of discrimination of persons for their belonging to a minority group.

¹¹ On the various proposals presented in the context of this discussion, see Kraus, see note 1, 40 et seq.

¹² Extraordinary EPC Ministerial Meeting, Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union of 16 December 1991, Doc. S/23293 of 17 December 1991, Annex II.

¹³ For an elaboration on the contribution given in particular by Austria and Italy see P. Hilpold, *Modernes Minderheitenrecht*, 2001.

In the Balkans and in Eastern Europe the situation was quite different. With regard to the formal legal framework it was not yet clear what attitude these newly constituted states would take with regard to minority protection. On the factual level, ethnic and religious hatred and violence that accompanied the transformations in this region seemed to bode ill in this regard. In other words: in 1991, there was a great gulf as to the treatment of minorities, and in general as to fundamental rights protection, both in and outside the EC. By imposing the conditions mentioned the EC wanted to make sure that the European *ordre public* would not be destabilized by the integration of new members diluting or even opposing the high standards of fundamental rights protection achieved in Europe. This seemed to be even more important if one considers the disruptive forces that ethnic conflicts harboured. The conditions mentioned were therefore to be seen also as a guarantee for the preservation of European security.

In 1919, on the contrary, no general fundamental rights protection was in place, neither in Europe nor elsewhere, but there was also a fundamental disparity of treatment between states with new minority situations resulting from the re-drawing of European borders. For example, no minority protection obligations were imposed on France, a state which gained with the annexation of Alsace Lorraine in 1919, a predominantly German speaking population.¹⁴ Even more appalling was the fact that Italy was not expected to assume any minority protection obligations even though extensive territories with large German and Slovene speaking minority populations had been ceded to Italy. In the case of South Tyrol the German speaking population totalled over 90 per cent of the population but nonetheless this territory was attributed to Italy without any referendum being held. The Italian representatives at the Peace Conference successfully resisted any attempt to impose minority protection obligations on Italy, one of the main arguments being that Italy was one of the core victorious powers. While the Italian king *Vittorio Emanuele I* had assured the populations of the newly gained provinces respect of their rights, reality was characterized

¹⁴ On the contrary, the French Government enacted a policy of expulsion and of forced assimilation. More than 100.000 “Germans” had to leave the country, see H. Thoß, “Purifier – centraliser – assimiler’ – Reannexion und Vertreibung im Elsaß und in Lothringen nach 1918”, in: F.L. Kroll/ M. Niedobitek (Hrsg.), *Vertreibung und Minderheitenschutz in Europa*, 2005, 281 et seq.

by harsh repression, especially after the Fascists came to power in 1922 which also led to international protest.¹⁵

By 1924 thirteen states had assumed minority protection obligations and a special, very detailed protection framework was in place for Upper Silesia.¹⁶ At its peak, sixteen states were obligated by this system. Requests for a general minority protection system continued to be advanced until the actual end of this order.¹⁷ It was exactly such a demand that set the final death blow to this system: on 13 September 1934 the Polish Minister for Foreign Affairs, *Józef Beck*, denounced the collaboration of his country with the League's organs in minority questions until a uniform international minority protection system was introduced.¹⁸ It was obvious that Poland, by setting a condition that was so unrealistic at that time, sought nothing more than a cheap justification for terminating its obligations.

Taking stock of this situation, it can be said that the birth defects of this system were many; first of all its haphazard, selective nature that was much more informed by the intent to find a general post-war settlement that would be severe towards the defeated nations than by an effort to really protect and to advance minority rights on a general scale. By far the greatest shortcoming of this system lay in the fact that it could not be anchored upon a general human rights system. As a consequence, debates about this system soon fell back to a logic of *do ut des* and of considerations of reciprocity so inimical to human rights issues. Nonetheless, as will be shown below, the potentiality lying within this order was enormous and the fact that it could not be used constitutes a great historic admonition for present-day reality. Finally, it should not be overlooked that many fundamental achievements of our present human rights system can be traced back to the interwar endeavours to constitute a sustainable minority protection system. It was the

¹⁵ See only L. Mair, *The Protection of Minorities*, 1928.

¹⁶ Veatch, see note 1, 368. Germany was bound by protection obligations only in relation to Upper Silesia, a fact much criticized in particular by Poland.

¹⁷ Latvia asked for a generalization of the system in 1922, Lithuania followed in 1925. This request was generally justified by the following consideration: if minority protection was useful then it should apply to all states with minorities, or else to none, see K. Rabl, "Minderheitenschutz in der Völkerbundära", in: Th. Veiter et al. (Hrsg.), *System eines internationalen Volksgruppenrechts*, 1972, 97 et seq. (103).

¹⁸ See Sierpowski, see note 1, 13 et seq.

tragedy of history that those groups that had to pay the price for the elaboration of basic human rights concepts could not benefit from them.

III. The Material Content of the Relevant Provisions and the Further Development of the League's Minority Protection System on the Procedural Level

With regard to the material content of the minority protection obligations assumed by the various states there was a common core made up by the following.¹⁹ First of all, the instruments contained provisions on the acquisition of nationality. At that time, nationality of the newly created states was to a large extent the prerequisite for enjoying minority rights and even for allowing members of minorities to remain in these states. The relevant provisions tried to facilitate the acquisition of nationality to the utmost extent possible and in any case to avoid statelessness. Thus, citizenship had to be granted both to persons habitually resident in the transferred territory or possessing rights of citizenship there when the Treaty came into force and to persons born in the territory of parents domiciled there at the time of their birth, even if they were not themselves habitually resident there at the coming into force of the Treaty. At the same time also a right to opt in favour of the kin state's citizenship was to be awarded to minority members, this time associated with the obligation to take residence in the state for which the option was expressed.

With regard to the substantive rights, the minority instruments contained, first of all, a right to equality (before the law, of civil and political rights, equality of treatment and security in law and in fact) applicable to all citizens. They were protected from discrimination with regard to admission to public employment, functions and honours or the exercise of professions.

In relation to the important area of education they had the right to establish and to manage, at their own expense, schools and other educational establishments. Similar rights were granted in the field of religion. In towns and districts with a considerable proportion of minority members they should have the right to primary education in the minor-

¹⁹ See the overviews contained in de Azcárate, see note 1, 172 et seq.; Robinson, see note 1, 85 et seq.

ity language and for the allocation of an equitable share of the public funds devoted to educational, religious, or charitable purposes. The official language could nonetheless be made a compulsory part of the educational curriculum.

With regard to language rights, minorities were granted the right to the free use of their language in private intercourse, in commerce, in religion, in the press or in publications of any kind, or at public meetings. Some Minority Treaties went even beyond granting autonomous rights.²⁰ On the whole, the rights granted were both of an individual and a collective nature.

Some Treaties (in particular those with Greece, Poland and Romania) contained special undertakings for the Jews. With regard to this group it should be noted that Jewish intellectuals and politicians had a considerable influence on the creation of the League's minority protection system. Already during the war, Jewish associations made preparations for the after-war period when borders in Central and Eastern Europe, where large Jewish populations resided, would be redrawn. In view of age-old records of persecution Jewish populations wanted to prevent a further deterioration of the situation and prepare, on the other hand, for a better future. The "Committee of the Jewish Delegations at the Paris Peace Conference" gave important contributions to the drafting process of the minority instruments.²¹ The Jewish Delegation

²⁰ The treaty with Czechoslovakia granted autonomy to the Ruthenes of the Carpathians, the treaty with Romania granted autonomy in religious and educational matters to the Szeklers and the Saxons of Transylvania and the treaty with Greece granted autonomy in religious, welfare and educational matters. The most successful autonomy regulation was that granted to the Ålanders by Finland, see P. Thornberry, *International Law and the Rights of Minorities*, 1991, 43 et seq. The autonomy for the Åland Islands is the only surviving element of the League system and to this day a primary reference point in any discussion on successful autonomy models. On the Åland case see L. Hannikainen, "The continued validity of the demilitarised and neutralised status of the Åland Island", *ZaöRV* 54 (1994), 614 et seq.; A. Spilioupoulou Akermark, "The Åland Islands in International Law and Cooperation: The Legal Capacity of an Autonomous Region", in: L. Hannikainen/ F. Horn (eds), *Autonomy and Demilitarisation in International Law: The Åland Islands in Changing International Context*, 1997, 257 et seq.; M. Suksi, "What can we learn from the Åland case?", in: D. Thürer/ Z. Kedzia (eds), *Managing Diversity*, 2009, 147 et seq.

²¹ According to H. Wintgens, *Der völkerrechtliche Schutz der nationalen, sprachlichen und religiösen Minderheiten*, 1930, 116, the memorandum presented by the Committee of Jewish Delegations of 10 May 1919 was the

tions tried to find approval for provisions catering for the specific needs of Jews by couching them in general protective instruments. Nonetheless, Jewish minorities were treated rather badly in the interwar period and the League's minority protection system could not help in any way to prevent the holocaust.

Alongside the material provisions, the minorities' protection system created within the League's legal order provided for procedural norms that were mostly created only after the system had already come into being.²² In the Treaties procedural aspects were treated only in a very rudimentary form.

The above-mentioned "guarantee clause" contained in the minority instruments entailed three specific rights,

- Any member of the Council of the League could bring any infraction, or any danger of infraction, of any of the obligations contained in the Treaties to the attention of this organ.
- The Council had the right to take such action and give such direction "as it may deem proper and effective in the circumstances".
- Any member of the Council of the League had the right to refer to the PCIJ any difference of opinion as to questions of law or fact arising out of the instrument's minority provisions.²³

It may be true that these provisions were revolutionary for that period and that they may even have "forced the widest breach which has ever been made in that granite-like structure known as national sovereignty", as one of the most renowned experts in this field has written.²⁴ Nonetheless, this system had two fundamental flaws,

- It was unrealistic to pretend that Council members would accuse each other of infractions in a systematic way as they occurred. In fact, practical experience demonstrated that usually Governments

most important document for the drafting of the Minorities Treaties. It asked for constitutional guarantees and for "potential sanctions on the part of the League of Nations" in case of violations of minority rights, see S. Sierpowski, "Minorities in the System of the League of Nations", in: P. Smith (ed.), *Ethnic Groups in International Relations*, 1991, 13 et seq. (14). Also the appalling situation of Jews especially in Eastern Europe was very much present to U.S. President Wilson and was a decisive reason for him to insist on the granting of minority rights.

²² This was the so-called "procedure non-écrite".

²³ See de Azcárate, see note 1, 96 et seq.

²⁴ *Ibid.*, 97.

took such a step only if ulterior interests were at stake. Council members acted primarily if the interests of kin minorities were involved. This explains, for instance, why Germany, for a long time, was the only Council member acting in this regard: only three inter-state complaints were presented in the years between 1929 and 1932 and all came from Germany.²⁵

In this regard, an interesting parallel can be drawn to the procedural provisions of human rights instruments conceived after 1945. As it is known, many of these instruments provide for inter-state complaints.²⁶ In practice, however, these complaints mechanisms were rarely made use of, exactly because Governments usually feared to lose the good-will of other nations if they criticize their behaviour in the human rights area (and in particular via an instrument that was considered so offensive, such as an official complaint).²⁷

²⁵ As Macartney, see note 1, 313 has evidenced these petitions were a mixed blessing to minorities: in the specific case they had useful effects but from an overall point of view they contributed heavily to the deterioration of the relevant political climate.

²⁶ See, *inter alia*, article 41 ICCPR; article 21 CAT; article 11 CERD; article 33 ECHR and article 45 American Convention on Human Rights.

²⁷ This is true, both if Governments act as kin-states or in the way of an *actio popularis*. As is known, inter-state complaints had some success within the system of the ECHR but even in this context, such complaints led repeatedly to extreme irritations. One case, the “Pfunders” case, even regarded a minority issue: when Austria brought a complaint against Italy before the European Commission of Human Rights because of the latter’s violation of procedural rights of minority members in criminal proceedings (see Eur. Comm. HR, *Austria v. Italy* (“Pfunders” case), Appl. No. 788/60, *Yearbook of the ECHR*, Vol. 4, 1961, 116), the political climate between these two countries deteriorated dramatically. Austria met with harsh resistance by Italy in its attempt to join the EEC and had to re-orient itself in the following in its attempts to become part of a larger integration zone. In the context of the case mentioned, the European Commission of Human Rights made, however, an important statement as to the nature of human rights protection: “the purpose of the High Contracting Parties in concluding the convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests, but to realize the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe (...). [The] obligations undertaken by the High Contracting Parties in the European Convention are essentially of an objective character, being de-

- Further, if a member of the Council managed to bring a minority issue to the attention of the Council, enormous hurdles existed before the Council could authorise action. In fact, in this still very sovereignty-oriented period the League’s Council took decisions by unanimity (see article 5 of the Covenant) and therefore the state against which the petition was directed, if represented on the Council, could block any decision to take measures.

It was recognized at an early period that this system had to be rendered somewhat more flexible.

With regard to the first point of criticism, this happened in 1920 by the so-called *Tittoni Report*²⁸ which opened the way for minority members (and minority associations) to bring any infraction, or danger of infraction of the Treaties, at least informally, to the attention of the Council. In a rather extensive interpretation of the guarantee clause the *Tittoni Report* found a respective loophole,

“Evidently this right does not in any way exclude the right of the minorities themselves, or even of States not represented on the Council, to call the attention of the League of Nations to any infraction or danger of infraction. But this act must retain the nature of a petition, or a report pure and simple, it cannot have the legal effect of putting the matter before the Council and calling upon it to intervene.”

The Council could therefore take notice of this information and subsequently take action as it deemed proper. In this regard it was not dependent upon the action of a member of the Council; it could practically use any information from any source. The petition could be a rather informal act, also as to its designation.²⁹ The Secretary-General had only to examine whether the following requisites were given,

signed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves”, *ibid*. Viewed from this perspective, inter-state complaints should be less problematic than they actually were.

²⁸ This report, named according to its author, the Italian Foreign Minister and Italian representative at the Council, *Tommaso Tittoni*, was adopted by the Council on 22 October 1920.

²⁹ In fact, many different designations were used such as petition, demand, request, memorial - “*mémoire*” or plaint - “*plainte*”, see Balogh, see note 1, 238.

- The petition had to concern a minority right conferred by the respective protection instrument.
- Its aim had not to be the severing of the political ties between the minority and the home state (i.e. it had not to aim at secession).
- The author of the petition should not be anonymous or unauthenticated.
- It had not to be drafted in an offensive language.
- The information and the facts indicated in the petition had to be different from those in recently presented petitions.
- The exhaustion of local remedies was not necessary.³⁰

In many ways these conditions resemble present-day prerequisites for the lodging of a complaint with international human rights bodies. Other elements, however, mirrored a totally different legal reality as they emphasized state sovereignty in a way that would seem anachronistic today. Only the fact that no exhaustion of local remedies was needed seemed to be the expression of the opposite philosophy. In reality, however, thereby it only took notice of the fact that many of the legal orders concerned did not offer sufficient guarantees for redress once a minority obligation had been violated.³¹ The modern local-remedies-concept is, on the other hand, an expression of an enormous strengthening of constitutional guarantees that should make reference to an international treaty body the absolute exception.

The fact that the individual had no *locus standi* in a formal sense came fully to bear again once the petition had been lodged. In fact, the individual obtained a receipt from the Secretary-General for the petition presented but afterwards he was totally left in the dark about the further procedural steps taken by the Council. This rule was changed only in 1929 where after the petitioners were at least notified by a communication of non-receivability, if such was the case.

³⁰ Ibid., 240.

³¹ This was the case even though the Signatory States had assumed the obligation to attribute to the substantive stipulations of the Minority Treaties the character of fundamental laws that should prevail over any law, regulation, or official act. See article 1 of the Polish Minority Treaty. Once a Signatory State was not prepared to accept the prevalence of a treaty stipulation with regard to a specific norm of national law it could be assumed that it was not prepared to accept prevalence with respect to a higher ranking national norm either.

The number of petitions declared to be receivable was rather high; at 55 per cent of all petitions presented.³² After having been declared receivable, the petitions were examined by a Committee of three Council representatives (Committee of the Three, Minorities Committee)³³ and the Minority Section of the League's Secretariat giving important technical assistance. The League's representatives and advocates took great pride in the fact that representatives of the accused state could not form part of this Committee. It was, however, not excluded that representatives of other states having minority problems would form part of this body. Investigations were conducted in close cooperation with the accused state. The petition was sent to the respective state which had two months to respond; a time period seldom respected. Afterwards, the Government's observations as well as the petition itself were circulated among all Council members. No doubt this measure was not merely a procedural step that would lead at a further stage to the implementation of the minority protection obligations. It is rather to be seen, to a considerable extent, as implementation as such. This early form of "naming and shaming" proved to be very effective. For several states it was in fact too effective, so that they insisted successfully in restricting the circulation to the mere Council members whereas until 1923 these documents were circulated in the Assembly and were therefore available for all League Member States.³⁴

Legally, it would have been up to the Council to take action if the investigation procedure had revealed a Treaty infraction. For the reasons given (unanimity required within the Council for such a measure) it was practically impossible to take such a step. Pragmatism showed a way out of this dilemma. It was recognized that merely placing the issue on the agenda of the Council for discussion could be a powerful remedial action and deterrent with regard to further infractions. There were substantially two ways this could happen. As demonstrated, according to positive law it would have been up to the individual Council members to bring such an issue to the attention of the full Council. This happened, however, only as an absolute exception: in three cases filed by Germany against Poland up to 1933.³⁵ The situation where the

³² See Veatch, see note 1, 372.

³³ As of 1929, as a consequence of the so-called Madrid Resolution, this number could be enlarged, on specific request, to five.

³⁴ The countries that had fought for this restriction were Poland and Czechoslovakia, see Veatch, see note 1, 372. See also under IV. below.

³⁵ *Ibid.*, 374.

Committee of the Three involved the Council with the petition, was one not even provided for by the Treaties but it proved to be the best solution as it needed no direct involvement of individual states and was most face-saving for the accused state.

Overall, the Committee of the Three as well as the Minority Section of the Secretariat operated in an extremely discreet way. Publicity was sought only as a measure of last resort, the conviction being that the primary goal should be to find a solution for the concrete problem at hand and to this end the accused state should not be alienated. Good reasons pleaded for such an attitude. First of all, as already evidenced, thinking in categories of sovereignty was very pronounced at that time and the feeling of the states burdened by minority obligations of having been treated unevenly raised further sensitivities. Furthermore, many of these states had just gained sovereignty and it is a common experience, repeated also after World War II in the context of decolonization, that new sovereignties demonstrate particular susceptibility with regard to actual or perceived infractions.³⁶ On the other hand, diplomatic secrecy gave rise to a multitude of suspicions, even of a contradictory nature. While minorities could get the impression that their petition had simply been ignored and that the League of Nations was indifferent to their woes, the accused states often felt to be unfairly singled out for criticism and to be under undue and excessive scrutiny. In the meantime, the Committee of the Three (or, respectively, the Committee of the Five) and in particular the Minority Section of the Secretariat often tried hard to hammer out a solution acceptable to both parties. It stands to reason that any such solution could only be sort of a compromise leaving all parties to some extent disappointed.

In 1929, with the so-called Madrid Resolution,³⁷ the Council further improved the rules of procedure. The respective improvements had been sponsored in particular by the Canadian Government as well as by Germany and its Foreign Minister *Gustav Stresemann* who had fought

³⁶ See, in this context, also the discussion about the constitution of an “New International Economic Order”. For an excellent contribution on this subject see Th.W. Waelde, “A Requiem for the ‘New International Economic Order’”, in: G. Hafner et al. (eds), *Liber Amicorum Ignaz Seidl-Hohenveldern*, 1998, 771 et seq. As Claude, see note 1, 40 stated, “[n]ewly liberated people, succumbing to the temptation to seek vengeance for past wrongs, seized upon the pretext of eliminating the special privileges which some minorities held as vestiges of their bygone hegemony in order to reduce those minorities to impotence.”

³⁷ This Resolution was adopted by the Council on 13 June 1929.

for far more extensive reforms but had to settle in the end for a compromise.

The main content of this reform was the following,

- From then on, the petitioner had to be informed by the League's Secretary-General if the petition was retained to be non-receivable.
- When the members of the Minorities Committee had finished the examination of a question, without asking that it be placed on the Council's agenda, they would communicate the result of their examination by letter to the other members of the Council for their information.
- Furthermore, the Secretary-General had to distribute once a year, for the information of all the members of the Council, a document reproducing the letters sent during the year by the various Minorities Committees to the members of the Council.
- With the consent of Governments concerned the Minorities Committees "should consider carefully the possibility of publishing" the result of the investigation.
- Transparency as to the statistics of minority petitions should be created. So, the Secretary-General started to publish annually in the Official Journal of the League statistics of the number of petitions received by the Secretariat during the year, the number of petitions declared to be non-receivable, the number of petitions declared to be receivable and referred to Committee of the Three, the number of Committees and number of meetings held by them to consider these petitions, the number of petitions whose examination by a Committee of the Three had been finished in the course of the year.

The year of 1929 marked a high of petitions received by the League's Secretariat. The League's minority protection activities were at their apex. In 1932 the number of petitions filed decreased sharply; in 1935 the system was nearly dead.³⁸ The reforms of 1929 had brought about more transparency and legal protection for minorities even if it had fallen far below the expectations by some states traditionally sustaining the interests of minorities. In 1929 *Gustav Stresemann* furthermore announced that Germany would from now on address the minority problem each year within the League's General Assembly.

³⁸ Veatch, see note 1, 380.

From a present-day viewpoint all these measures seemed to be sensible and appropriate. Paradoxically, in the respective period these reforms seemed to do more harm than good as the minority question was further politicized and in the process of growing nationalism minorities were caught in the middle.³⁹

IV. Institutions within the League Order involved in Minority Protection Activities

From an institutional point of view within the League system competence for minority questions was located primarily with the Secretariat and the Council. Within the Secretariat the Secretary-General had both a notarial role as well as the possibility to exercise functions of quiet diplomacy. Already in 1919 a specific Department was created within the Secretariat being responsible for dealing with minority questions. It was a small unit with a highly motivated and experienced staff. The two directors *Eric Colban* (from Norway, 1876-1956) and *Pablo de Azcárate* (from Spain, 1890-1971) gained lasting prominence. The Minority Section interacted closely with the Minorities Committees and provided information they had acquired not only from the petitions and Government observations but also from independent information gathering activities (in particular an independent Press Information Section, journeys to the minority states by the Director or staff members and visits by various informed people at the Secretariat in Geneva).⁴⁰

The Council was the central organ for deliberation on minority issues. Although this organ, due to the unanimity principle, was not able to “take action” in the proper sense it became the place of active negotiations and was itself a driving force behind such activities. Beyond that, the Council further developed the Rules of Procedure by adopting various Council Resolutions.⁴¹

With regard to the Assembly it should be noted that this body had no specific competence in the field of minority protection but, according to article 3 para. 3 of the Covenant of the League of Nations “[t]he

³⁹ Gütermann, see note 1, 123 et seq.

⁴⁰ de Azcárate, see note 1, 184 et seq.

⁴¹ So the *Tittoni Report* of 22 October 1920, and the Resolutions of 25 October 1920, 5 September 1923, 10 June 1925 and 13 June 1929.

Assembly may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world ...”

In practice the Assembly repeatedly gave important guidelines for the further development of the League’s minority policy. If a minority issue was discussed in the Assembly the utmost publicity was given to this subject. The delegates of Germany, the United Kingdom and Hungary passionately took up the minority question on repeated occasions.⁴²

Minority petitions were, as mentioned, first circulated to all states represented in the Assembly, although this practice met with sharp protest by the states subject to minority obligations, and in particular by Poland. Between 1921 and 1923 the role of the Assembly in the complaint procedures was gradually reduced. In 1921 it was agreed that petitions had first to be communicated to the state concerned before they were transmitted to all the members of the League.⁴³ In 1923 the circulation of the petition was restricted to the members of the Council.⁴⁴ Germany, in particular, fought for a reversal of this reform and, since the Madrid Resolution of 1929 had not fulfilled this request, *Stresemann* took the minority question to the Assembly where it was addressed each year between 1929 and 1934.

In 1933 events took a dramatic turn. Germany had changed from an advocate of minority interests to a dispassionate observer of the relevant developments abroad and an aggressive violator of minority rights at home, in particular as far as the Jewish population was concerned. In 1933 the petition of *Franz Bernheim*, a Jew from Upper Silesia who was discriminated against because of his ethnicity, was discussed in the Council⁴⁵ and this discussion led to a general condemnation of Germany’s anti-Semitic policy, which also had repercussions on the climate in the Assembly where the deterioration of the political and legal situation in Germany was discussed very critically. On 14 October 1933 Germany renounced its membership in the League.

⁴² Sierpowski, see note 1, 22.

⁴³ See Council Resolution of 23 June 1921.

⁴⁴ See Council Resolution of 5 September 1923, para. 3. Only at the request of the state concerned, or by virtue of a resolution to this effect passed by the Council after the matter had been duly submitted to it, could communications also be made available to other Members of the League.

⁴⁵ According to the Convention relating to Upper Silesia of 15 May 1922 petitioners from this territory had direct access to the Council, see article 149 para. 3 of the Convention.

Somewhat in the background stood the PCIJ, although in principle this organ was intended to play a pivotal role in the implementation of the minority system. According to the Minority Treaties, any difference of opinion as to questions of law or fact arising out of the respective instrument should be held to be a dispute of an international character under article 14 of the Covenant of the League of Nations.⁴⁶ States subject to Minority Treaty obligations accepted in advance the jurisdiction of the PCIJ as to any dispute arising out of the Treaty.⁴⁷ Each member of the League's Council could seize the PCIJ with a minority dispute arising out of one of the minority instruments.⁴⁸

As we also see in present-day international law, general international law courts are hardly suited to become primary referees for humanitarian issues.⁴⁹ It might be said that in this regard the ICJ cannot be compared to the PCIJ since after 1945 special courts were created to deal with human rights issues. Nonetheless, legally this would not be a barrier for seizing the ICJ with human rights disputes. As already mentioned it is rather the way human rights are implemented (as is known, they are not implemented in a reciprocal way but by the Governments in relation to their own people) that often disinclines Governments from intervening in foreign human rights affairs. So with no surprise the small number of contentious minority cases the PCIJ was seized with were all filed by Germany acting as the kin-state for German minorities abroad. Of these three cases two were presented by Nazi Germany and soon after dropped when this regime decided to leave the League. Previously, in only one case a judgment was rendered by the PCIJ.⁵⁰ The PCIJ rendered, however, a more consistent, though still small, number of Advisory Opinions on this subject. For the technical

⁴⁶ See article 14 2nd sentence, "The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it."

⁴⁷ See article 12 of the Treaty with Poland, "The Polish Government hereby consents that any such dispute shall, if the other party thereto demands, be referred to the Permanent Court of International Justice."

⁴⁸ Furthermore, this right was granted to all signatories of the Lausanne Treaty with Turkey, see Robinson, see note 1, 136.

⁴⁹ See P. Hilpold, "WTO Law and Human Rights: Bringing Together Two Autopoietic Orders", *Chinese Journal of International Law* 10 (2011), 323 et seq. and B. Simma, "Human rights before the International Court of Justice: community interest coming to life?", in: H. Hestermeyer et al. (eds), *Coexistence, Cooperation and Solidarity*, 2012, 577 et seq.

⁵⁰ Rights of Minorities in Upper Silesia, Judgment, 1928, PCIJ Ser. A No. 15.

and intellectual quality of these Opinions the PCIJ gained lasting praise. It can be said without exaggeration that these Opinions have shaped in a decisive way the modern conception of international minority law.⁵¹

According to article 14 of the Covenant, the Court could give an Advisory Opinion upon any dispute or question referred to it by the Council or by the Assembly. While the Assembly never exercised this right,⁵² the Council did so in a few cases.⁵³

While practically all these documents have brought about important new insights into the particularities of minority law and minority protection, in general two Opinions stand out in a particular way: one in the Greco-Bulgarian Communities case of 1930 and one in the Minority Schools in Albania case of 1935. In the first Opinion the PCIJ made clear that the existence of a minority (and the ensuing obligation for the state to protect this minority) cannot be made dependent upon the official recognition of this group, “[t]he existence of communities is a question of fact; it is not a question of law.”⁵⁴ This statement, as obvious as it might seem to us today, marked an important achievement as the contrary approach would have enabled the obligated states to escape their obligations by the simple denial of the minority group’s existence.

Of an outright revolutionary character were the findings by the PCIJ in the Minority Schools in Albania Opinion. Never before in history has it been stated with such clarity that effective minority protection requires not only the absence of discrimination but also positive

⁵¹ See in this regard C. Brölmann, “The PCIJ and International Rights of Groups and Individuals”, in: Tams/ Fitzmaurice, see note 1, 123 et seq.

⁵² Interestingly, after 1945 within the ICJ system this situation completely changed: now the General Assembly has become the active party when it comes to asking for opinions while the Security Council has remained largely inactive in this regard.

⁵³ These were the following cases: Settlers of German Origin in Poland, Advisory Opinion, 1923 PCIJ Ser. B No. 6; Acquisition of Polish Nationality, Advisory Opinion, 1923 PCIJ Ser. B No. 7; Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928 PCIJ Ser. B No. 15; Greco-Bulgarian Communities, Advisory Opinion, 1930 PCIJ Ser. B. No. 17; Access to German Minority Schools in Upper Silesia, Advisory Opinion, 1931 PCIJ Ser. A/B No. 40; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion 1932, PCIJ Ser. A/B No. 44; Minority Schools in Albania, Advisory Opinion 1935, PCIJ Ser. A/B No. 64.

⁵⁴ Greco-Bulgarian Communities, see note 53, 22.

measures. The whole “affirmative action” approach finds in this Opinion a pivotal base.⁵⁵ The decisive passage goes as follows,

“The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peacefully alongside that population and cooperating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs. In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties.

The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.

The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics. These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.”⁵⁶

Unfortunately, these insights came at a time when the League’s minority protection system was already almost dead and few were prepared to listen to the PCIJ on minority questions.

V. The Assimilationist Position

If one looks for the reasons why the League’s minority protection system failed, first of all the general political system comes to mind. With democracies in retreat and authoritarian regimes advancing, humanitarian ideas and norms had a difficult stand. This was even more the case if one considers that some of these regimes were not only dismissive of minority interests but advocated overtly racist ideas.

There was, however, also a second group of reasons for this failure and they were inherent to the system as such. In fact, uncertainties on the ultimate goals of this system persisted from its inception until al-

⁵⁵ Brölmann, see note 51, 134 et seq.

⁵⁶ Minority Schools in Albania, see note 53, 17.

most its very end. As demonstrated at the beginning *Clemenceau's* letter to *Paderewski* of 1919 had risen perplexities about the aims of this system, although it can be assumed that *Clemenceau* argued (also) strategically.

A very controversial discussion was provoked in 1925 by the Brazilian ambassador to Rome and League Rapporteur on Minority Issues, *de Mello-Franco* when, philosophizing about the functions of the League's minority protection system, he defended the "melting pot" – a concept, typical for the American continent, but, according to *de Mello-Franco*, best-suited for international application. This position was confirmed by the British Foreign-Secretary *Austen Chamberlain*, "The object of the Minority Treaties was to secure for the minorities measures of protection and justice which would gradually prepare them to be merged in the national community to which they belonged."⁵⁷

From a technical point of view it was hardly sustainable that the nationality issue in the Americas which was created by immigration accompanied by a strong will to form a wholly new nation, should be comparable to that in Europe where the most urgent nationality problems were unleashed by border changes most often undertaken against the will of the populations concerned.⁵⁸ From a political point of view *de Mello-Franco's* affirmation was more easily explainable as it was expressed in the context of Germany's joining of the League of Nations and it clearly had the effect of soothing the Czech and the Polish leadership.

On the other hand, it would be wrong to say that the assimilationist position was generally accepted or that in the interwar period there was an insufficient political or technical insight in the intricacies of minority protection. First of all, both minority experts individually as well as minority representative organizations collectively (as well as statesmen like *Stresemann*) protested strongly against *de Mello-Franco's* position. Secondly, even within the League's order clear insights at that time had already developed into the nature and the functioning of an effective minority protection system. This is in particular true for the PCIJ.

⁵⁷ Cited according to J. Hiden, *Defender of Minorities: Paul Schiemann, 1876-1944*, 2004, 120. As is known, however, later Sir Austen went back on this and made the following clarifications: "The word 'merged' was unhappily chosen. I did not mean for one moment to suggest that it was intended that the cultural characteristics of the minority population should be submergered or abolished.", cited according to Macartney, see note 1, 277.

⁵⁸ See in this sense also Rabl, see note 17, 104.

Thus, for example, the 1935 Advisory Opinion on Minority Schools in Albania reads as the perfect antithesis to *de Mello-Franco's* position, stating that minorities should have the,

“possibility of living peaceably alongside [the majority] and cooperating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.”

This position was further confirmed by the affirmation that minorities should be beneficiaries of what we might call today “positive measures”. Such measures are clearly directed at preserving and allowing for further development of minority cultures. In 1935, however, the PCIJ was no longer listened to and the Court’s pronouncement would fall on fertile ground only after the political circumstances had been subject to a dramatic change.

VI. The Empirical Situation⁵⁹

For a general assessment of the League’s minority protection system not only the relevant international instruments but also the specific empirical situation in which these instruments had to be applied has to be taken into consideration.

In this regard, first of all the situation in Poland must be referred to. While modern Poland, as a consequence of ethnic cleansing and mass expulsions during World War II and its immediate aftermath, presents itself as a widely ethnic homogeneous state,⁶⁰ in the interwar period it was characterised by the presence of several larger nationalities than the

⁵⁹ This Section is based on Hilpold, see note 1, 178 et seq.

⁶⁰ The “Gorzelik” case (Appl. No. 44158/98 of 17 February 2004), where an association claiming to represent the Silesian minority tried (unsuccessfully) to find recognition has, however, revealed, that there is a latent ethnic dimension within the Polish society that is far stronger than the authorities want to recognize. On this case and its (not totally satisfactory) solution by the ECHR see R. Hofmann, “Minority Protection in Europe: Standard-Setting by the Council of Europe and the OSCE”, in: D. Thürer/ Z. Kedzia (eds), *Managing Diversity*, 2009, 31 et seq. (50 et seq.). On the subject of expulsion see the many contributions by G. Gornig, for example “Völkerrechtswidrigkeit von Vertreibung und entschädigungsloser Enteignung unter besonderer Berücksichtigung der Sudetendeutschen. Aspekte der Wiedergutmachung”, *Literaturspiegel*, 1996, 1 et seq.

Polish. It is calculated that 30 – 40 per cent of the total population was made up of such groups. There were 4.9 million Ukrainians, 2.2 million Germans, 1.7 Belarusians, 40.000 Russians, 25.000 Czechs and 24.000 Lithuanians.⁶¹

The attitude of the Polish Government towards questions of minority protection was of pivotal importance for the whole League's minority protection system. The Minority Protection Treaty with Poland became the blueprint for all other Treaties but its ratification was subject to much controversy. As already mentioned, the Polish Government strongly opposed the introduction of a fragmented minority protection system obligating only a restricted number of states. It was *Clemenceau* who had to convince his Polish counterpart *Paderewski* to ratify the relevant Treaty. In the aftermath the Polish Government tried to interpret the Treaty restrictively and continued to urge for a generalization of the minority protection system. In the end, the rejection of this request was used as a justification by Polish Foreign Minister *Joseph Beck* to denounce the Minority Treaty.

This restrictive attitude can also partly be explained by the fact that Poland had just newly gained its sovereignty after a long and fierce fight that had lasted over a century. Fears that this sovereignty could again be lost or excessively restricted were therefore comprehensible. Both the German and the Ukrainian minority filed a large number of petitions with the League's Secretariat. While complaints by German petitioners regarded, first of all, encroachments on their property, Ukrainians often complained about severe personal harm that they had suffered by Polish authorities. Notwithstanding their large number, Jews only very rarely presented petitions at the League. The phenomenon with regard to the Jewish minority could also be noticed generally in other countries that had assumed minority protection obligations.⁶²

In Czechoslovakia the population was composed of 6.8 million Czechs, over 3 million Germans, nearly 2 million Slovaks, about 750.000 Hungarians, 460.000 Ruthenes, 180.000 Jews, 76.000 Poles and

⁶¹ G. Erler, *Das Recht der nationalen Minderheiten*, 1931, 261 et seq. According to Macartney, see note 1, 515 the number of Germans in Poland was 1 million.

⁶² According to Robinson, see note 1, 248, only three complaints of a collective nature in the interest of the Jewish minority were presented at the League. According to these authors, long experience had taught Jews that winning a case against their Government was often a Pyrrhic victory at best.

10.000 Romanians.⁶³ Among all the states that had accepted minority protection obligations Czechoslovakia had probably been, at least in the first years, the most minority-friendly nation. National minority legislation partly even went beyond the standards imposed by international obligations.⁶⁴ The implementation of protection provisions for the German minority was facilitated by the fact that this minority lived rather concentrated in clearly delimited territories.

As a consequence of the post-war peace settlement Romania was considerably enlarged. The population of about 16 million people comprised a large number of minorities. According to *Erler*⁶⁵ the most consistent minority groups were the Hungarians comprising 1.4 million people, 713.000 Germans, 500.000 Ukrainians and 351.000 Bulgarians. Furthermore, there were also a “non-negligible number” of Jews, Russians, Turks, Serbs, Poles, Czechs, Slovaks, Tatars, Greeks, Roma and Armenians. Several petitions were presented by these minorities. In the interwar period the Romanian Government tried to create a homogenous nation state by brutal force and to modernize the country by ironing out the existing ethnic differences. From the viewpoint of the minorities this brutal repression was transforming Romania into a police state.⁶⁶

From the League of Nation’s viewpoint, Austria, Bulgaria and Hungary were quite homogenous states with comparatively small minority groups. These states had primarily assumed minority obligations due to considerations of reciprocity. The (unfulfilled) hope was to strengthen thereby the overall system as well as the position of the kin-minorities in neighbouring countries.⁶⁷ In reality, these countries also had their minority problems but they never reached the proportions or received the attention of those in other countries under the League’s Treaty regime. At the same time, none of the three states mentioned was really

⁶³ Erler, see note 61, 217.

⁶⁴ In part, however, these obligations were not implemented. This was, in particular, the case for the autonomy of the Ruthenes. Furthermore it should be noted that also in Czechoslovakia widespread discrimination against minorities took place even though the situation was comparatively better than in other states.

⁶⁵ Erler, see note 61.

⁶⁶ See de Azcárate, see note 1, 45.

⁶⁷ In this sense *id.*, 55 et seq. On the role of kin-states in modern minority law see P. Hilpold/ Ch. Perathoner, *Die Schutzfunktion des Mutterstaates im Minderheitenrecht*, 2006.

generous to its minorities.⁶⁸ In Austria sufficient guarantees were given for protection against discrimination but positive measures were largely absent.⁶⁹

No particular sympathy towards their minority obligation was developed in Greece and in Turkey. In Greece minority petitions were presented by the Albanians and by the Russian and the Bulgarian monasteries from Mount Athos. Next to no cooperation with the League of Nations was demonstrated by the Turkish Government. This was hardly surprising in view of the fact that this Government was the offspring of a nationalistic movement that had transformed a pluri-ethnic state with a myriad of minorities (in particular Kurds, Armenians and the descendants of the Byzantine Greeks) into a largely homogenous state in which minorities were considered to be alien or altogether ignored.

Yugoslavia was in the midst of a nation-building process that already demonstrated all its contradictions that would finally lead, 70 years later, to the disruption of the country. Most petitions came from the Macedonians who were caught in the midst of a struggle between those who wanted to create a new Macedonian people and those who intended to emphasize the Bulgarian roots of this group.⁷⁰

In the three Baltic states of Estonia, Latvia and Lithuania the situation was not uniform either. Of these states Estonia had the smallest percentage of minorities and interestingly also the most minority-friendly legislation. The most important characteristic of the Estonian minority legislation consisted in the fact that under certain conditions minorities could find recognition as entities of public law. Thereby, a system of personal autonomy in the cultural field could be created. An electoral register certified membership of a minority. Each individual was free to register as a minority member. These entities had also the

⁶⁸ For this practice see Robinson, see note 1, 205 et seq.

⁶⁹ See also P. Hilpold, *Modernes Minderheitenrecht*, 2001, 240 et seq.; Karl Renner, a famous and influential politician of that time, qualified the Austrian minority legislation as a “soup for the poor” (“Bettelsuppe”), *ibid.*, 242.

⁷⁰ On this controversy see P. Hilpold, “Die Makedonienfrage”, *Europa Ethnica*, 1993, 113 et seq.

power to levy tax.⁷¹ This model is still much discussed in literature as a possible alternative to a territorial autonomy.⁷²

In Latvia minorities made up a far greater proportion of the total population: according to the 1925 census 30 per cent of the population belonged to a minority. In particular, 231.658 persons declared themselves as Russians, 95.675 as Jews, 70.964 as Germans, 51.143 as Poles, 23.192 as Lithuanians and about 10.000 as “others”. Originally, Latvia had planned to introduce a minority legislation similar to that of Estonia but in the end this intent was not further pursued. Minorities were only granted a certain degree of autonomy in the educational sector.⁷³ Nonetheless, in Latvia the relationship between the majority and the minorities did not create larger problems in the interwar period.⁷⁴

More problematic was the situation in Lithuania. There, a problematic minority situation was compounded by a strained relationship with the League due to this country’s quarrel with Poland over Vilna.⁷⁵ The proportion of minority members in relation to the total population was not very high but neither was it negligible. There were 7,58 per cent Jews, 3,23 per cent Poles, 2,49 per cent Russians, 1,44 per cent Germans, 0,22 per cent Belarusians and 0,81 per cent of other nationalities.⁷⁶ The Memel territory which also was part of Lithuania, had a German majority not included in the figures mentioned above. The contemptuous approach taken by the Lithuanian Government against its minorities created large cleavages in Lithuanian society and as a consequence the political situation became instable.

In Albania the number of minority members was not very large. While the total population was between 850.000 and 900.000 people, the largest minority group, the Greek had about 50.000 members. Like Poland, Albania had willingly accepted, as a pre-condition for its recognition, the assumption of minority obligations. Afterwards, however,

⁷¹ Erler, see note 61, 272 et seq.

⁷² Also the Treaty of Sèvres with Turkey of 1920 foresaw systems of personal autonomy. As is known, this Treaty, however, did enter into force and was later superseded by the Treaty of Lausanne of 1923. The minorities which the Treaty of Sèvres should have protected were largely driven from their homes or murdered.

⁷³ Erler, see note 61, 294 et seq.

⁷⁴ Both from Latvia and from Estonia only one petition that was declared admissible reached the League of Nations, Veatch, see note 1, 375.

⁷⁵ *Ibid.*

⁷⁶ Erler, see note 61, 298.

practice was less minority-friendly. When petitions were presented against Albania, the Government reacted usually promptly – but only with the statement that no reasons for a complaint were given. De Azcárate wrote in 1945 that Albania was a case where a population exchange (here with Greece) would have made sense⁷⁷ – a viewpoint which seems highly problematic from a modern human rights perspective but which was emblematic for the League’s pragmatic stance. At least indirectly, however, through the PCIJ’s Opinion on Minority Schools in Albania, this country was extremely important for the further development of a minority theory.

The extension of the League’s minority protection system to Iraq in 1932 was essentially an attempt to transfer a set of norms conceived for a European cultural and historic background to an Arab context which was profoundly different in nature. Such an attempt was doomed to failure in advance and this was all the more so since this minority protection system was also in decline in the region for which it had originally been conceived. The idea that a newly constituted state with an ethnically diverse population should assume minority obligations, independently of its geographic location was, of course, commendable but a series of adaptations and special considerations would have been necessary to make this attempt succeed. Some members of the League voiced the opinion that stronger instruments for intervention and control should be introduced but in the end a Declaration along the lines of the Albanian Declaration was declared to be sufficient.⁷⁸ As the cruel repression of the Assyrian and the Kurd minority demonstrated in the aftermath the minority protection obligations assumed by Iraq had no real impact on the situation of minority members in this country.

VII. Conclusions

Without doubt, the League’s minority protection system was an extraordinary experiment. Its failure ended up in tragedy for millions of people. As this failure was interwoven with even more extensive upheavals that totally changed the political reality in Europe, the said experiment fell into oblivion. A strong feeling of guilt may have further contributed to this uneasy silence. In fact, little was done, even by the democratic powers of that time, to buttress this system against the au-

⁷⁷ de Azcárate, see note 1, 54.

⁷⁸ Macartney, see note 1, 266 et seq.

thoritarian and nationalistic forces. What must raise the strongest concern is, however, the tendency in literature to attribute the fault for this failure totally or in large part to the protected minorities themselves. When it was said, in 1955, that “the minorities contributed substantially to the failure of the system which had been created for their own protection” this was unfair even if it was couched in a general study that gave a detailed account also of the faults of other protagonists like the “minority states” or the “neutral states”.⁷⁹ In the aftermath, the formula of the “co-responsibility of minorities” was repeated all too easily and for some, in particular the numerous German minorities became nothing else than a “fifth column” of Nazi Germany. This infamous attitude exculpated from responsibility generously in form and hypocritically in substance. If every party involved bore responsibility, no party was responsible in the end. If the main culprit were the minorities themselves which were annihilated or driven from their homes the chapter was definitely closed and no need was given to return to this subject. In a cynical move the main fault was laid with those who could no longer object. A closer look at the facts as well as the principal legal concepts reveals, however, a totally different situation.⁸⁰

Without doubt, the League’s minority protection system provided a certain degree of protection to millions of people in Central and Eastern Europe and the prevailing part of the minority states respected these obligations to a degree that the physical existence of these groups was rendered possible. Furthermore, in the prevailing number of cases enough room was given for cultural survival, at least for the time being. At the same time, however, a closer look at the many minority cases reveals a systematic and appalling pattern of discrimination that the competent League could not and did not even want to remediate in a radical way. The League was simply too weak to make a system that was created in an uncoordinated, tentative way work effectively. For many minorities it became clear over the years that their final destination would

⁷⁹ Claude, see note 1, 42. To be fair, one has to take into account that Claude listed in great detail the responsibilities of all parties involved. To place the responsibilities of minorities (as far as they had any) on the same level as those of the other parties (and, in particular, as those of the minority states) must be utterly rejected.

⁸⁰ Id., see note 1, 41, “The treaty-bound states not only failed, on the whole, to treat their minority groups in the prescribed manner, but they also seized every opportunity to nullify the international guarantee.” With regard to recent studies, Ch. Raitz v. Frenzt, *A Lesson Forgotten*, 1999, 129 et seq.

be assimilation and even this process would be accompanied by further economic and personal discrimination.

A facile excuse for the uncompromising and arrogant attitude by the minority states was the purported disloyalty of the minorities. At the heart of this accusation lay a basic misconception about the very nature of loyalty. To require a specific form of loyalty, going beyond that which is required from members of the majority, as a pre-condition for the fulfilment of international obligations, has no basis in law. In this context, basic aspects of minority protection are touched upon.⁸¹ Minorities are *per se* in a disadvantaged position. International minority protection obligations have been introduced in order to ensure that minority states actively try to overcome the factual inequality between majority and minority. It is the state which has to act first and it is not up to the minority to earn first the confidence of the Government in order to become eligible for protective measures. The obligation to implement Minority Treaties and the obligation of loyalty operate at different levels; both levels have to interact in a way that gives expression to the principle of good faith. Therefore, Governments may not first disregard their Treaty obligations and afterwards use protests by minority members as legal justifications for the non-fulfilment of their obligations. It is entirely questionable whether unruly behaviour by minority members can set aside international Treaty obligations of their home states. For a termination of the Treaty obligations the respective state would have to declare a “Supervening Impossibility of Performance” according to article 61 para. 1 of the Vienna Convention on the Law of Treaties (if we want to refer to a present-day set of rules). It is obvious that a very extensive lack of cooperation (if not an outright rebellion) by the minority would be needed to allow a Government to invoke this clause.

Loyalty is no one-way street. There are loyalty obligations both for the minority and for the minority state. These obligations are interrelated, but not in a reciprocal way. The Treaty obligations run between the minority state and the other Contracting Parties. Furthermore, the “minority guarantee” constituted an international law obligation between the single minority state and the League of Nations as a whole. In the case of minority obligations constituted by unilateral Declarations, an immediate relationship between the single minority state and the League of Nations was constituted. The minority states were there-

⁸¹ See also P. Hilpold, “Commentary to Art. 20”, in: M. Weller (ed.), *The Rights of Minorities*, 2005, 537 et seq. (538).

fore directly obliged towards the other Contracting Party and/or the League of Nations as an international organization.⁸² The minorities as such are only the beneficiaries of these obligations and there is no need for them to demonstrate a particularly submissive attitude. Of course, any constitutional order also requires a certain degree of loyalty from citizens towards their state. No justification, however, exists as already stated for requiring from minority members a greater degree of loyalty than from all other citizens. Minority members are not second-class citizens that have first to demonstrate that they are worthy of consideration and protection. Thus, acts of protest against discrimination can never be qualified as an expression of disloyalty, unless these acts are totally unjustified and bordering on systematic obstruction. Even by adopting a very critical stance towards the minority activities it would hardly be possible to come to such a qualification.

It is equally wrong to accuse kin-states of undue agitation conducive to the demise of the League's minority protection system. As is known, this criticism points primarily at Germany but this country was, during the Weimar era, one of the system's strongest advocates. In this context in particular the name of *Gustav Stresemann* should be mentioned who, against all odds, and fighting up to the limits of physical exhaustion⁸³ managed to gain international respect and to obtain a series of concessions which improved the system considerably in favour of the individual minority members.

It is an extreme misinterpretation of history to equal Germany's position in the interwar period with that of Nazi Germany. On the contrary the German Governments had long been the staunchest advocates of this system and had undertaken by far the greatest efforts to further develop and improve it. *Hitler's* seizure of power changed all this. *Hitler* was not interested in the fate of (German) minorities but in the realization of his Pan-German fantasies of world-domination. In these plans, the "frontier Germans" were no more than pawns; their individual lot was secondary at best. It is interesting, however, to note that the respective change in German politics did not take place immediately. In the first months after *Hitler* had come to power a certain uneasiness

⁸² In this sense, a first basis for the formation of *erga-omnes* obligations was created. On this concept see P. Picone, *Comunità internazionale e obblighi "erga omnes"*, 3rd edition, 2013.

⁸³ As it is known, Stresemann died in 1929, only three weeks after his last emotional speech at the League's Assembly where he had defended again the cause of minorities.

could be noted and there were even signs for a continuation of the preceding politics. Two new proceedings before the PCIJ were started and *Goebbels* gained his first experience with international diplomacy as a member of the German delegation in Geneva, only to discover, however, that international minority politics is a far more complicated business than he imagined.⁸⁴ Soon after, Germany withdrew its suits at the PCIJ and renounced its membership of the League.

Now a total reversal took place and even some renowned minority rights experts lavishly praised this new orientation as if everything done before had been wrong. *Erler* gave best expression to this new attitude in a very disconcerting way.⁸⁵ According to this view, the individual member of a minority and even the minority itself count for nothing. It is rather the German people as a whole whose interests are exclusively of relevance. Behind these concepts stands a mystified idea of German nationality. One can acquire this nationality only through descent and not through assimilation. Jews should generally be excluded from any protective measure, as they were, according to *Erler*, “a religious-racial migrant group in a foreign racial region.”⁸⁶

It is therefore simply wrong to state that the League’s minority protection system was destroyed by excessive demands of remote-controlled German minorities but it is, on the contrary, the case that Nazi Germany had next to no interest in this system.⁸⁷ If in the aftermath the minorities themselves were faulted for the demise of this order, a last wrong is committed in their regard. As was said, “[p]ostwar consciousness of the suffering experienced during the German occupation, as well as the necessity of justifying historically the forced removal of millions of Germans were the most important motives” for this attitude.⁸⁸

⁸⁴ Sierpowski, see note 1, 29 et seq. and Veatch, see note 1, 380 .

⁸⁵ See G. Erler, “Mißverstehen, Mißtrauen und Mißerfolg im Genfer Minderheitenschutzsystem”, *Zeitschrift für Völkerrecht* XXII (1938), 1 et seq. (10 et seq.).

⁸⁶ *Ibid.*, 3.

⁸⁷ See also de Azcárate, see note 1, 37: “[...] ‘minority’ preoccupations played a very small part in the great political operation planned and carried out by Hitler”.

⁸⁸ See R. Jaworski, “The German Minorities in Poland and Czechoslovakia in the Interwar Period”, in: P. Smith (ed.), *Ethnic Groups in International Relations*, 1991, 169 et seq.

Was this minority protection system as a whole and in any sense a failure? No simple answer can be given to this question. For the minorities it referred to, some degree of protection was provided which was, depending on the specific situation, more or less intensive. It is true that for many of them historical developments during World War II and shortly after ended up in disaster. As shown, no blame for this can be put on the minorities even though the victors have often tried to develop exactly such a narrative.⁸⁹ As demonstrated, the abusive reference to the concept of loyalty to justify legally such a conclusion does not withstand closer scrutiny.

Unfortunately, however, this misinterpretation of the concept of loyalty is continuing to resurface. The minority practice of the Geneva institutions, notwithstanding all its shortcomings, has provided important insights into the realities of minority protection. The PCIJ jurisprudence, finally, has given direction to the whole minority rights discussion of the post-war period and influenced to a considerable extent the general human rights discussion, even though this fact is widely neglected. On the basis of these facts alone the League's minority protection system can be qualified as a success.

A number of praiseworthy studies have been undertaken on the League's minority protection system, especially in the period when it was still in force. Many of these studies are now widely forgotten; interest in them disappeared almost totally in 1945. The time has come to bring these studies back to attention and to analyse the respective events with the knowledge and the instruments of our time. Modern human rights law in general and minority law in particular could gain much from such an approach.

⁸⁹ See instead T. Bagley, *General Principles and Problems in the Protection of Minorities*, 1950, 126: "It is unjust to view the failure of the minority system of the League [...] independently of the general international conditions of its time. The minorities protection system was but a part of the world structure established at Paris. Inevitably [it] depended on the general state of international order and relations, and inevitably when that order disintegrated the system collapsed with it, like one floor of a toppling building. The between-war world was witness to an appalling phenomenon of regression, a backsliding of morals and politics. Dictatorships replaced democracies, hate and intolerance flourished, power over-rode reason, and passionate nationalism crushed the growing bloom of international co-operation. That the minorities should suffer in such a climate was inevitable."

Minority protection as well as human rights protection in general could be rendered more effective and an important contribution could be given to ensure that the tragic events of the first half of the 20th century do not find a repetition.