State succession and minority rights – a case study of the dissolution of the Former Yugoslavia

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Executive summary

Dissolution and separation of States especially threaten minorities, whose protection serves not only the interests of the successor State, but also that of the international community. As a minimum, successor States should continue the human rights treaties to which their predecessor was party. Furthermore, the international community imposed on the successor States of the Former Yugoslavia a series of additional obligations protecting minorities which largely exceeded the minority rights standards of the Cold War period. The international instruments imposed on the new States contributed to a crystallization of a higher minimum standard of minority protection which shall bind all new States tending to be legitimized.

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Introduction – Definition of the scope of the research

Research question: a higher standard of minority protection in case of dissolution of States

Given the lack of a consistent State practice, the relation between State succession and minority protection seems to be an uncertain area of public international law, as it has not yet worked out the rules governing the conduct of successor States "in respect of minority rights treaties". There are no written rules on the questions whether the duties of minority protection – binding the predecessor State before – continue to be in force or they cease to exist, and the new State starts with a "clean slate" or whether the new States has any additional obligations *vis-à-vis* minorities. However, the dissolution wave after 1990 served as a decisive legal and doctrinal precedent.

Among the independent States stemming from the dissolution wave of the 1990s, especially the dissolution of the Social Federal Republic of Yugoslavia (SFRY) provided as an instructive example for the strong connection between dissolution and the protection of minorities. That is the reason why the present thesis has chosen the case of the dissolution of the SFRY to study the new requirements imposed by the international community on successor States in order to protect minorities becoming victims of the birth of new nation-States.

The European Community required the successor States of the SFRY to guarantee "the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE"[1] as a condition of their recognition. The new States including the Federal Republic of Yugoslavia (FRY) were required not only to fulfill the

[1] Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (16 December 1991). In: 4 (1) EJIL 65 (1993), p. 65.

human rights obligations assumed by the SFRY – on the basis of the principle of automatic State succession in respect of human rights treaties –, but also to provide a minority protection which exceeded by far the minimum standard ever required by international law with respect to the protection of minorities.[2] The rules forming a higher standard of minority protection are included especially in Article 2 of the Draft Peace Treaty on Yugoslavia,[3] which protects minorities stricter than the earlier international instruments for two reasons: firstly, it obliges the new republics to implement minority rights enshrined in the relevant minority protecting conventions[4] and particularly in non-binding instruments[5]; and secondly, it imposes on successor States the obligation to guarantee a special status, i.e. a type of autonomy for minorities forming a local majority in a certain area.[6]

This attitude of the international community following the dissolution of the SFRY raises several questions: Was there a "minimum standard required by international law"[7] with respect to the protection of minorities before 1990? If yes, what was that standard? Did the SFRY undertake this international standard of minority protection? What has changed after the dissolution wave of the 1990s with respect to minority protection? Can we talk about crystallized rules of international law in this matter or rather about a gray zone? On what

[2] Christian Hillgruber: The Admission of New States to the International Community. In: 9 (3) EJIL 491 (1998) [hereinafter: Hillgruber (1998)], p. 501.
[3] The European Community Conference (1991-1992). Draft Convention. Treaty Provisions for the Convention of 4 November 1991. In: The International Conference on the Former Yugoslavia. Official Papers (ed. B. G. Ramcharan). Kluwer Law International, the Hague/London/Boston. Vol. 1, p. 13-23.
[4] Art. 2. a) par. 1. refers, among others, to the International Covenant on Civil and Political Rights, the Convention of the Elimination of Racial Discrimination, the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention on the Rights of the Child of the United Nations.
[5] The Final Act of the Conference on Security and Co-operation in Europe and the Charter of Paris for the New Europe. Furthermore, Draft expects successor States to "take appropriate account of: proposals for United Nations Declarations on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities; the proposals for a Convention for the Protection of Minorities of the European Commission for Democracy and Law in the framework of the Council of Europe."
[6] Art. 2.c).; see also Marc Weller: The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia. In: 86 (3) AJIL 569 (1992) [hereinafter: Weller (1992)], p. 583.
[7] Ibid.

conditions can we speak about a rule of customary international law in this matter? These are the main questions which the thesis intends to answer.

The present thesis will come to the conclusion that due to the fundamental changes in the ethnicity of the successor States of the SFRY as compared with the ethnic composition of their predecessor State, a closer research reveals that the international community imposed on them a higher standard of minority protection than the obligations based on the treaties ratified by their predecessor State. Furthermore, the case of the dissolution of the SFRY may lead to the presumption that the higher standard of minority protection should form a general obligation on all successor States of future separations and dissolutions.

Although several authors have dealt with the requirements of minority rights imposed by the international community as a consequence of the ethnic conflicts arising in the sequence of the collapse of the SFRY and even more scholarly writers analyzed the obscure rules of State succession, no attempt has been made to analyze the possible connection between State succession and minority rights.

Notion of minority rights

As for the minority rights, as the special human rights in the focus of the study, the present thesis will not go into the details of minority protection. Briefly, the study understands minority rights as the human rights originated from Art. 27 of the International Covenant of Civil and Political Rights (ICCPR) as a minimum standard, but not restricted thereto. Considering the ICCPR as a starting point seems reasonable since all further international instruments[8] detailing

[8] E.g. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief; European Charter for Regional or Minority Languages; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. UN Doc. A/RES/47/135 [hereinafter: the 1992 UN

and extending the meaning of minority rights refer to the ICCPR, at least in their explanatory notes.[9] Moreover, at the time of the dissolution of the SFRY, minority rights were understood as the rights enshrined in Art. 27 of the ICCPR.[10]

The "higher standard of minority protection" is understood as a standard imposed by the international community on successor States of the SFRY extending the meaning of Art. 27 of the ICCPR. Although the present study examines these standards by concentrating on the case of the dissolution of the SFRY, it will examine the constitutional law of the SFRY and of the successor States only as strictly necessary, concentrating rather on the attitude of the international community.

Notions of State succession – restriction of the research to the separation of States

State succession encompasses a wide range of notions treated under this common notion by the literature. The traditional legal definition of State succession is found in the two Vienna treaties: "the replacement of one State by another in the responsibility for the international relations of the territory".[11] Under State succession, the literature envisages four different cases: the uniting and the separation of States, newly independent States, and the transfer of part of the territory of a State to another State. Considering that the birth of new States occurs nowadays generally by the break-up of existing States, while the three other cases of State

Declaration]; Framework Convention for the Protection of National Minorities. Council of Europe, European Treaty Series – No. 157 [hereinafter: Framework Convention].

[9] E.g. see the preamble of the 1981 UN Declaration and that of the 1992 UN Declaration; the preamble of the European Charter for Regional or Minority Language; the Explanatory Notes of the Framework Convention (par. 26.).

[10] Alain Pellet: Note sur la Commission d'Arbitrage de la Conférence Européenne pour la paix en Yougoslavie. In: 37 AFDI 329 (1991) [hereinafter: Pellet (1991)], p. 339.

[11] A) Art. 2, 1. (b), Vienna Convention on Succession of States in respect of Treaties [hereinafter: the 1978 Vienna Convention]; B) Art. 2, 1.(a), Vienna Convention on Succession of States in respect of State Property, Archives and Debts [hereinafter: the 1983 Vienna Convention].

succession remain unimportant, the study will focus on the separation of States.

Under the 1978 Vienna Convention, separation means the case when "a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist"[12] and the 1983 Vienna Convention gives a similar definition.[13] The categories of separation of States (like *secession*[14], *dissolution*[15], *scission*[16]) are further divided by the literature and are rather of theoretical, than of practical importance or are very controversial,[17] so the study will consider "separation" in the broad sense,[18] i.e. all State successions which entail the decrease of the territory of the predecessor State.

As for the territorial and time scope of the present thesis, it focuses on the separation wave which concerned the territory of the former Yugoslavia and led between 1991 and 2006 to the sequent break-up of the SFRY and the FRY,[19] from the point of view of the international requirements of minority protection imposed upon the successor States. Considering the strong debates about the legality of Kosovo's declaration of independence and

[12] Art. 34, 1.(a), See supra fn. 11 A).
[13] Art. 17, 1., See supra fn. 11 B).
[14] "sécession", which is defined by Alexis Vahlas: if the will of separation stems from the detached entity, and the fact of the separation is a direct consequence of the latter's action, one speaks about a "sécession". Alexis Vahlas: Les séparations d'Etats – l'Organisation des Nations Unies, la sécession des peuples et l'unité des Etats. Université Panthéon-Assas, Paris 2., 2000. p. 21. (doctoral thesis)
[15] According to Vahlas, if the separation the disappearance of the State, one speaks about "dissolution". Ibid, p. 22.
[16] According to Vahlas, if the separations take place simultaneously and involve the dissociation of the whole territory of the State without a remaining Predecessor State, one speaks about "scission". Ibid, p. 22.
[17] See e.g. the debate about the "continuator State" title required by the FRY between 1991 and 2000. See e.g. Michael P. Scharf: Musical Chairs: The Dissolution of States and Membership in the United Nations. In: 28 Cornell ILJ 29 (1995), p. 36.
[18] Applied by Art. 34 of the Vienna Convention of 1978. Vienna Convention on Succession of States in respect of Treaties, United Nations, doc. A/CONF.80/16/Add.2, p. 199-209 (1978).
[19] I.e.: the dissolution of the SFRY consisted of the separation of Slovenia (1991), Croatia (1991), Bosnia-Herzegovina (which terminated at the end of the Bosnian war, 1991-1995), the Former Yugoslav Republic Macedonia (1991) and the establishment of the FRY (1992). After 1992, the FRY existed until 2003 when it was transformed to the State Union of Serbia and Montenegro (2003-2006). In 2006, Montenegro declared independence after the referendum held on 21 May 2006 expressed this will. Finally, on 17 February 2008, Kosovo unilaterally declared its independence.

the current proceedings on it,[20] the thesis will take into account only its tendencies without treating it as a terminated separation.

Methodology

The study is restricted to examining the topic exclusively from the point of view of public international law. The methodology follows also the sources of public international law: the study analyses the doctrine, the relevant international instruments, the practice of States and international organizations. The literature reviewed by the study encompasses especially the scholarly writings of recent years reacting on the new States that emerged from the dissolution of the SFRY and the Soviet Union. As for the relevant legal sources, the study focuses on the universal[21] and European[22] treaties and declarations including provisions protecting minorities and reflecting the minimum standards which can be imposed on successor States. The study will take into account the opinions of the Arbitration Commission of the Conference on Yugoslavia (Badinter Commission)[23] and the official papers of the International Conference on the Former Yugoslavia.[24] The cases to be examined are the contentious cases of the ICJ related to the dissolution of the SFRY [Genocide case (Bosnia-Herzegovina v. Serbia-Montenegro);[25]

[20] See Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion), ICJ Reports (2008).
[21] International Covenant on Civil and Political Rights, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (A/RES/47/135); or the material concerning indirectly the minorities (Charter of the United Nations, Universal Declaration of Human Rights, Convention on the Prevention and Punishment of the Crime of Genocide, International Convention on the Elimination of All Forms of Racial Discrimination, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief).
[22] European Framework Convention for the Protection of National Minorities, European Charter for Regional or Minority Languages; The European Convention on Human Rights; Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union'.
[23] Opinions No. 1 to 10 of the Arbitration Commission of the Conference on Yugoslavia. Reproduced in: 31 ILM 1494 (1992), p. 1494-1526.
[24] International Conference on the Former Yugoslavia : Official Papers. Edited by B. G. Ramcharan. The Hague, Kluwer Law International, 1997.
[25] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [hereinafter: Genocide case (Bosnia-Herzegovina v. Serbia-Montenegro)].

Revision of the Judgment of 11 July 1996 case;[26] Croatia v. Serbia case[27]].

The thesis follows a logic from the general to the special: it will firstly analyze the rules of State succession in respect of minority treaties, then those related to minority rights, lack of any treaty obligation and finally, it will focus on the concrete case of the dissolution of the SFRY.

In Chapter One, the study analyzes the doctrinal majority opinion about the accepted rules of State succession in respect of human rights treaties. This chapter concentrates on the broader context of the State succession in respect of human rights, since these rules are trendsetting in respect of special human rights, namely minority rights. This chapter will continue to examine whether in the doctrine commonly accepted rule of automatic State succession in respect of treaties could be exceeded by a rule protecting human rights in a stricter manner.

Chapter Two will narrow the research to minority rights: it will examine whether minority rights as special human rights present any particular rule within human rights in case of State succession. Furthermore, since Chapter One concerned only human rights protected by the international conventions of the predecessor State, Chapter Two will try to find stricter rules protecting minority rights irrespective of the treaty obligations of the predecessor State. It will ask whether successor States have minority rights obligations even in the absence of any earlier treaty obligation – either because its predecessor was not party to human rights treaties or not to conventions protecting minority rights. So, this chapter will answer the question whether there are any stricter rules related to minority rights which exceed the bare rule of automatic State succession.

[26] Application for Revision of the Judgment of 11 July 1996 in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina), Judgment, ICJ Reports, 2003 [hereinafter: Revision of the Judgment of 11 July 1996 case].

The conclusions of the first two chapters will give a general overview about the State succession rule in respect of minority protection, irrespective of the special attitude of the international community towards the sequence of the dissolution of the SFRY, which Chapter Three will analyze. Moving from the abstract rules to the specific case, Chapter Three will examine the international human rights treaties protecting minorities which were ratified by the SFRY, as well as their destiny after the dissolution of the SFRY. Beyond the existing international obligations of the predecessor State, this chapter will study the higher standards related to minority rights that the international community expected from the successor States of the SFRY. Under "higher standard of minority protection", this thesis means the requirements claimed by the international community after 1990 which exceeded the protection ensured to minorities by the international instruments under the Cold War era (mainly the ICCPR) to which the new States succeeded. New minority rights and specified State duties were defined by various international instruments which this part will analyze. Finally, this chapter will answer the question whether the higher standard of minority protection required in case of the dissolution of the SFRY had any consequent State practice in the recent decade.

[27] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Application instituting Proceedings, 1999 [hereinafter: Croatia v. Serbia case].

I. Chapter One: Majority opinion about State succession in respect of human rights treaties

1.1. State succession in respect of human rights treaties: a controversial way towards an automatic State succession

Although the Vienna Convention of 1978 on Succession of States in respect of Treaties[28] providesfor certain special treaties like boundary regimes and other territorial regimes, it does not mention the conventions related to human rights. Public international law has never recognized a principle according to which the successor State remains bound from the time of its independence by the obligations of human rights treaties to which the predecessor State was party. Neither has the existence of such a customary rule been confirmed by any judicial body, but there are some reasons why one could accept its recognition.

However, the doctrine elaborated several arguments supporting an obligation of successor States to continue automatically the human rights treaties of the predecessor State.[29] The majority opinion prefers a kind of automaticity in respecting the treaty obligations of the predecessor State,[30] whereas the concept of "clean slate" (*tabula rasa*) doctrine grants

[28] See Vienna Convention on Succession of States in respect of Treaties, United Nations, doc. A/CONF.80/16/Add.2, pp. 199-209 (1978).

[29] Rein Müllerson: Law and Politics in Succession of States: International Law on Succession of States. In: Brigitte Stern (ed.): Dissolution, Continuation and Succession in Eastern Europe. Martinus Nijhoff Publishers, The Hague/Boston/London. 1998 [hereinafter: Müllerson (1998)], p. 26.; Florentino Ruiz Ruiz: The Succession of States in Universal Treaties on the Protection of Human Rights and Humanitarian Law. In: 7 (2) The International Journal of Human Rights 42 (2003) [hereinafter: Ruiz (2003)], p. 95., fn. 104.; Isabelle Poupart : Succession aux traités et droits de l'homme: vers la reconnaissance d'une protection ininterrompue des individus. In: Pierre Michel Eisemann – Martti Koskenniemi, Hague Academy of International Law: La succession d'Etats: la codification à l'épreuve des faits. Martinus Nijhoff Publishers, 2000, p. 465-492. [hereinafter: Poupart (2000)], p. 465.

[30] See e.g. Ruiz (2003), supra fn. 29, p. 44.: Akbar Rasulov: Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity? In: 14(1) EJIL 141 (2003) [hereinafter: Rasulov (2003)], p. 148.

successor States the free choice to decide whether to join the international treaties of their predecessor States or not.[31]

In what follows, the study will summarize the arguments of the literature supporting the automatic State succession in respect of human rights treaties.[32] Parallel to these arguments, the thesis will take into account the counterarguments supporting the "clean slate" concept.

The first argument for the continuity is the lack of termination clauses of human rights conventions, the second is the analogy between acquired rights and human rights, the third is based on the universal values represented by human rights, the fourth explains this theory with Art. 34 of the Vienna Convention, while the fifth, sixth and the seventh argue with the practice of UN, ECHR organs and that of the States.[33]

The final conclusion of this part is that although there is no unequivocal, consistent State practice, there is a growing need for the automatic State succession in respect of human rights treaties among scholars and supported by the State practice of Central and Eastern Europe.

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[31] See e.g. Ruiz (2003), supra fn. 29, p. 44.: Akbar Rasulov: Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity? In: 14(1) EJIL 141 (2003) [hereinafter: Rasulov (2003)], p. 148.

[32] See e.g. Menno T. Kamminga, State Succession in Respect of Human Rights Treaties. In: 7 (4) EJIL 469 (1996) [hereinafter: Kamminga (1996)], p. 469-484.; Poupart (2000), supra fn. 29, p. 466.; John O'Brien: International Law. Taylor & Francis, 2001 [hereinafter: O'Brien (2001)], p. 596-97.; Ruiz (2003), supra fn. 29, p. 52.; Andreas Zimmermann: Staatennachfolge in Völkerrechtliche Verträge. Zugleich ein Betrag zu den Möglichkeiten und Grenzen völkerrechtlicher Kodifikation. [Andreas Zimmermann: State Succession in Respect of Treaties. An Apport to the Possibilities and Limits of a Codification of International Law] Springer, Berlin, 2000 [hereinafter: Zimmermann (2000)], p. 577.; Philipp Jäger: Staatennachfolge und Menschenrechtsverträge [Philipp Jäger: State Succession and Human Rights Treaties.] Shaker Verlag, Aachen, 2002 [hereinafter: Jäger (2002)], p. 243.; Nihal Jayawickrama: Human Rights in Hong Kong. The Continued Applicability of the International Covenants. In: 25 Hong Kong Law Journal 169 (1995), p. 176.; Rein Müllerson, The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia. In: 42 ICLQ 473 (1993) [hereinafter: Müllerson (1993)], p. 490-492.

[33] As for the practice of the ICJ, its jurisprudence concerned the question of automatic State succession in respect of the Genocide Convention on several occasions, among which one can highlight four steps: the Judgment of 1996 on the Preliminary Objections in the Genocide case (Bosnia-Herzegovina v. Serbia-Montenegro), the 2003 Judgment in the Revision of the Judgment of 11 July 1996 case, the final judgment of the Genocide case in 2007 and finally the Croatia v. Serbia case. Briefly, the jurisprudence of the Court does neither refute nor support the claim of the automaticity rule, but it is significant that several judges recognized its validity. See Genocide case (Bosnia-Herzegovina v. Serbia-Montenegro), Preliminary Objections, ICJ Rep. 1996, Separate opinion of Judge Shahabuddeen, of Judge Weeramantry, of Judge Parra-Aranguren; Genocide case (Bosnia-Herzegovina v. Serbia-Montenegro), Judgment of 26 February 2007, Separate opinion of Judge Tomka.

1.1.1. The irreversibility of human rights treaties

Human rights conventions do not contain termination clauses. Moreover, the Human Rights Committee prohibited in its General Comment 26 the termination of the obligations under the ICCPR[34] and the Inter-American Court of Human Rights followed also this view.[35] As Kamminga adds, this special character of human rights treaties is also reflected in Art. 60(5) of the Vienna Convention on the Law of Treaties (the 1969 Vienna Convention), which declares that no provision protecting human rights contained in treaties of humanitarian character may be terminated or suspended in response to a material breach by another party.[36]

Beyond the legal side of this argument, one should keep in mind its moral aspect: in case of a break in the human rights protection, the population of the territory would be deprived of the protection guaranteed before the State succession.[37] That is what Kamminga calls an "accountability gap",[38] where human rights violations remain unaccountable. The danger of such a legal gap in human rights treaties and its negative moral and destabilizing impact make this argument considerable.

[34] The General Comment No. 26 was issued after North Korea had declared on 25 August 1997 that it would terminate the application of the ICCPR. See UN Doc. CCPR/C/21/Add.8/Rev.1, General Comment 26.; See also Rasulov (2003), supra fn. 31, p. 152.;

[35] When Peru declared in two ongoing cases that it revoked the competence of the Inter-American Court of Human Rights, the Court established in both case its competence, referring to the special character of human rights treaties. See Ivcher Bronstein Case, Decision on the Competence, 24 September 1999, p. 11., par. 42; Constitutional Court Case, Decision on the Competence, 24 September 1999, p. 13., par. 41.

[36] See Kamminga (1996), supra fn. 32, p. 473.; See also Rasulov (2003), supra fn. 31, p. 152.

[37] Two judges used this argument in the same case before the ICJ. See Separate opinion of Judge Shahabuddeen, Genocide case (Bosnia-Herzegovina v. Serbia-Montenegro), supra fn. 25, p. 635, 637.; See also the argumentation of Judge Weeramantry, infra fn. 44; see also Ruiz (2003), supra fn. 29, p. 63.; Vladimir-Djuro Degan: La Succession d'Etats en matière des traités et les Etats nouveaux (issus de l'ex-Yougoslavie). In: 42 AFDI 206 (1996) [hereinafter: Degan (1996)], p. 215.

[38] See Kamminga (1996), supra fn. 32, p. 484.

1.1.2. Human rights as acquired rights: are they directly granted to individuals?

Most scholarly writers compare human rights by analogy to the notion of "acquired rights",[39] by referring to the advisory opinion of the Permanent Court of International Justice (PCIJ) in the German Settlers in Poland case. In that case, the Court held that private rights can be validly enforced also against the successor State, so individuals' property rights and other claims against the State do not become void as a consequence of the change of the sovereign power.[40]

However, under the definition of O'Connell, acquired rights are "any rights, corporeal or incorporeal, properly vested under municipal law in a natural or juristic person and of an assessable monetary value"[41]. This definition excludes its applicability to human rights, as these cannot be expressed in cash value.[42] Thus, the argumentation based on the analogy between acquired rights and human rights is refutable, so one should look for other arguments.

1.1.3. Human rights represent universal values

Another, more philosophical argument is that human rights are of universal value which have to be protected by the international community as a whole.[43] Most authors refer also to the similar reasoning of Judge Weeramantry in the Bosnia and Herzegovina v. Yugoslavia case[44]

[39] E.g. Müllerson (1998), supra fn. 29, p. 27.; O'Brien (2001), supra fn. 32, p. 596.; Rasulov (2003), supra fn. 31, p. 168.; Hersch Lauterpacht : Succession of States with Respect to Private Law Obligations. In : E. Lauterpacht (ed.) : 3 International Law; Being the Collected Papers of Hersch Lauterpacht 126 (1977) [hereinafter: Lauterpacht (1977)], p. 136.; Enver Hasani: The Evolution of the Succession Process in Former Yugoslavia. In: 4 (2) Miskolc Journal of International Law 12 (2007), p. 33.

[40] German Settlers in Poland, (Advisory Opinion) 10 September 1923, PCIJ Series B, No. 6, at 36.; See the similar definition given by Lauterpacht : "an acquired right is any right which, were there no territorial changes, would be protected by the courts in a lawful State". See Lauterpacht (1977), supra fn. 39, p. 136.

[41] See D.P.O'Connell: International Law, I-II. London, Stevens & Sons (1970), p. 763.

[42] Jäger expressed similar doubts in this issue. See Jäger (2002), supra fn. 32, p. 110.

[43] See Rasulov (2003), supra fn. 31, p. 151.

[44] Judge Weeramantry mainly argues with the universal values of human rights treaties. He holds that human rights and humanitarian treaties do not represent an exchange of interests but are designed to protect the

or to the Barcelona Traction case[45], where the ICJ held that "principles and rules concerning the basic rights of the human person" are of *erga omnes* nature, i.e. invokable against all States. It must be noticed that the ICJ earlier recognized the existence of a special category of treaties (often called by the doctrine "law-making treaties" or "universal treaties") which conventions do not enshrine a balance of the reciprocal interests of the State parties, but "a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention".[46]

These value-oriented claims do not seem in themselves sufficient to prove an automaticity rule and, as Poupart proposes, it is wiser to examine State practice and Art. 34 of the Vienna Convention, a provision that the next point will discuss.[47]

1.1.4. In case of separation, Art. 34 codifies the automatic State succession in respect of treaties

As mentioned above, the Vienna Convention of 1978 on Succession of States in respect of Treaties does not deal particularly with human rights treaties, but grants them the same

international community as a whole rather than interests of particular States. Secondly, human rights treaties transcend concepts of State sovereignty, i.e. such treaties are far beyond the boundaries of State sovereignty as they are of universal concern, so the succession in the subject of the sovereignty does not concern them. Thirdly, human rights are not a gift given by the State but they are an entitlement to which people were born "by virtue of their humanity", the States only recognize human rights in the treaties. Fourthly, he finds that as the principles underlying the Genocide Convention were recognized "by the civilized nations as binding on States" in Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (ICJ Reports 1951, p. 23.), the same can be said of all human rights treaties. Fifthly, rules protecting human rights which became part of the customary international law (like the prohibition of genocide) remain valid irrespectively of State succession. The other arguments are based on the problem that without automatic continuation of the human rights treaties, citizens would be left unprotected during the interim period (until the accession of the new State to the treaty). See Genocide case (Bosnia-Herzegovina v. Serbia-Montenegro), supra fn. 25, Separate opinion of Judge Weeramantry, pp. 645-653.

[45] See Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. reports 1970, par. 33-34.

[46] Reservations to the Convention on Genocide, Advisory Opinion, ICJ Reports (1951), p. 23.

[47] See Poupart (2000), supra fn. 29, p. 469.

treatment as other types of treaties. In case of separation, Art. 34 (1) codifies the automatic State succession in respect of treaties:[48]

> When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
> (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

This provision unequivocally requires the automatic State succession in respect of all treaties without any formal requirements. However, it must be admitted that this provision does not reflect a customary rule for the following reasons:

- In the 1970s, the ILC could not base its work on an abundant State practice,[49] but codified the "progressive development of law".[50]
- The Vienna Convention came into force only in 1996, almost two decades after its codification and only 17 State Parties have ratified it[51] - a fact that indicates the low willingness of States to accept its provisions.
- Separated successor States very often chose the "clean slate" rule rather than the automaticity rule, especially in case of political, military agreements, bilateral or multilateral treaties with a limited number of participants.[52]

Considering the heterogeneous State practice,[53] the doctrine does not consider Art. 34 as customary law and has expressed doubts about the validity of this article.[54] Thus, this article

[48] However, for "newly independent States" (States born of decolonisation), the convention codifies the *tabula rasa* principle, see Art. 17 (1).
[49] Examples of separation before the adoption of the 1978 Vienna Convention: the separations of Pakistan, Singapore and Bangladesh.
[50] It was recognized by Sir Francis Vallat, member of the ILC. See Summary Records, ILC, Committee of the Whole, 48th meeting, 8 August 1978, p. 105, par. 10.; It is the opinion of Judge Kreća in the Genocide case (Bosnia-Herzegovina v. Serbia-Montenegro), supra fn. 38, p. 779.; Similarly, see P. Dumberry – D. Turp: La succession d'Etats en matière de traités et le cas de la secession: du principe de la table rase à l'émergence d'une présomption de continuité des traités. In: 36/3 RBDI 377 (2003) [herainafter: Dumberry – Turp (2003)], p. 397.
[51] See: http://untreaty.un.org/sample/EnglishInternetBible/partI/chapterXXIII/treaty2.asp (29.12.2008). It is remarkable that among the State Parties, one finds Bosnia and Herzegovina, Croatia, the Czech Republic, Slovakia, Slovenia, the Former Yugoslav Republic of Macedonia, Ukraine and Yugoslavia, all of them affected in their history by the separation.

cannot serve as a strong legal basis for the automaticity rule. However, it does not lessen its theoretical and practical influence: the doctrinal arguments in favour of Art. 34 (1) are the continuity and stability of treaty relations notwithstanding a State succession,[55] avoiding "legal *vacuums*" and the principle of "*pacta sunt servanda*".[56]

1.1.5. The practice of most UN bodies supports the automatic State succession in respect of human rights treaties

Although special treaty bodies are independent of the States, thus can only provide a subsidiary, indirect source of public international law[57] and their views are not binding, they could nevertheless reflect State practice if States accept impliedly, without protestation the views of the treaty body.[58] Thus, the thesis will examine the practice of special UN treaty bodies and under the next point, that of the bodies of the European Convention on Human Rights (ECHR).

From the State succession wave in the 90s, UN bodies have presented a more or less consequent practice requiring the new States to ensure the protection assumed by the predecessor State in a human rights convention concluded by the latter.

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[52] See Müllerson (1993), supra fn. 32, p. 489. ; Degan (1996), supra fn. 37, p. 217.
[53] See infra, point 1.1.8.
[54] See e.g. Poupart (2000), supra fn. 29, p. 472.; Kamminga (1996), supra fn. 32, p. 484.; Müllerson (1993), supra fn. 32, p. 488.; Knut Ipsen: Völkerrecht. 3. Auflage, München, 1990, p. 135. [Knut Ipsen: Public International Law. 3rd edition, Münich, 1990, p. 135.]. Similar opinion in its 4th ed. (1999), p. 129.; Paul R. Williams: The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, Czechoslovakia: do they continue in force? In: 23 (1, Fall) Denver Journal of International Law and Policy (1994) [hereinafter: Williams (1994)], p. 1.; Hans D. Treviranus: Die Konvention der Vereinten Nationen über Staatensukzession bei Verträgen. [Hans D. Treviranus: The UN Convention on State Succession in respect of Treaties.] In: 2 Zeitschrift für Ausländisches und Öffentliches Recht 259 (1979), p. 279.; Dumberry – Turp (2003), supra fn. 50, p. 397.; It is the opinion of Judge Kreća in the Genocide case (Bosnia-Herzegovina v. Serbia-Montenegro), supra fn. 25, p. 779.; See also Marc Bojanic: Éléments d'appréciation de la pratique étatique en matière de succession aux traités de la République Socialiste Fédérative de Yougoslavie. In: 33 RBDI 489 (2000) [hereinafter: Bojanic (2000)], p. 494.; See also Degan (1996), supra fn. 37, p. 219.
[55] See Müllerson (1993), supra fn. 32, p. 487.
[56] See Degan (1996), supra fn. 37, p. 217.

In 1992, the Human Rights Committee issued a resolution stating that "there was no reason to presume that successor States [of the former Yugoslavia] would not continue to apply human rights treaties."[59] When the successor States of the Soviet Union chose accession instead of succession, the Committee disapproved this practice and noted that "the date of independence should continue to be the starting point" for all the obligations except for the submission of the national report.[60]

Other important special treaty bodies, such as the Committee on the Elimination of Racial Discrimination (CERD) or the chair persons of the human rights treaty bodies[61] also urged all successor States to confirm their succession to the relevant human rights treaties.

Some authors criticize the practice of special treaty bodies stating that the requirement of the notification of the depositary about the succession excludes automaticity since they contribute to this notification a constitutive force.[62] However, this claim is refuted by the wording of the resolutions speaking about a "confirmation" of existing treaty obligations[63] - the treaty bodies are of the view that the successor States are bound to continue the treaties

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[57] See Jäger (2002), supra fn. 32, p. 78.
[58] See Jäger (2002), supra fn. 32, p. 76.
[59] Human Rights Committee Decision on State succession to the Obligations of the Former Yugoslavia under the International Covenant on Civil and Political Rights. In: 15 European Human Rights Reports 233 (1992), p. 233-243. Furthermore, the Human Rights Committee required Bosnia-Herzegovina, Croatia and the FRY to submit reports, while supposing that they are all bound by the ICCPR as successor of the SFRY. It emphasizes that "all the peoples within the territory of the former Yugoslavia are entitled to the guarantees of the Covenant. See: UN Doc. CCPR/C/SR.1178/Add.1, p. 2. The Committee considered the submission of the report by Bosnia-Herzegovina as an implied recognition of the automaticity rule. Similarly, the Committee considered the submission of the report and the compliance of Croatia with the Committee as a recognition of the automaticity rule. See: UN Doc. CCPR/C/SR.1201, p. 2. The Comment to the report submitted by the FRY similarly perceives this compliance as a recognition of automatic State succession to the ICCPR although the FRY did not confirm its succession. See UN Doc. CCPR/C/79/ADD.16, p. 2., par. 3. Finally, the General Comment No. 26 is also based on the continuity of treaty obligations. See supra, fn. 34.
[60] CCPR/C/SR.1332, p. 12., par. 67.
[61] See the General Recommendation XII (42) of the Committee on the Elimination of Racial Discrimination in respect of the Convention on the Elimination of All Forms of Racial Discrimination, UN Doc. E/CN.4/RES/1995/80, par. 2.; See also the fifth meeting of the persons chairing the human rights treaty bodies in December 1994, UN Doc. A/49/537, par. 31.
[62] See above Rasulov (2003), supra fn. 31, p. 155-157.; Degan (1996), supra fn. 37, p. 225.; Williams (1994), supra fn. 54, p. 18., fn. 102. ; Bojanic (2000), supra fn. 54, p. 508. ; Brigitte Stern: Rapport Préliminaire sur la succession d'Etats en matière de traités constitutifs d'organisations internationales et de traités adoptés au sein des organisations internationales. International Law Association, Taipei Conference, 1998, p. 17., 18.
[63] See e.g. UN Doc. E/CN.4/RES/1993/23, par. 1., fifth phrase of the preamble and first paragraph.

ipso jure from the date of independence.[64] Furthermore, in several cases, the Human Rights Committee treated certain States as bound by the ICCPR even lack of any confirmation of succession[65] and even in cases where post-Soviet republics chose to accede to the ICCPR instead of succeeding thereto, the Committee declared that it considered them bound by the Covenant retroactively from their respective date of independence, not from the date of the accession.[66] All these facts prove that the requirement of the notification of succession can be perceived as a formality serving legal certainty and the cooperation with the respective treaty bodies.[67]

Beyond special treaty bodies, the Secretary-General and the Commission on Human Rights – as a functional commission of the UN Economic and Social Council (ECOSOC) – consistently followed the automaticity rule.[68]

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[64] See Zimmermann (2000), supra fn. 32, p. 544. He refers also to the comments of the representatives of Russia and Chile on the 41st meeting of the Commission on Human rights since both contributed to the confirmation on succession only declarative force, thus supported the *ipso facto* continuation of human rights treaties. See: E/CN.4/1994/SR.41, p. 11-12. Furthermore, as noted above, the Human Rights Committee based its view on the existence of automaticity even lack of any confirmation of succession. See UN Doc. CCPR/C/79/ADD.16, p. 2., par. 3. Finally, the fifth meeting of the persons chairing the human rights treaty bodies in December 1994 expressly emphasized that the automaticity rule applies notwithstanding the declaration of confirmation. See above, fn. 61.

[65] E.g. after the submission of the national report by Bosnia-Herzegovina, see UN Doc. CCPR/C/79/ADD.14, par. 3, 7. or similarly in the case of the FRY, see CCPR/C/79/ADD.16, par. 3.; the Committee requested Kazakhstan to submit a national report notwithstanding the fact that Kazakhstan failed to notify its succession or accession to the ICCPR, see UN Doc. A/55/40(VOL.I), par. 64.

[66] See e.g. A/48/40(PARTI), par. 41.; See also A/51/40[VOL.I](SUPP), Vol. I., Annex I/A.; Nevertheless, the Committee disapproved the method of accession used by post-soviet republics instead of succession, see CCPR/C/79/ADD.38, par. 4.

[67] See Zimmermann (2000), supra fn. 32, p. 544.; Matthew Craven: The Genocide Case, the Law of Treaties and State Succession. In: 68 BYIL 127 (1997) [hereinafter: Craven (1997)], p. 145.; In addition, it is confirmed by Art. 38 (1) of the 1978 Vienna Convention, which, no matter how weakly it reflects customary international law, does not require a written notification to the depositary in case of succession to a treaty. See Degan (1996), supra fn. 37, p. 219.; On the other hand, the practice of non human rights bodies is inconsistent. It seems that the constitutive force of the notification was supported by the International Conference on the Former Yugoslavia [UN Doc. S/24795 (11 November 1992), Annex VII., Appendix, (b)]. However, it has no legal force and does not clearly refute the above mentioned practice of human rights treaty bodies. Similarly, whereas the depositary of the Geneva Convention, the Swiss Government did not consider successor States of the USSR and SFRY as parties to the humanitarian conventions until they have declared they succession or accession thereto, the monitoring body, the ICRC and the UN Security Council did. See Zimmermann (2000), supra fn. 32, p. 583.

[68] As for the Secretary-General, see UN Doc. E/CN.4/1996/76, par. 9. ; As for the Commission on Human Rights, see UN Doc. E/CN.4/RES/1993/23, par. 1.; UN Doc. E/CN.4/RES/1994/16, par. 1.; UN Doc. E/CN.4/RES/1995/18, par. 1.

Although the practice of the Human Rights Committee, the meeting of the chairmen of human rights bodies and the Commission on Human Rights clearly supported the automaticity rule, and the views of the Committee on Economic, Social and Cultural Rights, the CERD and the Committee on the Elimination of Discrimination against Women partially supported it, the Committee against Torture and the Committee on the Rights of the Child remained indifferent in the question since these latter two bodies equally accepted accession and succession to the treaties by the successor States.[69]

One can nevertheless state that most UN bodies required more or less an automatic succession in respect of human rights treaties and all of them encouraged successor States at least to become members of the respective human rights treaties, whether by accession or by succession.[70] Their troubles achieved that most successor States – with very few exceptions[71] – are State parties to all human rights treaties of their predecessor States.

1.1.6. The practice under the ECHR supports the automaticity rule

The legal problem with an automatic State succession in respect of the ECHR is that former Art. 66[72] provides that only a member of the Council of Europe is entitled to become party to the Convention. Thus, a successor State can only become a member of the ECHR after being admitted to the membership of the international organization, which decision is made exclusively by the Committee of Ministers.[73]

The ECHR was ratified before 1991 only by Czechoslovakia, but not by the Soviet Union or by the SFRY. Both the Czech Republic and Slovakia declared that notwithstanding

[69] See a deeper analysis on the practice of all these bodies at Jäger (2002), supra fn. 32, p. 235.
[70] See Jäger (2002), supra fn. 32, p. 242.
[71] E.g. until 01.09.2009, Tajikistan and Turkmenistan have not signed the Genocide Convention.
[72] Since the entry into force of Protocol 11 on 1 November 1998, Art. 59.
[73] See Zimmermann (2000), supra fn. 32, p. 572.; Jäger (2002), supra fn. 32, p. 227.

the lack of membership in the Council of Europe, they consider themselves bound by the ECHR.[74] The Committee of Ministers decided on 30 June 1993 that both the Czech Republic and Slovakia are bound by the ECHR from the date of their independence, i.e. from 1 January 1993.[75] The European Commission of Human Rights and the European Court of Human Rights consistently applied the ECHR to these two successor States from the date of their independence,[76] even in cases where the individual complaint had been filed after the date of dissolution, but before the accession to the Council of Europe.[77]

This practice was followed after the separation of Montenegro: the Committee of Ministers considered Montenegro as a party to the ECHR and its Protocols and invited it to accede to the Council of Europe.[78] It is important to highlight that the Committee of Ministers expressly recognizes the process as "succession" to the treaties of the predecessor State.[79] Furthermore, the Court held in a recent case that the Convention "should be deemed as having continuously been in force in respect of Montenegro as of 3 March 2004, between 3 March 2004 and 5 June 2006 as well as thereafter".[80]

In sum, the practice of the bodies under the ECHR supports the automaticity rule. It is not clear from the practice whether the Court did recognize the succession in respect of the ECHR on the basis of the successor State's expressed will to do so or on the basis of the

[74] See Declaration of the Czech National Council to All Parliaments and Nations of the World of 17 December 1992. In: Council of Europe doc. A/Conf 80/31.; See also the Declaration by the Government of the Slovak Republic made on 8 December 1992. Reprinted in: J.-F. Flauss: Convention européenne des droits de l'homme et succession d'Etats aux traités: une curiosité, la décision du Comité des Ministres du conseil de l'Europe en date du 30 juin 1993 concernant la République tchèque et la Slovaquie. In: 1 RUDH 1 (1994) [hereinafter: Flauss (1994)], p. 1.

[75] See the unpublished note of the Legal Department of the Council of Europe to all member States, RB/hms JJ 2989 C, 13 July 1993. Cited by Zimmermann (2000), supra fn. 32, p. 570.

[76] See e.g. Case of I. S. v. Slovakia, Appl. No. 25006/94, Judgment (4 April 2000), par. 36; Case of Punzelt v. the Czech Republic, Appl. No. 31315/96, Judgment (25 April 2000), par. 70; Case of Ceský v. the Czech Republic, Appl. No. 33644/96, Judgment (6 June 2000), par. 71.

[77] See e.g. J. A. v. the Czech Republic, Appl. No. 22926/93, Decision of 7 April 1994 on the Admissibility of the application, par.118-121.

[78] See CM/Del/Dec(2007)994bis 7 and 9 May 2007, Item 2.1a

[79] "to succeed to those conventions to which the State Union of Serbia and Montenegro had been a Party or Signatory". See CM/Del/Dec(2007)994bis 7 and 9 May 2007, Item 2.1a;

[80] See Case of Bijelić v. Montenegro and Serbia, Appl. No. 11890/05, Judgment (28 April 2009), par. 69.

decision of the Committee of Ministers, and whether it would have acted similarly lack of any declaration of the successor State.[81] Whether the perception of an automaticity rule was initially followed by the successor States or the Committee of Ministers, both cases reflect State practice which was consistently assisted by the European Court and European Commission of Human Rights.

1.1.7. The practice of States partly supports the automatic State succession in respect of human rights treaties

While Central and Eastern European successor States (successor States of Czechoslovakia and of the SFRY) consistently chose succession in case of most international human rights conventions (with rare exceptions),[82] successor States of the USSR did not and generally chose the formal accession to the treaties.[83] They chose accession contrary to the general will of succession expressed by the Alma-Ata Declaration, reflecting rather the "clean slate theory" and producing sometimes lengthy gaps of protection.

Rasulov concludes that automatic State succession[84] in respect of human rights treaties is not supported by the actual trends of international law, since the State practice did not

[81] Zimmermann is of the view that a succession to the treaty obligations under the ECHR depends on the decision of the Committee of Ministers: a successor State may succeed in respect of the ECHR only if the Committee confirms it, but from the date of its independence. See Zimmermann (2000), supra fn. 32, p. 572.

[82] See Rasulov (2003), supra fn. 31, p. 160.; See also Ruiz (2003), supra fn. 29, p. 80-81., fn. 32. See the actualized, corrected and extended version of the table summarizing the action chosen by recently separated States towards the most important international human rights conventions in Appendices. As for the explanation of the exceptions, see infra fn. 100.

[83] Apart from the very few cases where a successor State was not reported as party at all (see above, fn. 95), there was only one exception from the generally applied accession to the treaties (Kazahstan ratified the CC). See Rasulov (2003), supra fn. 31, p. 160.; Ruiz (2003), supra fn. 29, p. 81-82., fn. 33. and p. 55.

[84] He distinguishes two types of continuity: firstly, under the interpretation of Kamminga, the "*ipso jure* State succession" in respect of human rights treaties without issuing any confirmation; and secondly, the more moderate "*de facto* continuity", when formalities are performed, but successor States consider them as declarative and automatic State succession as a convenience, not a legal duty. Rasulov finds that State practice does not strongly support neither type of automatic State succession. See Rasulov (2003), supra fn. 31, p. 157.

follow it.[85] His argument is persuasive: because State succession is based on customary law, it is the practice of States which indicates what the law is. Contrary to the general doctrinal support for the automaticity, State practice of post-Soviet States revealed rather the "clean slate" view.

1.1.8. Summarizing the arguments

In sum, theoretical arguments, the majority of the doctrine, UN and ECHR treaty bodies all support the automaticity. However, this thesis recognizes that public international law is mainly formed by State practice, which proved to be inconsistent in the debate between succession/accession to human rights treaties.

Nevertheless, there is a spreading long-term tendency among successor States to follow the automaticity rule. Moreover, the inconclusive practice of the successor States of the Soviet Union reflected a kind of sympathy towards continuation: although they acceded to human rights treaties, in many cases they continued to apply the same treaties before the formal accession.[86]

The final conclusion of most authors is nuanced: they speak about a "presumption in favour of the continuity of human rights treaties",[87] a "wide support" for the principle of continuity,[88] a "considerable signs supporting" it existence,[89] a development "on the verge of widespread international acceptance",[90] or the "indicatives" which fight for the recognition of

[85] Ibid, p. 165.
[86] Ibid, p. 67.
[87] Ibid, p. 69.; Similarly Zimmermann (2000), supra fn. 32, p. 577.
[88] See Kamminga (1996), supra fn. 32, p. 484.
[89] See Craven (1997), supra fn. 67, p. 158.; Jäger (2002), supra fn. 32, p. 239., 243.
[90] Malcolm N. Shaw: State Succession Revisited. 5 Finnish Yearbook of International Law 82 (1994), p. 84. Cited by Zimmermann (2000), supra fn. 32, p. 577., fn. 564.

the rule of continuity.[91] Because of a lack of consistent State practice, no author dares to speak about an already existing customary rule, but about its need and a tendency towards it.

Nevertheless, the following part argues for a type of regional custom, being mandatory on the States of the Eastern and South-Eastern European region.

1.2. Synthesizing the doctrinal views: signs of a regional custom of continuity in Eastern and South-Eastern Europe

Having summarized the majority opinion supporting the principle of continuity (especially Poupart, Kaminga, Müllerson) and its criticism which highlights rather the inconclusive State practice (Rasulov), this thesis argues for the golden mean: although there is a clear difference in the practice between the practice of Central and Eastern European successor States (of Czechoslovakia and of the SFRY) and that of post soviet States, one can suppose that there is a regional custom in Central and Eastern Europe following the automaticity principle in respect of human rights treaties.[92]

Customary international law, under the definition of Rosenne, "consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required

[91] See Poupart (2000), supra fn. 29, p. 489.; Oscar Schachter: State Succession: The Once and Future Law. 33 Virginia Journal of International Law 260 (1993) [hereinafter: Schachter (1993)], p. 259.

[92] However, to the possible claim that one can observe a regional custom of continuity in respect to Central and Eastern Europe, Rasulov answers that there is sufficient evidence to believe that the successor States of Czechoslovakia and the SFRY felt bound by the Vienna Convention on the succession of States in respect of treaties and not by a continuity norm. See Rasulov (2003), supra fn. 31, p. 164.; Nevertheless, his claim is not supported by evidence: in reality, the successor States of the SFRY did not follow Art. 34 of the 1978 Vienna Convention. Only one quarter of the treaties ratified by the SFRY were undertaken by all successor States. See Bojanic (2000), supra fn. 54, p. 506. Therefore, the following argumentation concerns only human rights treaties.

them to act that way."[93] According to this commonly used definition, a custom has three main requirements:

1. State practice: similar international acts have to be repeated by States over time, constantly and uniformly.[94]
2. Its prevalent feature: "the acts are taken by a significant number of States and not rejected by a significant number of States."[95] The ICJ did not require unanimity among States, but "a very widespread and representative participation in the convention", "provided it included that of States whose interests were specially affected."[96]
3. Opinio juris: States have to act so due to a sense of obligation (subjective element)

Furthermore, applying analogously the same criteria, the ICJ itself recognized the possibility of a regional or local customary law.[97] Based on the essential criteria of customary international law, the thesis will examine the existence of a regional custom in respect of continuity:

1. Firstly, the State practice requirement of the custom should be proved. By applying automatic State succession in respect of human rights treaties, successor States of Czechoslovakia and of the SFRY followed the same practice after gaining independence. It can be concluded that all States "whose interests were specially affected" were participating in this practice, since all successor States born after 1990 in the region followed it. As for the second wave of State succession (after 2001) in the region, Montenegro notified its succession to all major human rights treaties to which Serbia and

[93] Shabtai Rosenne: Practice and Methods of International Law. London, Rome, New York, Oceana Publications, 1984, p. 55.
[94] Nguyen Quoc Dinh – Patrick Daillier – Alain Pellet: Droit International Public. 4e édition, Paris, Librairie Général de Droit et de Jurisprudence, 1992 [hereinafter : Daillier – Pellet (1992)], p. 315-316.
[95] International Legal Research Tutorial. See at: http://www.law.duke.edu/ilrt/cust_law_2.htm (01.02.2009).
[96] North Sea Continental Shelf, Judgment, ICJ Reports 1969, p. 42., par. 73.
[97] Colombian-Peruvian asylum case, Judgment of November 20th, 1950: ICJ, Reports 1950, p. 276-78.

Montenegro was party[98] and the Secretary General indicated it in the depositary records accordingly.[99]

Furthermore, this repetition has to be observable uniformly and constantly. Uniformity does not exclude possible exceptions and indeed in two cases in the region, very particular circumstances induced States to choose accession instead of succession and in one isolated case, some States have not become parties to a treaty.[100] Apart from these rare exceptions, successor States in the region consistently followed automaticity rule – this widespread practice is worth being treated as uniform.

As for the constancy of the repetition of the custom, this condition seems more problematic: considering the unique and irregular character of State succession, there is no decent-long practice in the region. Nevertheless, the ICJ ruled that the short period of time does not bar in itself the birth of a custom if State practice is "extensive and virtually uniform".[101] Since the application of the continuity rule concerned a period of time firstly

[98] See UN Doc. A/HRC/WG.6/3/MNE/1. See also in: IEMed Institut Europeu de la Mediterrània. See at: http://www.iemed.org/anuari/2007/taules/ae01.pdf (03.02.2009).

[99] See Status of the Multilateral Treaties Deposited with the UN Secretary General, Chapter XXIII, http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en (03.03.2009). Furthermore, within the Council of Europe, the Committee of Ministers decided in a resolution dated 7 and 9 May 2007 that the Republic of Montenegro is to be regarded as a Party to the ECHR.

[100] The first case is not really contrary to a possible regional custom of automaticity: Slovenia acceded to the Convention against Torture since it considered its date of independence 25 June 1991, but the Convention was ratified by the SFRY only on 10 September 1991. Since at the time of its independence the Convention did not apply to the territory of Slovenia, it was legally correct that Slovenia acceded to the Convention, with a date of 15 August 1993 (ratification). See Jäger (2002), supra fn. 32, p. 199.; As for the later exception, the FRY chose in 2001 to accede to the Genocide Convention. It can only be explained by the procedural strategy of the FRY: at that time, the FRY was interested in proving in the ongoing ICJ procedure against Bosnia-Herzegovina [See Genocide case (Bosnia-Herzegovina v. Serbia-Montenegro), supra fn. 25] that it had not been bound by the Convention before, thus had not succeeded thereto. That is why the FRY chose to accede to the Genocide Convention rather than succeeding thereto. See Jäger (2002), supra fn. 32, p. 214.; Finally, it must be added that Slovakia, Slovenia and the FYROM have not become party to the International Convention against Apartheid in Sports at all, a fact that can be explained by the practical insignificance of that treaty in European context. Since they have State duties to prevent discrimination under other human rights treaties, this failure does not seem to weaken radically a possible regional custom.

[101] North Sea Continental Shelf, Judgment, ICJ Reports 1969, p. 43, par 74.

from 1992 to 1994[102] and secondly from 2001 to 2006[103], these two waves let the thesis argue for the fulfillment of the constancy condition.

In sum, the condition of State practice seems to be fulfilled by the State practice of the region. Now the criteria of *opinion juris* and the widespread and representative participation should be examined.

2. Secondly, as for the condition of widespread and representative participation, the unanimity of States is not a condition.[104] Nonetheless, the more restricted is the group of States forming the regional practice, the more unanimity is necessary.[105] In Central and Eastern Europe, considering that 8 successor States[106] are concerned and all of them followed in overwhelming number of cases the rule of continuity, one can conclude that the condition of widespread participation is fulfilled.

3. Thirdly, States of the region have to act due to a sense of obligation. As mentioned before, there are many international bodies which informed successor States that they should follow the continuity rule.[107] Although no such declaration was binding on States, as a

[102] According to the day of succession reported by the Status of the Multilateral Treaties Deposited with the UN Secretary General (Chapter XXIII), most human rights conventions were succeeded at the following dates: 6 Jul. 1992 (Slovenia), 12 Oct. 1992 (Croatia), 22 Febr. 1993 (Czech Republik), 28 May 1993 (Slovakia), 29 dec. 1992 (GC) or 1 Sept. 1993 (e.g. ICCPR) (Bosnia and Herzegovina), 2 Dec. 1993 (CRC) or 18 Jan. 1994 (ICCPR, CEDAW, GC) or 12 Dec. 1994 (CAT) (the former Yugoslav Republic of Macedonia). See at: http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en (03.03.2009)

[103] 12 March 2001 (date of admission of Serbia and Montenegro to the UN, after 2006 "Serbia"), 23 Oct 2006 (Montenegro).

[104] Except for bilateral customs, which have to be unanimous. See Daillier – Pellet (1992), supra fn. 94, p. 317-319.

[105] Ibid.

[106] As for an eventual ninth State, Kosovo, which declared independence from Serbia on 17 February 2008, it is too early to deduce any conclusions. By all means, it should be mentioned that its constitution incorporated the rule of "Continuity of International Agreements and Applicable Legislation" which Serbia was Party to. See Art. 145 and Art. 22 of the Constitution of the Republic of Kosovo. In sum, whether State or not, Kosovo tries to follow the practice of other successor States in the region and this attitude strengthens the argumentation for a possible regional customary law.

[107] Namely, the Human Rights Committee and the Commission on Human Rights (and mainly in respect of the successor States of the USSR, the Committee on the Elimination of Racial Discrimination or the chair persons of the human rights treaty bodies). See point 1.2.1. E.; The US consistently emphasized that the successor States of the SFRY, Czechoslovakia and the Soviet Union are obliged to continue the treaty obligations concluded by the predecessor States. See Williams (1994), supra fn. 54, p. 1. ; Last but not least, the EC Recognition Guidelines required Successor States to guarantee the human rights enshrined in various

pressure, the Commission on Human Rights for example expressed its will by using the words "encourage successor States to confirm [the succession]", "shall succeed"[108], "calls [successor States]". In some cases, the Badinter Commission itself referred to the succession to human rights treaties as one of the conditions that it had to examine before its opinion on the recognition of the concerned State (e.g. in the case of Slovenia).[109]

In order to comply with the requirements expressed by the competent UN bodies or the recognition requirements of the EC, the successor States of the region must have felt the obligation to succeed to human rights treaties. All of them expressed the intention to continue the treaties in force concluded by their predecessor State[110] and some of them expressed that they act in conformity with their obligation to succeed to the given treaties.[111]

Another element which could explain why this region followed the continuity rule and the post-Soviet did not is that the successor States of the SFRY and of Czechoslovakia were constitutionally recognized units of a federal State: they had more influence during the decision on the conclusion and ratification of treaties than the republics of the Soviet Union which perceived their independence as a process similar to newly independent

international human rights conventions such as the ICCPR. See infra point 3.2.1. See also Degan (1996), supra fn. 37, p. 223.

[108] UN Doc. E/CN.4/RES/1993/23, par. 1.

[109] See Ruiz (2003), supra fn. 29, p. 83., fn. 36.

[110] As for the notifications of succession, see Historical information about the State parties to the treaties deposited with the Secretary-General.; See also e.g. the constitutional decision on the independence of Croatia of 25 June 1991: "Narodne Novine" (Official Journal), No. 31/1991, p. 849., cited by Degan (1996), supra fn. 37, p. 223., fn. 32.; See also Bojanic (2000), supra fn. 54, p. 494.; Moreover, the compliance with this obligation is more unequivocal in the case of the submission of national reports: as a consequence of the requests of the Human Rights Committee to submit reports, all successor States of the region followed the requirement of continuity.

[111] See the letter dated 16 February 1993 and sent for the Secretary-General by the Czech Republic or the a letter dated 19 May 1993 and sent to the Secretary-General by Slovakia (both contains: "In conformity with the valid principles of international law and to the extent defined by it"); see the letter dated 1 July 1992 and received by the Secretary-General from Slovenia ("This decision was taken in consideration of customary international law"), in: Historical information about the State parties to the treaties deposited with the Secretary-General.

States, gaining sovereignty and liberty in foreign affairs.[112]

In sum, the international claims for automatic succession and the former constitutional autonomy as federal units are the main reasons for a sense of obligation of the continuity rule which bound successor States of the region.

If one accepts these main arguments for the validity of a regional custom of continuity presented above, it follows that successor States in Central and Eastern Europe had and have an obligation based on particular customary law to ensure the respect of all human rights ratified by their predecessor States. Thus, any new State of the region shall succeed *ipso jure* to the human rights treaties of its predecessor, it cannot "lower the bar" and lessen the guarantees.

1.3. Conclusion

Having proved the growing acceptance of the automatic State succession in respect of human rights treaties and its State practice in the region of Central and Eastern Europe, one can certainly claim that continuity of human rights obligations has a validity in this region, whether as regional custom or not.

Chapter II will discuss whether a special human right, namely minority rights are by definition treated somehow else than other human rights in respect of the strictness of the protection. If minority rights belonged to *jus cogens* or customary law, it would follow that they oblige successor States irrespectively of whether their predecessor State ratified any international instrument enshrining minority rights or not.

[112] See the letter dated 1 July 1992 and received by the Secretary-General from Slovenia: "This decision was taken in consideration of customary international law and of the fact that the Republic of Slovenia, as a former constituent part of the Yugoslav Federation, had granted its agreement to the ratification of the international

treaties in accordance with the then valid constitutional provisions." In: Historical information about the State parties to the treaties deposited with the Secretary-General.

II. Chapter Two : Minority rights at the time of separation of States

2.1. The connection between separation and minorities: a situation of instability

State succession, and concretely dissolution and separation of States especially threaten minorities, whose protection serves not only the interests of the given State (point 2.1.1.), but also that of the international community (point 2.1.2.).

2.1.1. The need of stability through minority protection in the States concerned by separation or dissolution

A separation of States usually involves political instability, which is often followed by human rights violations and massive atrocities.[113] But inversely, political instability usually increases the tension among national and ethnical minorities of a State which accelerates separatist movements. Especially if a minority is not officially recognized by the State, will it try to establish an independent State separating from the ethnically different majority which implicates the negative reaction of the latter. This *circula vitiosa* was clearly observable in the case of the dissolution of the SFRY.[114]

[113] See Rasulov (2003), supra fn. 31, p. 152.; Kamminga (1996), supra fn. 32, p. 469.; Jäger (2002), supra fn. 32, p. 3.

[114] William A. Schabas : La Crise Yougoslave : Les tentatives internationales de protection des minorités. In: Emmanuel Decaux – Alain Pellet: Nationalité, minorités et succession d'Etats en Europe de l'Est. Actes du colloque de Prague des 22-24 septembre 1994 [10e Journée d'actualité internationale]. Cedin Paris X Nanterre, Cahiers Internationaux n° 10, Montchrestien, 1996 [hereinafter: Nationalité, minorités et succession d'Etats (1996)], p. 296.

According to Kardos, "the most serious consequence of ethnical conflicts is the questioning of the territorial boundaries".[115] However, according to Kardos, the ethnical tensions cannot be reconciled by the modification of the territorial boundaries, since no State would consent to alter its boundaries.[116] There is only one solution which can remedy this *circula vitiosa*: the recognition and respect of minority rights.

One of the various grounds of the collapse of multiethnic socialist States (the USSR, the SFRY and Czechoslovakia) after 1990 was that protection of minorities was not guaranteed, but ethnical claims were suppressed. Separation and constitution of nation-States was deemed to solve ethnic conflicts within these ethnically diverse societies. Nevertheless, it was an illusion to establish pure, ethnically homogenous States, since the ethnic composition of the region is traditionally and historically mixed. Many new States born by secession found themselves in a similar ethnic heterogeneity as their predecessor States, so ethnic tensions were merely placed in a different State context,[117] they were also "succeeded". Furthermore, not only territories which have separated, but also rump States like Serbia after the separation of Montenegro face with ethnic pluralism in their remaining territory.[118]

The consequence of this "succession of ethnic diversity" was that the dominant group of the predecessor State became a dominated group of the new State overnight. Moreover, the new State context can exacerbate the situation of the minority since "new majorities" often tend to stabilize their political power by suppressing or overshadowing the minority. Moreover, a minority which forms a regional majority in a given territorial part of the State is

[115] Kardos Gábor: Kisebbségek: Konfliktusok és garanciák [Minorities : Conflicts and Guarantees]. Gondolat, Budapest, 2007, p. 11.
[116] Ibid.
[117] John McGarry: 'Orphans of Secession': National Pluralism in Secessionist Regions and Post-Secession States. In: National Self-Determination and Secession. Ed. By Margaret Moore. Oxford University Press, 1998 [hereinafter: McGarry (1998)], p. 221.; See also Märta C. Johanson: Kosovo: Boundaries and Liberal Dilemma. In: 73 Nordic Journal of International Law 535 (2004) [hereinafter: Johanson (2004)], p. 540.
[118] See McGarry (1998), supra fn. 117, p. 223.; Diane F. Orentlicher: Separation Anxiety: International Responses to Ethno-separatist Claims. In: 23 Yale Journal of International Law 1 (1998), p. 36.

also susceptible to oppress the regional minority group in that territory, especially if the latter forms the dominant ethnicity on the national level.[119] Although the intensity of the conflict and the post-separation situation of the minority depend on various factors, new States in Eastern Europe born after 1991 are all concerned with the dominant-dominated ethnic group tension.[120]

The consequences of the privileging of the national majority and the disadvantageous situation of national minorities could be disastrous: the minority could react by violent rebellion aiming either at the prevention of the secession of the whole successor State[121] or the creation of an own State.[122] However, the most usual reaction of the minority is the migration from the successor State to the State where it forms a majority. Whether the reaction is violent or not, the consequences all weaken the stability of the new State.

Thus, all successor States of the region, especially the successor States of the SFRY had to face a challenge of their eventual ethnic tensions. There was a particularly important responsibility on the successor States to establish a country where not only the plurality, but also the minorities belonging whether to the ethnicity of the predecessor or to one of the neighbor States are recognized as addressees of human and especially minority rights. On the contrary, if minority rights were not guaranteed to the minorities of the successor State, it has led to new ethnic tensions and further possible separations, like in the case of the FRY.

Johanson argues that no independent successor State has legitimacy if it does not sufficiently protect minority groups within its territory. The dissolution of the SFRY, the

[119] Julie Ringelheim: Considerations in the International Reaction to the 1999 Kosovo Crisis. 2 RBDI 475 (1999) [hereinafter: Ringelheim (1999)], p. 519.
[120] McGarry (1998), supra fn. 117, p. 221. Such instances were the expulsion of Serbs from Croatia in 1995, the narrowing of the language rights of the Hungarian minority in Slovakia under the Meciar government, the exclusion of masses of Russians minority members from citizenship in Estonia and Latvia.
[121] E.g. Croatia's Serb minority resisted to the independence of Croatia and tended to unite its territory with Serbia; similarly did Bosnia's Serbian and Croatian minorities, the Ossetian minority in Georgia, the Armenian minority in Azerbaijan, the Ukrainian and Russian minorities in Moldova. McGarry (1998), supra fn. 117, p. 221.

separation of Montenegro from Serbia and that of Kosovo from Serbia were due to the lack of liberal treatment of minorities in the territory of the predecessor State.[123] Thus, it is the interest of the successor State to gain legitimacy by establishing a liberal context for minorities and by resolving ethnic tensions. In the process of establishing appropriate minority protection regimes, successor States often needed motivation and assistance of the international community.[124]

2.1.2. The stabilizing interests of the international community

Beyond the interests of the successor State and the minorities living in that State, it is also in the interest of the international community as a whole to stabilize the new State and ensure a sufficient minority protection system.[125] The international community recognized in the 1990s, as it did after the First World War, that the sanctity of boundaries cannot be ensured without guaranteeing the acceptable living conditions of the minorities living in the State.[126]

Ethnic tensions, especially if leading to violent armed conflicts within the successor State, can easily be transformed into threats against international peace and security.[127] As the case study of Yugoslavia will prove in Chapter III, *a priori* the international peace and security justified the intervention of the international community protecting human and rights, but at the

[122] E.g. the Abkhazian minority in Georgia, the Chechens in Russia, Kosovo's Albans in Serbia. See McGarry (1998), supra fn. 117, p. 221.
[123] See the forecast of Johanson. See Johanson (2004), supra fn. 117, p. 547.
[124] See Danilo Türk: Recognition of States: a Comment. In: 4 EJIL 66 (1993), p. 71.
[125] The Commission on Human Rights, when examined the minority protection system under the auspices of the League of Nations, also recognized this three-fold advantage of the international protection of minorities: "(...) the guarantee of the League of Nations regarding obligations in respect of the protection of minorities was of a special character: while representing an advantage for the protected minorities and for the international community the stability of which it was designed to ensure, it was also a safeguard for the States bound by the obligations." See Commission on Human Rights: Study of the Validity of the Undertakings Concerning Minorities. UN-Doc. E/CN.4/367, 7 April 1950, Geneva [hereinafter: Study of the Validity of the Undertakings Concerning Minorities], p. 16-17.
[126] Colin Warbrick: Recognition of States. In: 41(2) ICLQ 473 (1992) [hereinafter: Warbrick (1992)], p. 476.
[127] See Johanson (2004), supra fn. 117, p. 547.

same time States and especially Europe tended to ensure a long term stability in the region by requiring the respect for minority rights.

2.2. Minority rights obligations beyond treaty context

2.2.1. Going beyond the principle of automatic State succession: the possibility of a higher standard of protection

The rule of automatic State succession in respect of human rights treaties does not entail more than a bare continuation of the treaty obligations of the predecessor State. But it does not require more, i.e. any obligation to protect other human rights not guaranteed by the treaties in force or to increase the standard of protection which is required by the treaties of the predecessor State. That is exactly what this part will examine: beyond the automatically succeeded conventional duties related to human rights, what other obligations have successor States, especially if the predecessor was not a party to one or more human rights treaties or if the ratified conventions do not cover certain special human rights? This question has an importance especially in case of minority rights which were, apart from one single provision of the ICCPR, not expressly protected before 1990 by universal international treaties.

The thesis will examine whether successor States have a special duty to protect minority rights irrespectively of treaty obligations or in lack of treaty obligations. There are two ways to study the eventual higher standard of minority rights compared to the bare rule of automatic State succession:

- Firstly, the present study will discuss whether minority rights could be considered as customary rules. Under this logic, all States are bound by the duty to protect all minority rights on the basis of a sense of obligation (point 2.2.2.).
- Secondly, the thesis will examine the *jus cogens* nature of minority rights declared by the Badinter Commission (point 2.2.3.).

This point will lead to the conclusion that there is a narrow scope of minority rights which belongs to customary law and which creates a minimum standard which all States have to guarantee.

2.2.2. The claim to consider minority rights as customary law

As already mentioned,[128] Art. 27 of the ICCPR served as a basis for further international instruments protecting minority rights. Nowadays, even more and more scholarly writers consider Art. 27 of the ICCPR as a rule of customary international law.

Wheatley and Thornberry recognize that Art. 27 may be considered as a rule of customary international law.[129] Craven claims that the longstanding international efforts to protect minorities by international instruments might suggest that minority rights are developing into customary international law.[130] Dinstein considers Art. 27 as "a minimum of

[128] See supra point 1.2.

[129] Steven Wheatley, Democracy, Minorities and International Law. Cambridge University Press, Cambridge, (2005), p. 15.; Patrick Thornberry: Minority Rights. In: Collected Courses of the Academy of European Law, VI-2., 1995, p. 385. Cited by Gaetano Pentassuglia: Minorités en droit international. Une étude introductive. Conseil de l'Europe, Strasbourg, 2004 [hereinafter: Pentassuglia (2004)], p. 117.

[130] See Matthew C. R. Craven: The European Community Arbitration Commission on Yugoslavia. In: 66 BYIL 333 (1995) [hereinafter: Craven (1995)], p. 391.; Packer speaks similarly on the possibility of the customary law nature of Art. 27, see J. Packer: United Nations Protection of Minorities in Time of Public Emergency: the Hard-Core of Minority Rights. In: D. Prémont (ed.): Non-Derogable Rights and State of Emergency. Émile Bruylant, Brussels, 1996, p. 514.

rights recognized by customary international law" and interprets it as the "right to preserve a separate identity".[131]

The protectors of the customary nature of minority rights may refer to the fact that the Human Rights Committee itself recognized the customary law character of minority rights in its general comments.[132] Namely, in General Comment No. 24, the Committee held that reservations to the ICCPR that offend peremptory norms or customary rules would be incompatible with the object and purpose of the Covenant. Among the provisions of customary character, the Committee mentioned the right of minorities "to enjoy their own culture, profess their own religion, or use their own language." Secondly, in its General Comment No. 29, the Committee held that "the international protection of the rights of persons belonging to minorities includes elements that must be respected in all circumstances." Consequently, it warned that among such elements, the prohibition against genocide, the non-discrimination clause in Art. 4 (1) and Art. 18 (the right to freedom of thought, conscience and religion) cannot be derogated in emergency situations under Art. 4.

Furthermore, the Inter-American Commission on Human Rights treated in one case the minority rights provision of the ICCPR as customary rule: it applied Art. 27 in the Yanomami v. Brazil case (1985) although the later was not party to the ICCPR.[133] Thus, as Pentassuglia argues, the Commission indirectly recognized the customary nature of Art. 27.[134]

[131] Yoram Dinstein: Collective Human Rights of Minorities. In: 25 ICQL 102 (1976) [hereinafter: Dinstein (1976)], p. 118.
[132] General Comment No. 24 (Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant), UN.Doc. CCPR/C/21/Rev.1/Add.6 (1994), par. 8.; General Comments No. 29 [Derogations During a State of Emergency (Article 4)], UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), par. 13 (c).
[133] Inter-American Comission on Human Rights, Comunidad Yanomami. Caso No. 7615. Resolución No. 12/85, par. 7.
[134] See Pentassuglia (2004), supra fn. 129, p. 118.

As opposed to these instances, a considerable part of the doctrine still holds that the entirety of minority rights has not yet reached the strength of customary law,[135] which needs some precision. Some ingredient rights of minority rights undoubtedly belong to customary law: the prohibition of racial discrimination or the right to recognition of one's identity have not only a customary law character, but may belong to *jus cogens.*[136] Similarly, the following rights presenting a customary law nature may be said to form the heart of minority protection: the right to existence[137] and the prohibition of genocide, the non-discrimination rule,[138] equality before the law[139] and the right not to be assimilated. However, these rights seem nowadays axioms and do not cover the key element of minority protection, the granting of special privileges.

In sum, it is doubtful whether minority rights as a whole has a character of customary international law and it is more difficult to argue that minority rights are peremptory norms, as the next point will explain.

[135] See e.g. Malenovski, who sees no customary laws in the matter of minority rights, but considers minority rights as obligations assumed by States as soft law obligations. See Jiri Malenovski: Vers un régime cohérent de protection des minorités nationales en droit international? In: Nationalité, minorités et succession d'Etats (1996), supra fn. 114, p. 104.
[136] See Pellet (1991), supra fn. 10, p. 340.
[137] See Patrick Thornberry: International Law and the Rights of Minorities. (Clarendon Paperbacks) Oxford University Press, New York, 1991 [hereinafter: Thornberry (1991)], p. 109.
[138] See Thornberry (1991), supra fn. 137, p. 221.; He cites the unpublished opinion of Jan Brownley who supports the same view, ibid.
[139] See e.g. Pentassuglia (2004), supra fn. 129, p. 118.

2.2.3. The claim to consider minority rights as *jus cogens*

Not only the existence of the *jus cogens*,[140] but also its definition is widely accepted: under Art. 53 of the 1969 Vienna Convention,

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[141]

Since peremptory norms impose obligations on all States, it follows that all successor States are bound by them.[142] This rule was also affirmed and extended to minority rights by the European Community Arbitration Commission on Yugoslavia (Badinter Commission) when it stated that "the peremptory norms of general international law and, in particular, respect for the fundamental rights of the individual and the rights of people and minorities are binding on all parties to the succession."[143] This phrase of the first opinion of the Badinter Commission – discussing the *dismembrement* of the SFRY – includes the audacious claim that minority rights have the status of *jus cogens* – a view never stated before.[144]

The opinion of the Badinter Commission was strongly questioned by the doctrine. The main arguments against the *jus cogens* nature of minority rights and the pro arguments responding thereto can be summarized as follows:

[140] See Craven (1995), supra fn. 130, 381.; Alfred Verdross : Jus Dispositivum and *Jus cogens* in International Law. In: 60 AJIL 55 (1966) [hereinafter: Verdross (1966)], p. 55.; Michel Virally : Réflexions sur le *jus cogens*. In : 12 AFDI 5 (1966), p. 5-29.

[141] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969). UN, Treaty Series, vol. 1155, p. 331. Note that this article was unanimously adopted by the ILC. See Verdross (1966), supra fn. 130, p. 57.

[142] Matthew C. R. Craven: The European Community Arbitration Commission on Yugoslavia. In: 66 BYIL 333 (1995) [hereinafter: Craven (1995)], p. 412.

[143] Opinion No. 1 of the Arbitration Commission of the Conference on Yugoslavia. Reproduced in: Alain Pellet: The Opinions of the Badinter Arbitration Committee. A Second Breath for the Self-Determination of Peoples. In: 3 EJIL 182 (1992), p. 182., par. 1) e); Furthermore, Opinion No. 2 declares more clearly – referring to its Opinion No. 1 – that "the – now peremptory – norms of international law require states to ensure respect for the rights of minorities." See ibid, p. 184., par. 2.

1. Firstly, the imprecise nature of these norms excludes the evolution towards *jus cogens* norms.[145] Similarly, Craven notes that at the time of the adoption of the opinion of the Badinter Commission, there was no specific human rights convention detailing the content of minority rights except for Art. 27 of the ICCPR.[146] Two remarks should be added: firstly, Art. 27 gave birth to a various case law before the Human Rights Committee which treaty body detailed the meaning of this article. Secondly, there are sufficient guidelines about the content of minority rights, since the Badinter Commission referred to the Draft Peace Treaty on Yugoslavia (Carrington Draft),[147] which enumerates the relevant rights. Nevertheless, the fact that this extended list of minority rights, the Carrington Draft was not in all successor States implemented, strengthens the argument of the imprecise nature of minority rights.
2. Secondly, minority rights are not at all recognized by all States.[148] For example, two States made a reservation to Art. 27 when ratifying the ICCPR (France and Turkey) and three States to the minority clause (Art. 30) of the Convention on the Rights of the Child.[149] According to the practice of the Human Rights Committee, State parties have to object to a reservation offending a peremptory norm.[150] However, after France had excluded the applicability of Art. 27 of the ICCPR, its reservation was not objected to

[144] See Craven (1995), supra fn. 130, p. 390.; Pellet (1991), supra fn. 10, p. 339.
[145] Commentaires de Wladyslaw Czaplinski. In: Nationalité, minorités et succession d'Etats (1996), supra fn. 114, p. 319.
[146] See Craven (1995), supra fn. 130, p. 391.; see similarly Pellet (1991), supra fn. 10, p. 339.
[147] The European Community Conference (1991-1992). Draft Convention. Treaty Provisions for the Convention of 4 November 1991. In: The International Conference on the Former Yugoslavia. Official Papers (ed. B. G. Ramcharan). Kluwer Law International, the Hague/London/Boston. Vol. 1, p. 13-23.
[148] Commentaires de Wladyslaw Czaplinski. In: Nationalité, minorités et succession d'Etats (1996), supra fn. 114, p. 319.
[149] See Status of the Multilateral Treaties Deposited with the UN Secretary General, Chapter XXIII, see at: http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en (04.03.2009)
[150] As the Human Rights Committee stated in its comment, "reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant". Thus, the Committee extended Art. 19 (c) of the Vienna Convention on the Law of Treaties (the prohibition of reservations being incompatible with the object and the purpose of the treaty) to reservations violating *jus cogens*. See UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), par. 8.

by any other State Party,[151] which suggests the non-peremptory nature of minority rights.

3. Thirdly, maybe the most important argument of the critics of the *jus cogens* qualification of minority rights is that Art. 27 is, under the ICCPR, a derogable right. The past practice of the Human Rights Committee similarly confirmed it.[152]
4. Fourthly, the international community does not react to the violation of minority rights.[153] Although the violation of minority rights in itself does not form an international crime to be prosecuted by international criminal tribunals, there are nevertheless an increasing need for the elaboration of monitoring mechanisms. As for concrete results, the Human Rights Committee is responsible for individual complaints under the Optional Protocol and its case law pressed several times States to comply with Art. 27. As for the Framework Convention for the Protection of National Minorities, the Advisory Committee composed of recognized experts plays an increasing role in the monitoring.[154]
5. Finally, one should take into account that the opinions of the Badinter Commission do not have any binding force,[155] but nevertheless may reflect the current international law. As Schabas notes, the phrase "the – now peremptory – norms of international law"

[151] H.K. v. France, Communications No. 222/1987, UN Doc. CCPR/C/37/D222/1987, 8 December 1989, par. 8.5.
[152] See e.g. Lovelace v. Canada (1981), where the Committee set out that limitations of Art. 27 are acceptable if they are reasonable and objectively justified. See: Kristin Henrad: The Interrelationship between Individual Human Rights, Minority Rights and the Right to Self-Determination and Its Importance for the Adequate Protection of Linguistic Minorities. In: 1 (1) The Global Review of Ethnopolitics 41 (2001), p. 44-45.; Craven adds that the ILC has never considered minority rights as being peremptory norms (i.e. non-derogable). See Yearbook of the ILC, 1966, vol. 2, p. 248. Cited by Craven (1995), supra fn. 130, p. 391.
[153] Commentaires de Wladyslaw Czaplinski. In: Nationalité, minorités et succession d'Etats (1996), supra fn. 114, p. 319.
[154] Although it is the Committee of Ministers which is responsible for the monitoring. See e.g. Rainer Hofmann: The Framework Convention for the Protection of National Minorities. In: Bernd Rechel (ed.): Minority rights in Central and Eastern Europe (BASEES/Routledge series on Russian and East European studies). Routledge, 2009, p. 46-60.; Filing the Frame. Five Years of Monitoring for the Protection of National Minorities. Proceedings of the Conference held in Strasbourg, 30-31 October 2003. Council of Europe Publishing, 2004.
[155] See Pellet (1991), supra fn. 10, p. 331.

implies that the Badinter Commission was aware of its innovator role,[156] concerning a shaky ground of current international law.

Summarizing the above arguments and counterarguments, it is decisive that minority rights have not yet reached a universal recognition and that Art. 27 is a derogable right. Considering that State practice and the majority of the doctrine[157] have not yet recognized the imperative nature of minority protection, the opinion of the Badinter Commission accepting it does not reflect the actual status of international law.[158]

2.3. Conclusion

Although minority rights – as special human rights – are not considered by State practice and by the doctrine as belonging to peremptory norms, there is an increasing support for the customary nature of minority protection. Furthermore, certain minority rights (the right to existence, the prohibition of genocide, of discrimination, of forced assimilation and equality before the law) have certainly gained a customary law nature. It follows that successor States of Central and Eastern Europe have not only a customary obligation to continue the treaty provisions protecting minorities – as Chapter One proved –, but to comply with the customary elements of minority protection. These axiomatic elements can be considered as the absolute minimum standard of minority protection.

[156] William A. Schabas : La Crise Yougoslave : les tentatives internationales de protection des minorités. In : Nationalité, minorités et succession d'Etats (1996), supra fn. 114, p. 278. ; similarly, see Pellet (1991), supra fn. 10, p. 339.
[157] See e.g. Pellet (1991), supra fn. 10, p. 339-340.; Craven (1995), supra fn. 130, p. 390.;
[158] As Crawford stated, the protection of minorities determined by the Badinter Commission went "well beyond current international law." See James Crawford: State Practice and International Law in Relation to Unilateral Secession. Report to Government of Canada concerning unilateral secession by Quebec. 1997, par. 44.. See at: http://www.tamilnation.org/selfdetermination/97crawford.htm (04.03.2009); See also William A. Schabas : La Crise Yougoslave : les tentatives internationales de protection des minorités. In : Nationalité, minorités et succession d'Etats (1996), supra fn. 114, p. 278.; See Craven (1995), supra fn. 130, p. 391.

Having an overview about the general trends of the State succession in respect of minority rights, the thesis will examine in the following chapter the special attitude of the international community towards the sequence of the dissolution of the SFRY. It will prove that beyond the requirements examined above, the international community added certain current international standards which created a higher standard of minority protection.

III. Chapter Three: The higher standard of minority protection imposed on successor States of the SFRY by the international community

Having established a regional customary law which binds successor States in Central and Eastern Europe, the thesis will examine the concrete international obligations of the SFRY related to minority protection which were succeeded by the successor States under the before-mentioned regional custom (at that time *in statu nascendi*). The international community required successor States not only to continue these minority protecting obligations, but to undertake additional ones. Whereas the first part of this chapter analyses the standard of the international obligations of the SFRY before 1991 (point 3.1.), the second part compares this standard to the new obligations required by the international community after 1991 (point 3.2.).

3.1. International minority protection obligations of the SFRY before 1991

The nomination of the Social Federal Republic of Yugoslavia originates in 1977, but the State existed within the same borders from 1919 until 1991 (hereinafter: Yugoslavia), although under different names and constitutional structures.[159] Until 1991, it undertook international obligations requiring the protection of minorities under the peace treaty of 1919 (point 3.1.1.), the Osimo Agreement (point 3.1.2.) and the ICCPR (point 3.1.3.). Hereinafter, the thesis will analyze the formerly enumerated international instruments and their impact on the successor

[159] The Kingdom of Serbs, Croats and Slovenes changed its name in 1929 to Kingdom of Yugoslavia, and after 1945 to Federated People's Republic of Yugoslavia. In 1963, the new constitution changed the name of the State to Socialist Federated Republic of Yugoslavia. It is generally recognized that political changes as the

States. On the basis of these obligations, by using a uniform evaluation scale, this paper will establish a measured standard of minority protection which all successor States of the region have to ensure in their territory under the continuity rule.

3.1.1. Treaty of Saint-Germain-en-Laye (1919)

The first major systematic international agreements protecting minority rights were concluded in the framework of the World War I peace settlement. The framers were aware that the new States to be established in central Europe would incorporate significant ethnic minorities.[160]

As a compensation for the minorities, the victorious powers intended to establish a large-scale minority protecting system. This would have served the long-term reconciliation of the minorities and the stabilization of the newly created States.[161] As a consequence, the new States and defeated powers were obliged to conclude so-called Minorities Treaties.[162]

The newly created Yugoslavia signed its Minorities Treaty (hereinafter: the Minorities Treaty)[163] in 1919 which determined the minority protection in Yugoslavia until 1945. Hereinafter, the thesis will summarize the main international obligations enshrined in the

change of the name, the constitution or the form of State do not lead to State succession and the identity of the State remains. See Schachter (1993), supra fn. 91, p. 254.

[160] Geoff Gilbert: Religio-nationalist Minorities and the Development of Minority Rights Law. In: 25(3) Review of International Studies 389 (1999) [hereinafter: Gilbert (1999)], p. 402.

[161] See the letter of the French Prime Minister Clemenceau to the Polish Prime Minister Paderewski which accompanied the communication of the final draft of the Treaty of Versailles to the Polish Government in June 1919: "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." See United Kingdom Treaty Series 8 (1919), Cmd 223., par. 4. Cited by Gilbert (1999), supra fn. 160, p. 402.

[162] Only the international agreements concluded with Poland, Czechoslovakia, Romania, Greece and the Serb-Croat-Slovene Kingdom were properly called "Minorities Treaties". See Gilbert (1999), supra fn. 160, p. 402.

[163] It entered into force on 16 July 1920 and became protected under the auspices of the League of Nations on 29 November 1920. See Szalayné Sándor Erzsébet: A kisebbségvédelem nemzetközi jogi intézményrendszere a 20. században. (Kisebbségi Monográfiák III.). Gondolat Kiadói Kör – MTA Kisebbségkutató Intézet, Budapest, 2003 [Szalayné Sándor Erzsébet: The International Legal System of Institution of Minority Protection in the 20th Century. (Minority Monographies III.). Gondolat Kiadói Kör – Hungarian Academy of Sciences Minority Research Center] [hereinafter: Szalayné Sándor (2003)], p. 81.

Minorities Treaty (point 3.1.1.1.), measures the historical threshold of minority protection ensured by it (points 3.1.1.2-3.) and examines its historical effect (point 3.1.1.4.).

3.1.1.1. International obligations of Yugoslavia under the Minorities Treaty

From the nine material articles related to minority protection (Art. 2-10), four (Art. 2, 6, 7 and 8) applies in respect of all inhabitants (or "nationals") of Yugoslavia ("general minority rights"), while five articles were especially drafted taking into account the situation of 1919, with regard to special minorities ("special minority rights").

As for the general minority rights, the four articles not only ensure basic human rights (right to life, liberty and freedom of religion, Art. 2), non-discrimination (Art. 7) and equality before the law (Art. 7-8), but grant clear minority rights privileging racial, religious or linguistic minorities. It grants nationality to "all persons" born in the territory of the State and not being nationals of another State (Art. 6). Furthermore, it recognizes the free use of language in private, public life and in the press. Since it does not provide for the free use of one's own language in the communication with public authorities, this provision seems to establish a purely negative State duty. However, it grants the right to "adequately" ensure the use of one's own language before the courts, a flexible clause which leaves a wide margin of appreciation for the State. Finally, minority members have the right to establish and maintain "at their own expense" religious, social and educational establishments.

The Minorities Treaty includes special minority rights of which inclusion was due to the context, the ethnic composition and geographic situation of Yugoslavia at the time of the conclusion of the Treaty. Some of the articles apply only to those inhabitants who were before 1919 citizens of the territories transferred from enemy States to Yugoslavia by the peace

treaties. The Treaty grants the population of the transferred territory the right to opt either for Serb-Croat-Slovene nationality or the nationality of their kin State (Art. 3-4).

In territories transferred to Serbia or to the Serb-Croat-Slovene State since 1913, the Treaty provides that "in towns and districts in which a considerable proportion" belongs to the minority, the State shall ensure the right to instruction in the minority language in primary schools (Art. 9). In addition, these minorities shall benefit from an equitable share of public sums for educational, religious and charitable purposes. Especially this provision providing financial support is of particular importance since very few later adopted international instruments stated it.

It grants the Muslim population special religious privileges[164] adding that religious foundations and establishments shall be recognized and assured by the State.

In sum, the Minorities Treaty ensures the free cultural, linguistic and religious life for all minority members in Yugoslavia. The special minority rights grant the minority members of the transferred territories various entitlements – such as the right to option for nationality, the instruction in the mother tongue in primary schools, the equitable share in the enjoyment and application of certain public sums – or allows the Muslim minority certain privileges.

As for the guarantee mechanism, Art. 11 provides that the League of Nations shall guarantee the respect of the before-mentioned rights. The Council has the power to "take such action and give such directions as it may deem proper and effective in the circumstances"[165] and to refer a dispute to the PCIJ. Later, the League of Nations established a petition

[164] The privilege to regulate personal status and family law under their religious rules, to have a nominated spiritual leader, the protection of religious establishments by the State (Art. 10).
[165] Art. 11 of the Treaty of Saint-Germain-en-Laye (Treaty between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes), 10 September 1919 [hereinafter: the Minorities Treaty].

mechanism: any group or individual had the right to file a petition with the League of Nations which was later forwarded to the violator State and to the Council.[166]

Although a little percentage of cases could be effectively solved under the auspices of the League of Nations, the international organization served as a "formalised, supra-national procedure through which complaints could be addressed without it being seen as confrontational" and minorities had at least a forum to turn to.[167]

3.1.1.2. A basis for further comparisons – the threshold of minority protection ensured by the Minorities Treaty

On the basis of the obligations enshrined in the Minorities Treaty, the thesis will establish a theoretical threshold of minority protection, which will serve as a basis of comparison with the further international instruments. However, it must be admitted that it is fast impossible to compare the international obligations under one human rights instrument with those required by another.[168] As opposed to the difficulties of such an analysis, the thesis will nevertheless establish a uniform system of comparison which could at least *grosso modo* demonstrate how

[166] See the Tittoni Report of 1920, elaborated in the League of Nations, see Protection of Linguistic, Racial or Religious Minorities by the League of Nations. Series of League of Nations Publications, I. B. Minorities, Geneva, 1931. I.B.1 (C.8.M.5.1931.I), p. 13-14. See also Pablo de Azcárete y Florez: League of Nations and National Minorities. An Experiment. Translated from the Spanish by Eileen E. Brooke. Washington, Carnegie Endowment for International Peace, 1945, p. 103-104.; The Minorities Committees were responsible for the examination of the petition in the Council which had a filter and mediator role in the procedure. Instead of legal sanctions, this procedure similarly led to political compromises. See Gilbert (1999), supra fn. 160, p. 405.

[167] See Gilbert (1999), supra fn. 160, p. 406.

[168] Firstly, this comparison focuses mainly on the text of the minority rights provisions and takes into account the practice followed by States only to a limited extent. Secondly, the thesis will compare international instruments of different nature, on a wide scale from international treaties up to political declarations whose binding force extremely differs. Thirdly, minority rights provisions have been drafted traditionally in a manner which leaves the State a wide flexibility to decide to what extent it ensures the minority rights. For example, a classical minority right stipulated by several instruments is the right to use the minority language, a provision that in itself does not specify who, where, when, what language and to what extent shall enjoy this right. Although States have undoubtedly a wide margin of appreciation, some international instruments or the monitoring bodies tried to specify the above mentioned obscurities.

far the standard of international minority protection developed and which are the common elements of the different instruments imposed on Yugoslavia and its successor States.

The thesis will analyze the minority protecting instruments from the point of view of the following State obligations (expressed sometimes as "rights", meaning an obligation on the part of the State)[169]:

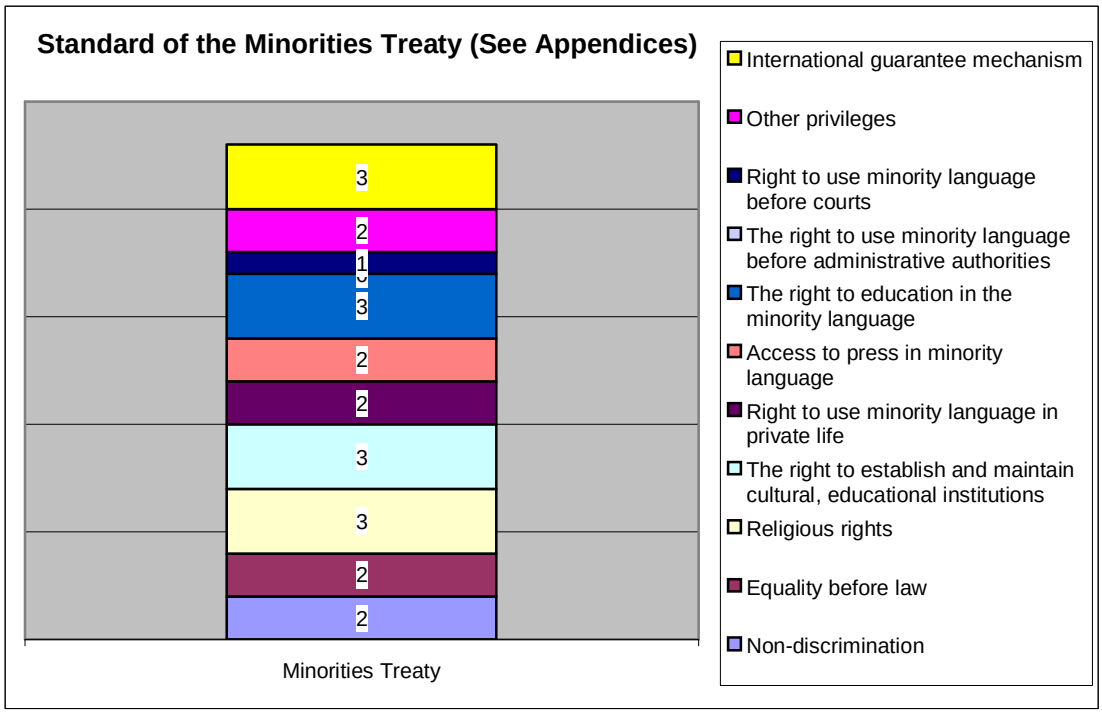
1. the rule of non-discrimination; 2. equality before law (although the later two could also be treated under one common aspect); 3. obligations concerning religious rights of the minority; 4. cultural rights (the right to establish and maintain cultural, educational institutions); 5. the right to use the minority language in private life; 6. the right to use the minority language in public before courts; 7. the right to use the minority language in public before administrative authorities; 8. access to press in minority language; 9. the right to have instruction in the minority language and/or the right to have instruction of the minority language; 10. other privileges of minority members (e.g. political rights, constitutional status like autonomy).

When measuring the standard of minority protection under international instruments, the inclusion of each of the before mentioned elements will count as a level increasing the standard. The weight of the obligation depends on the legal stringency of the obligation: whereas obligations limited by a flexibility clause ("as far as possible", "in accordance with national legislation" etc.) are evaluated less, other obligations without expressed positive obligation (with a margin of appreciation of the State, but the content is well-defined through the text of the provision, treaty bodies etc.) or positive obligations limited by a flexibility clause weight more and the most weighty are the rights with expressed positive obligations (e.g. State funds, "shall ensure" etc.). The present survey does not try to measure the standard

[169] Admittedly, these rights do not cover the whole spectrum of minority rights (e.g. the land rights of indigenous people or the dynamically developing rights of migrant workers), but focus on the rights which were included already in the Minorities Treaty and which formed a basis for further progressive legal instruments. In any case, the category of "other privileges" is able to cover all further minority rights codified by other instruments.

quantitatively, but contents oneself with the visualization of the threshold and compares it to those of other international instruments. The more rights are enshrined in the international instruments and the more precisely the obligations are defined (either by the text, or the relevant practice), the higher is the threshold established by it. Moreover, the strength of the international guarantee mechanism, if any, will be similarly evaluated: a monitoring body with advisory power counts less than a monitoring body functioning a petition procedure, whereas a binding international guarantee mechanism with a complaint procedure is evaluated as the strongest mechanism.

Considering the above criteria, the standard required by the Minorities Treaty can be visualized as follows:



3.1.1.3. The alleged termination of the Minorities Treaties

After Second World War, the Minorities Treaties were not expressly terminated on the Peace Conference and States represented different opinions about the validity of the Minorities Treaties concluded in the inter-war period.[170] Within the United Nations, the Secretariat was requested to give an opinion on the validity of the Minorities Treaties.

The Secretariat prepared a study[171] in which it examined whether the principle of *clausula rebus sic stantibus* could be applied to the Minorities Treaties. This always disputed principle enables to terminate a treaty in case of fundamental change of circumstances. As such changes, the study examines the dissolution of the League of Nations as the guarantee mechanism, the inter-war minorities protection regime and its substitution by the UN Charter and the treaties concluded after 1945 and finally the considerable changes in the position of the States bound by or interested in the minorities treaties.

Summarizing the above-enumerated changes, the Secretariat concludes that the minority protection regime of the Versailles treaties "should be considered as having ceased to exist".[172] It seems that the study based this conclusion not on each of the fundamental changes of circumstances, but on the changed situation as a whole.[173] Beyond this general conclusion under the *clausula rebus sic stantibus*, the study examines its applicability to Yugoslavia. The

[170] For instance, whereas Hungary claimed that the Minorities Treaties were still in force, other States like Romania considered the special protection of minority rights as incompatible with the concept of human rights, thus did not apply more the Minorities Treaties. The majority of States imagined minority protection in the wider concept of the universal protection of individual human rights, thus held the "indirect" minority protection sufficient. For the argumentation of Hungary, see Nancy Kontou: The Termination and Revision of Treaties in the Light of New Customary International Law. (Oxford Monographs in International Law) Clarendon Press Oxford, Oxford, 1992 [hereinafter: Kontou (1992)], p. 94.; As for Romania, see Statement of the Romanian representative, 2 September 1946, Doc. CP/ROU/P Doc. 8, p. 13. See also the declaration of the Romanian delegate, Collection of Documents of Paris Conference, vol. I., p. 227. Both cited by Kontou (1992), p. 94.

[171] See Commission on Human Rights: Study of the Validity of the Undertakings Concerning Minorities. UN-Doc. E/CN.4/367 (7 April 1950), Geneva [hereinafter: Study of the Validity of the Undertakings Concerning Minorities].

[172] See Study of the Validity of the Undertakings Concerning Minorities, supra fn. 171, p. 71.

[173] See Study of the Validity of the Undertakings Concerning Minorities, supra fn. 171, p. 70.

study draws its conclusion mainly on the basis of the assistance of the minorities (minorities other than the Turkish and the Greek population) for Yugoslavia's enemies: it holds that "at least" as regards these minorities, the Minorities Treaty regime "is no more applicable".[174]

As for the evaluation of the study by the doctrine, most authors accepted the Secretariat's conclusion,[175] but some among them criticized the passivity of the UN related to minority rights.[176] Haraszti is of the view that although the final conclusion of the study is just, the reasoning is "defective and inconclusive".[177]

On the other hand, some authors do not share the conclusion of the study. One basic argument against the conclusion is that under Art. 62 of the 1969 Vienna Convention, the fundamental change of circumstances is invokable only by one of the parties, but not by third parties like the UN or its Secretary-General.[178] Given the legal weaknesses of the study and

[174] See Study of the Validity of the Undertakings Concerning Minorities, supra fn. 171, p. 65.

[175] See Thornberry (1991), supra fn. 137, p. 54.; Inis L. Claude: National Minorities: an International Problem. Harvard University Press, Cambridge, 1955, p. 55-60. Cited by Szalayné Sándor (2003), supra fn. 163, p. 170., fn. 65.; Dinstein (1976), supra fn. 131, p. 117.; Aristos Frydas: Validité des traités minoritaires conclus après la première guerre mondiale. In: VI (1) Revue Hellčnique de Droit International (1953), p. 60–63.; Tore Modeen: The International Protection of National Minorities in Europe. Åbo Akademi, Åbo, 1969, p. 72-73. Cited by Athanasia Spiliopoulou Åkermark: Justifications of Minority Protection in International Law. Kluwer Law International, London-The Hague-Boston, 1996 [hereinafter: Åkermark (1996)], p. 121.; Capotorti, in his famous study, cited the conclusions of the Secretariat's study without critics. See UN Doc. E/CN.4/Sub.2/384, Francesco Capotorti: Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities. New York, 1979 [hereinafter: Capotorti Study], par. 140.; Kontou notes that there are the two ways in which a new custom can terminate a treaty: either by a specific act of one of the parties or by a tacit agreement among the parties to disregard the minorities treaties in the future on the basis of human rights protection. This latter is called *desuetude* in which case the minority protecting obligations should not be expressly terminated. See Kontou (1992), supra fn. 170, p. 96. ; Similarly, Feinberg claims that the Minorities Treaties were terminated by an accelerated process of desuetudo. See N. Feinberg: The Legal Validity of the Undertakings Concerning Minorities and the Clausula Rebus Sic Stantibus. See also In: Studies in Law, 5 Scripta Hierosolymitana 95 (1958) [hereinafter: Feinberg (1958)], p. 116-123, 128-129. Reproduced in his Studies in International Law 17 (1979); Bruegel is also for the *desuetudo* rather than the fundamental change of circumstances, see J. W. Bruegel: A Neglected Field of the Protection of Minorities. In: 2-3 Revue des Droits de l'Homme/Human Rights Journal 413 (1974) [hereinafter: Bruegel (1974)], p. 415.

[176] See Szalayné Sándor (2003), supra fn. 163, p. 168-169.; See Josef L. Kunz: The Present Status of the International Law for the Protection of National Minorities. In: 48 AJIL 282 (1954) [hereinafter: Kunz (1954)], p. 285.

[177] György Haraszti: Treaties and Fundamental Change of Circumstances. In: 146 Recueil des Cours 1 (1975-III) [hereinafter: Haraszti (1975)], p. 32.

[178] This rule was called by Haraszti as the "procedural requirement" of the principle of *clausula rebus sic stantibus*. He holds that if any of the parties had invoked the *clausula rebus sic stantibus* and no one of the others had objected to it, then there would have been no need for an expressed termination of the treaty. See Haraszti (1975), supra fn. 177, p. 32.; See also Kunz (1954), supra fn. 176, p. 284.; Åkermark (1996), supra fn. 175, p. 121.

particularly the lack of invoking the *clausula rebus sic stantibus* by any party to the Minorities Treaties, this thesis considers the Secretariat's memorandum legally erroneous. Furthermore, neither the general nor the special changes of circumstances did fundamentally transform the status of Yugoslavia as a contracting party. However, in the Cold War climate, no leading power tried to revive a minority rights mechanism and for that reason, the conclusions of the study proved to be enduring.[179] Consequently, this thesis considers the termination of the Minorities Treaties in the Cold War period as a *fait accompli*, but emphasizes a scholar claim to ensure their standard which the next point will explain.

3.1.1.4. The (historical) effect of the Minorities Treaty

Although the international community was too shortsighted to continue the Minorities Treaties in the Cold War era, the historical changes of 1990 gave rise to certain claims which either discussed the possible validity of the Minorities Treaties or even proposed their reactivation.[180] For example, the ILC was reticent to invoke the study of the Secretariat as a major precedent of the *clausula rebus sic stantibus* and the study got a minor role in the commentary of the 1969 Vienna Convention. Similarly, two members of the Working Group on Minorities of the Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed to

[179] In addition, the Commission on Human Rights and the Sub-Commission were reluctant even to discuss the study. It was for years on their agenda and there was no expressed reason why these bodies did not deal with the properness of the study. Szalayné Sándor adds that the Commission on Human Rights voluntarily decided not to take into consideration the study because of the expected pointlessness of the discussion. See See Szalayné Sándor (2003), supra fn. 163, p. 153.; It is a further sign of the tendency according to which, as Bruegel notes, the protection of minorities was replaced after the Second World War by the "protection from minorities". See Bruegel (1974), supra fn. 175, p. 414.

[180] For the latter, see e.g. the claim of an NGO on the meeting of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Written Statement submitted by International Fellowship of Reconciliation, a non-governmental organization in consultative status (category II). See UN Doc. E/CN.4/Sub.2/1992/NGO/27 (3 September 1992); Similarly, this view was represented by the observer of the International Committee for European Security and Cooperation on the first session of the Working Group on Minorities. See UN Doc. E/CN.4/SUB.2/1996/2, p. 11., par. 44.

enforce the past Minorities Treaties[181] and even the Chairman-rapporteur, Asbjørn Eide did not exclude that the Minorities Treaties were still binding.[182] Finally, Bosnia-Herzegovina argued in the Genocide case (Bosnia-Herzegovina v. Serbia-Montenegro) that the ICJ had jurisdiction, among other bases, under the Minorities Treaty which it considered valid. Although the Court avoided to discuss the validity of the Minorities Treaty and based its jurisdiction on other grounds, at least one can state that it neither excluded nor confirmed the possibility of the validity of the Minorities Treaty and Yugoslavia's succession to it. [183]

As these instances indicate, the validity of Minorities Treaties have lost neither its actuality and, as the subsequent humanitarian crises show in the region, nor its importance. Although international law does not support its validity, a doctrinal claim would call for Yugoslav successor States to guarantee the protection that once their citizens enjoyed. This theoretical requirement is linked to the irreversibility of human rights treaties,[184] and focuses on State's obligations: once a State reached a standard of human rights protection required by international law, it must not later "lower the bar" and weaken the legal guarantees. For that reason, it is required that successor States of the SFRY ensure at least the standard of the Minorities Treaty by adopting contemporary international standards and eventually by exceeding them by internal legislation.

3.1.2. The International Covenant on Civil and Political Rights

The SFRY signed the ICCPR in 1967 and ratified in 1971. The relevance of Covenant in this thesis is due to a special article on the protection of minorities, Art. 27. Before analyzing the

[181] See UN Doc. E/CN.4/SUB.2/1996/2, p. 11., par. 45.
[182] See UN Doc. E/CN.4/SUB.2/1996/2, p. 12., par. 46.
[183] See Genocide case (Bosnia-Herzegovina v. Serbia-Montenegro), supra fn. 25, Preliminary Objections, Judgment of 11 July 1996, p. 619., par. 38.
[184] See supra point 1.1.1.

substance of the minority rights ensured by this provision, two introductory remarks seem necessary: firstly, the lapse of the Minorities Treaties did not hinder its indirect effect on the subsequent works of the UN related to minority protection. Already during the drafting of the Universal Declaration of Human Rights, there was a proposal on the inclusion of an article protecting minorities[185] (although it was finally rejected[186]) and between 1953 and the adoption of the ICCPR in 1966, the UN did not deal with minority protection. Nevertheless, the *travaux préparatoires* of Art. 27 of the ICCPR did not take place in a legal *vacuum*, but were certainly influenced by the material provisions of the Minorities Treaties.[187]

Secondly, not only the Minorities Treaties had an effect on the adoption of Art. 27, but Yugoslavia itself: Yugoslavia submitted several times draft proposals on minority rights.[188] Its most important draft was the proposal on a "Declaration as to Protection of Minorities" which led finally in 1992 to the adoption of the 1992 UN Declaration.[189]

[185]Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, Report submitted to the Commission on Human Rights, Un Doc. E/CN.4/52, 6 December 1947 [hereinafter: Un Doc. E/CN.4/52], Section I., p. 8.

[186] Its adoption was hindered by Eleanor Roosewelt, a member of the drafting committee. See UN Doc. SR/A/C.3/161, p. 726.

[187] See Åkermark (1996), supra fn. 175, p. 123.; Moreover, the core of the latter adopted Art. 27 was already drafted in 1950: "Persons belonging to ethnic, religious, or linguistic minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. " See UN Doc. E/CN.4/641, Annex II.

[188] After the Second World War, Yugoslavia proposed to include a provision in the peace treaty with Hungary about the education of Yugoslavian minority members in their mother tongue which was rejected by the American and the British delegates. The Yugoslav representative expressed his disagreement and warned that it would lead to international conflicts. See Joseph B. Schechtman: Decline of the International Protection of Minority Rights. In: IV (1) The Western Political Quarterly 1 (March, 1951), p. 8.; As for the similar proposal on the Italian Peace Treaty, see supra fn. 170; During the discussions on the drafting of the UDHR in the Third Committee of the General Assembly, the main proponents of detailed minority provisions were the Soviet Union, Denmark and Yugoslavia. Un Doc. E/C.3/307/Rev.2.; In 1968 and 1974, Yugoslavia organized two seminars under the aegis of the UN (UN Doc. ST/TAO/HR/23, Ljubljana; UN Doc. ST/TAO/HR/49; Ohrid); finally, not surprisingly, the minority paragraph of the 1975 Helsinki Final Act was also prepared by the representatives of Yugoslavia. See Thornberry (1991), supra fn. 137, p. 251.

[189] As for Yugoslavia's proposal, see UN Doc. E/CN/4/1.1367/Rev.1 (2 March 1978); see also the report of the Commission on Human Rights at its 39th session (1982): UN Doc. E/1983/13, par. 446.; UN Doc. D/CN.4/1983/66.

Thus, it is clear that the SFRY was interested in promoting detailed minority protection, although the final wording of Art. 27 became one single compact phrase, a kind of common denominator of the international community. The provision sounds as follows:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Given the brief wording of the provision as opposed to its importance, the interpretation of the article has a primary role. Under Art. 31 of the 1969 Vienna Convention, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". It is the text, any agreement or instrument concluded in relation to the treaty by the parties that shall be analysed primarily. Given the lack of any additional or subsequent agreement related to Art. 27 between the parties, the doctrinal interpretation, the *travaux préparatoires* or the "subsequent practice" on the article should be taken account.

As for the interpretation given by the doctrine, there exist two main schools of interpretation: the minimalist or passive view (Modeen, Tomuschat, Nowak, Higgins)[190] and the radical or activist school (Capotorti, Thornberry, Sohn, Ermacora, Cholewinski)[191]. Whereas the radical or activist school extends the scope of Art. 27 and holds that States have to take affirmative action in order to ensure the rights of minorities, the minimalist view's

[190] Tore Modeen: The International Protection of National Minorities in Europe. Åbo Akademi, Åbo, 1969, p. 108-109.; Christian Tomuschat: Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights. In: Rudolf Bernhardt et al.: Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte. Festschrift für Hermann Mosler, 1983, p. 949-979.; Nowak (1993), supra fn. p. 480-505.; Åkermark mentions also Higgins as possibly belonging to this school: Rosalyn Higgins: Minority Rights: Discrepancies and Divergences between the International Covenant and the Council of Europe System. In: R. Lawson – M. de Blois (eds.): The Dynamics of the Protection of Human Rights in Europe. Essays in Honour of Schermers. Vol. III, Dordrecht, Martinus Nijhoof, 1994, p. 195-210.

[191] Capotorti Study, supra fn. 175, par. 588.; Thornberry (1991), supra fn. 137, p. 181.; Louis B. Sohn: The Rights of Minorities. In: Louis Henkin (ed.): The International Bill of Rights – The Covenant on Civil and Political Rights. 1981, p. 270-289.; Felix Ermacora: The Protection of Minorities before the United Nations. In: 182 (1983-4) Recueil des Cours 251 (1983), p. 323-324.; Ryszard Cholewinski: State Duty towards Ethnic Minorities: Positive or Negative? In: 10 Human Rights Quarterly 344 (1988), p. 344-371.

standard does not require positive measures and leaves the State a wide margin of appreciation in choosing to what extent it ensures minority rights. Thus, one can draw a "minimalist standard" which interprets the text of Art. 27 restrictively, where all the rights are softly determined leaving the State a flexibility and not requiring positive duties.

This mimimalist standard of minority protection corresponds to the customary law elements of minority rights (see point 2.2.): from the specific minority rights identified above, the non-discrimination rule and the equality before law are covered by this standard. Furthermore, one must add the religious freedom of minority members since this right is non-derogable under the ICCPR (Art. 18). During the Cold War, no other universal human rights convention detailed minority rights and thus no international instrument suggested a higher standard than that of the minimalist view. Therefore, this thesis will consider the threshold of the minimalist view as a basis for comparison with other minority rights instruments.

However, the radical school required various positive obligations of the State from which it is difficult to find a common denominator. Given the considerable differences between the doctrinal views of the minimalist and the activist school, and the risk that their synthesis does not allow an objective identification of an "ICCPR standard", the present study will examine other interpretation methods.

The *travaux préparatoires* do not deeply detail the discussions of the material content of Art. 27. Furthermore, under Art. 32 of the Vienna Convention on the Law of Treaties, the *travaux préparatoires* have only a secondary importance in the interpretation of a treaty.[192]

Finally, the "subsequent practice" could help in the interpretation under Art. 31 (3) of the 1969 Vienna Convention. Åkermark holds that the case law and the annual reports of the Human Rights Committee, the special treaty body of the ICCPR considerably assist in the

[192] See Åkermark (1996), supra fn. 175, p. 126.

interpretation as primary means.[193] Since this seems to be an objective guideline to identify a possible "standard" of Art. 27, the thesis will follow the method proposed by Åkermark who based the interpretation of Art. 27 mainly on the Annual Reports of the Committee. Her reasoning is persuasive: whereas the summary meeting records of the Human Rights Committee do not necessarily reflect the majority opinion of the Committee when commenting a State report, the Annual Reports draw general conclusions reflecting the views of the whole Committee as a body. Hereinafter, this thesis examines the requirements formulated by the Committee in the Annual Reports. Although one can criticize this method claiming that the observations of the Committee are fluctuating and not necessarily consistent, the thesis will, as far as possible, concentrate on the standards that were repeatedly expressed by the Committee in its Annual Reports between 1982 and 2009.[194]

Under Art. 27, the Committee requires equality before law[195] and an active prevention of discrimination: States are required to provide not only effective remedies, programs against discrimination,[196] but also access to public offices,[197] positive measures[198], representation in decision-making, "at all levels of government"[199] (in the parliament,[200] local government,[201]

[193] See Åkermark (1996), supra fn. 175, p. 126-127. However, she does not find the General Comment as a source of primary importance for the interpretation since the General Comment on Art. 27 was finally adopted in 1994 and it does not necessarily express the total experience of the Committe on Art. 27. See ibid, p. 133.
[194] These annual reports are available on the home page of the Committee. Requirements that expressed the Committee insularly, once in its practice, e.g. street signs in the minority language [UN Doc. A/60/40(Vol. I) (2005), par. 85 (18)] will not be taken into account.
[195] E.g. UN Doc. A/55/40[VOL.I](SUPP) (2000), par. 37.
[196] UN Doc. A/60/40(Vol. I) (2005), par. 82 (22); UN Doc. A/62/40 (VOL. I) (SUPP) (2007), par. 80 (24)
[197] See e.g. UN Doc. A/46/40(SUPP) (1991), par. 486., UN Doc. A/47/40(SUPP) (1992), par. 72.
[198] See e.g. UN Doc. A/46/40(SUPP) (1991), par. 646.; Doc. A/54/40[VOL.I](SUPP) (1999), par. 157.; Sometimes the Committee was ready to discuss complicated and nuanced questions like "whether the minimum number of pupils required for a school to receive State funding discriminated against minority religions." See UN Doc. A/48/40 (Part I) (1993), par. 572. ;
[199] See e.g. UN Doc. A/44/40 (1989), par. 136.; UN Doc. A/47/40(SUPP) (1992), par. 322.;
[200] See e.g. UN Doc. A/46/40(SUPP) (1991), par. 646., 613.; UN Doc. A/48/40 (Part I) (1993), par. 240.; UN Doc. A/48/40 (Part I) (1993), par. 482.
[201] See e.g. UN Doc. A/44/40 (1989), par. 135.; UN Doc. A/46/40(SUPP) (1991), par. 646.; UN Doc. A/47/40(SUPP) (1992), par. 450.

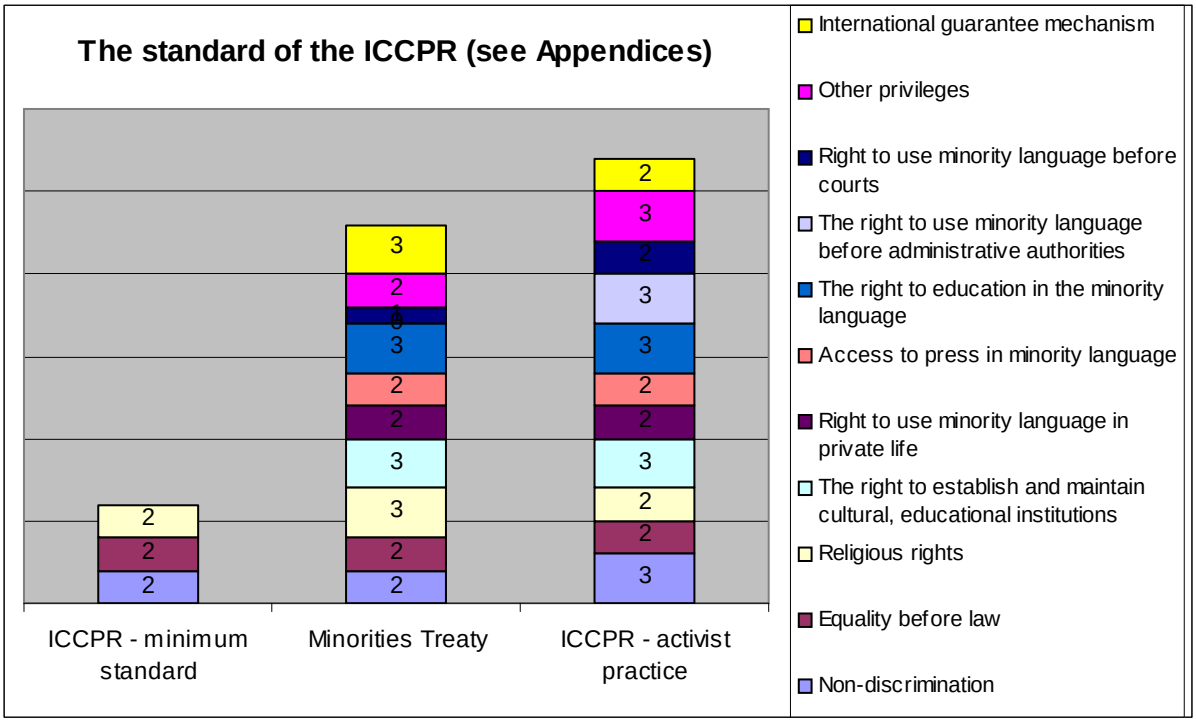
army, police[202] and in the judiciary[203]). Beyond the freedom of religion (Art. 18), the Committee recognizes the right to establish religious institutions,[204] educational institutions and urges positive measures to preserve the culture of the minority.[205] The right to use minority language in private life is ensured by Art. 17 (right to privacy), whereas linguistic rights in official matters are largely recognized by the Committee. States are asked to guarantee the right to use minority language before courts,[206] although it is unclear whether it covers criminal proceedings, civil or administrative procedures as well.[207] The Committee requires States to ensure the right to use the minority language in official communications, before legal and administrative bodies[208] and states that information and materials about voting should be available in minority languages.[209] It emphasizes also the right to have access to media in the minority language.[210] As for educational rights of minorities, it repeatedly required the use of language in the school system,[211] the right to education in minority language,[212] of the minority language,[213] books in minority language[214] and specific instruction about the minority culture.[215] Finally, it consistently requires that the status of the minorities shall be determined

[202] See e.g. UN Doc. A/53/40[VOL.I](SUPP) (1998), par. 383. ; UN Doc. A/58/40 [VOL.I](SUPP) (2003) par. 83 (8) (a)
[203] UN Doc. A/63/40(VOL. I) (2009), par. 81 (8) ; UN Doc. A/63/40(VOL. I) (2009), par. 82 (26)
[204] See Åkermark (1996), supra fn. 175, p. 154.
[205] See e.g. UN Doc. A/46/40(SUPP) (1991), par. 136., 180.; UN. Doc. A/47/40(SUPP) (1992), par. 276.
[206] UN Doc. A/41/40 (1986), par. 406.; UN Doc. A/46/40(SUPP) (1991), par. 180. ; UN Doc. A/63/40(VOL. I) (2009), par. 80 (17)
[207] See Åkermark (1996), supra fn. 175, p. 144.; UN Doc. A/53/40[VOL.I](SUPP) (1998), par. 131.
[208] See e.g. UN Doc. A/40/40 (1985), par. 215.; UN Doc. A/52/40[VOL.I](SUPP) (1997), par. 385. ; UN Doc. A/60/40(Vol. I) (2005), par. 85 (20); UN Doc. A/63/40(VOL. I) (2009), par. 72 (17) (the Committee used a much more softer wording!)
[209] General comment No. 25 (57), par. 12. See UN Doc. A/51/40[VOL.I](SUPP) (1996), Annex V.
[210] See e.g. UN Doc. A/46/40(SUPP) (1991), par. 90.; UN Doc. A/48/40 (Part I) (1993), par. 462.
[211] See e.g. UN Doc. A/37/40 (1982), par. 321., UN Doc. A/38/40 (1983), par. 80., 274.
[212] UN Doc. A/47/40(SUPP) (1992), par. 172.; UN Doc. A/54/40[VOL.I](SUPP) (1999), par. 118. ; UN Doc. A/63/40(VOL. I) (2009)
[213] See e.g. UN Doc. A/47/40(SUPP) (1992), par. 451.
[214] See e.g. UN Doc. A/33/40 (1978), par. 358.; UN Doc. A/34/40 (1979), par. 327.; UN Doc. A/39/40 (1984), par. 235-237 (primary and university education in minority language!); UN Doc. A/43/40 (1988), par. 195.
[215] UN Doc. A/63/40(VOL. I) (2009), par. 74 (20);

by law in a foreseeable and accessible manner[216] – a State duty which can be classified as an "other privilege" of minorities. As for the guarantee mechanism, the Human Rights Committee is responsible for the monitoring and can examine – under certain conditions – individual cases. However, its decisions do not have binding force: instead, the Committee tries to achieve friendly solutions.

Summarizing the standards under the practice of the Human Rights Committee, one can observe an exceptional activity of the Committee which established high standards with positive obligations especially in linguistic rights in education, before administrative bodies, cultural rights of the minority and in the representation of minority members in several segments of public life. These requirements do not necessarily reflect the common denominator of State practice, but presents an "activist" perception of Art. 27 by the special treaty body responsible for the monitoring.

[216] See e.g. UN Doc. A/47/40(SUPP) (1992), par. 298.; UN Doc. A/50/40[VOL.I](SUPP) (1995), par. 322.; UN Doc. A/51/40[VOL.I](SUPP) (1996), par. 121.; UN Doc. A/52/40[VOL.I](SUPP) (1997), par. 105.



3.1.3. The Osimo Agreement

After the Second World War, the Paris Peace Treaty with Italy of 1947 provided for the status of the Trieste region and divided it to a British-American (zone A) and to Yugoslav administration zone (zone B). While the Peace Treaty granted the inhabitants of the Free Territory only modest minority rights,[217] the Memorandum of Understanding (1954) and the Osimo Treaty (1975) expanded the scope of minority protection.

The Memorandum of Understanding between the Governments of Italy, the UK, the US and Yugoslavia (London Memorandum) established an Italian civil administration in zone A and a Yugoslav civil administration in zone B.[218] Beyond the delimitation of the boundaries

[217] Namely, the non-discrimination rule and the "equality of eligibility for public office" (Annex VI, Art. 4), the Slovene, Italian and eventually Croat as official languages (Annex VI, Art. 7), the right to option for nationality (Art. 19-20, Annex VI, Art. 6). On the other hand, Annex IV on the Trento and Bolzano Provinces guaranteed a much wider minority protection. See Treaty of Peace with Italy, 10 January 1947. In: Australian Treaty Series, see at: http://www.austlii.edu.au/au/other/dfat/treaties/1948/2.html (30.10.2009).

[218] Memorandum of Understanding between the Governments of Italy, the United Kingdom, the United States and Yugoslavia Regarding the Free Territory of Trieste. In: United Nations, Treaty Series: Treaties and

between Italy and Yugoslavia, the London Memorandum guaranteed several minority rights which were continued to apply under the Osimo Agreement of 1975 (Osimo Treaty) which finalized the status of Trieste. It provided in its Art. 8 that Italy and Yugoslavia shall "guarantee to the members of the concerned minorities the same level of protection as was provided by the Special Statute, which is hereby terminated."[219] Thus, the minority provisions of the London Memorandum continued to be valid after 1975.[220] It is worth to consider the standard of this treaty (point 3.1.3.1.) and its sort after 1991 (point 3.1.3.2.).

3.1.3.1. The standard of the Osimo Treaty

The London Memorandum, of which minority provisions are continued by the Osimo Treaty, grants minority rights the Italians coming under Yugoslav authority and the Slovenes and Croats coming under the authority of Italy. Firstly, the treaty declares the non-discrimination rule (Art. 6), the right to return to the territory or to move away without administrative barriers/duties (Art. 8). In its Annex, the London Memorandum concretizes the rights granted for the concerned minorities. It refers to the UDHR as governing the action of the State parties (Art. 1). Under the equality before law provisions, it imposes concrete obligations how to realize this right by affirmative action: Yugoslavia and Italy shall facilitate the access to and fair representation of minority members in administrative positions, especially as inspectorates of schools [Art. 2 (c)].

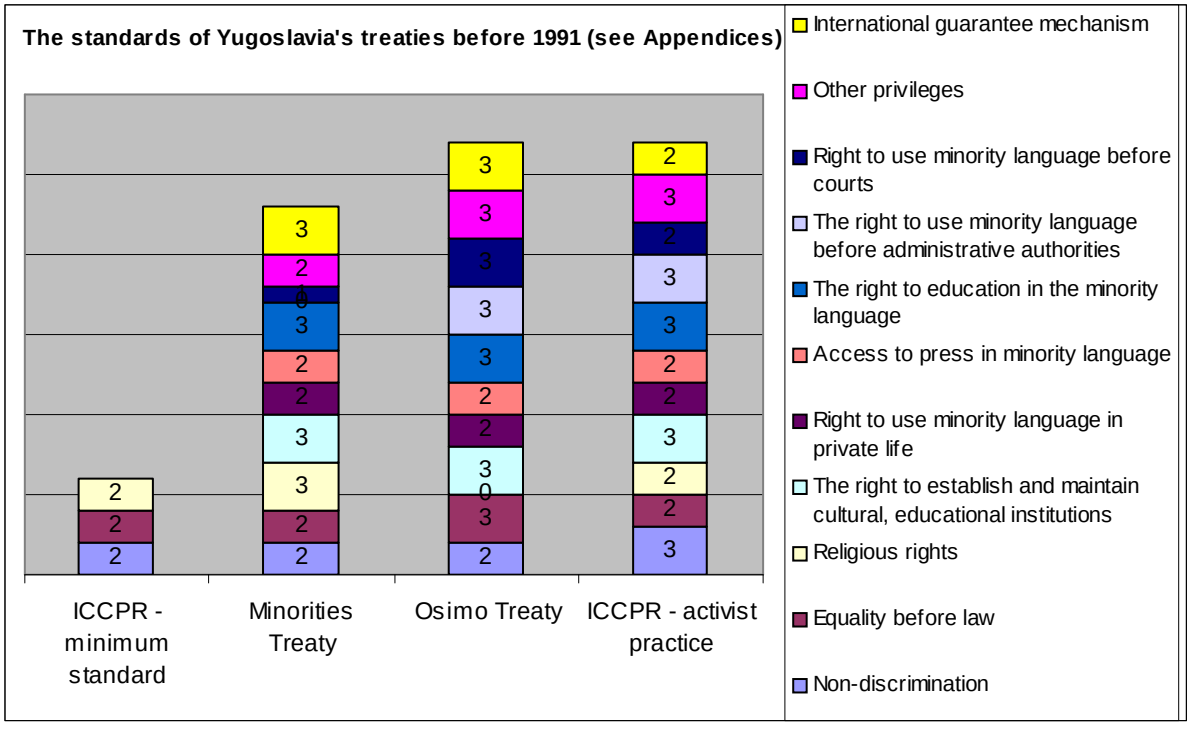
International Agreements Registered or Field and Recorded with the Secretariat of the United Nations, Vol. 235, London, 5 October 1954.

[219] Cited by Matjaž Klemenčič – Jernej Zupančič: The Effects of the Dissolution of Yugoslavia on the Minority Rights of Hungarian and Italian Minorities in the Post-Yugoslav States. In: 32 (4) Nationalities Papers 853 (2004) [hereinafter: Klemenčič – Zupančič (2004)], p. 886.

[220] It was recognized by the Decree of the Constitutional Court of Republic of Slovenia, No. U-I-283/94, Uradni list Republike Slovenije, No. 20/98, Ljubljana, 1998. Cited by Klemenčič – Zupančič (2004), supra fn. 219, p. 886., fn. 115.

Minority members shall have the right to use minority language in private life, before administrative authorities and courts (Art. 5), in press [Art. 4 (a)]. It guarantees the kindergarten, primary, secondary and professional education in minority language and stipulates the obligation to maintain the minority schools listed in the annex [Art. 4 (b)-(c)], to employ teachers of the same mother tongue as the students while not to dismiss the teachers of the other ethnicity etc. As for the guarantee mechanism, the Treaty provides for a Mixed Yugoslav-Italian Committee with an individual complaint procedure (Art. 8).

For conclusion, the Osimo Treaty conserved a wide range of minority rights with expressed affirmative obligations which seem to farly exceed the minimalist standard under the ICCPR. However, one must take into account that the Osimo Treaty is of a restricted territorial scope since it applies only to the minorities of the Trieste region.



3.1.3.2. The succession to the Osimo Treaty

The dissolution of the SFRY influenced the sort of the Osimo Treaty: from the successor States, only Slovenia and Croatia were concerned by its provisions. Slovenia has common land boundary, Croatia a common maritime boundary with Italy and only these successor States were inhabited by a significant number of Italians. Under Art. 34.1. (b) of the 1978 Vienna Convention, treaties which applied in respect of only a part of the territory of the predecessor State which has become a successor State continue to bind that successor State alone. Consequently, the Osimo Treaty, which applied to the Trieste region, should continue to apply, under the logic of the 1978 Vienna Convention, only in respect to Slovenia and Croatia.

After its declaration of independence, Slovenia notified Italy in 1992 that it continued to respect the Osimo Treaty[221] and similarly, Italy recognized its validity as well.[222] Until today, although it has been subject of tensions, the minority protection continued to apply both in Italy and in Slovenia.[223]

As for Croatia, it was less clear whether it succeeded to the treaty since it did not notify its intention to do so in the 1990s.[224] The Croatian Maritime Code does not refer to the Osimo Treaty when it provides on the territorial seas, but Charney presumes that it is still valid since Art. V of the Constitutional Decision on the Sovereignty and Independence of the Republic of

[221] Akt o nostrifikaciji nasledstva sporazumov nekdanje Jugoslavije z Republiko Italijo [Act on Nostrification of Succession of Agreements of Former Yugoslavia with the Republic of Italy], Uradni list Republike Slovenije, No. 40/92, Ljubljana, 1992, p. 127-128. Cited by Klemenčič – Zupančič (2004), supra fn. 219, p. 886., fn. 117.
[222] Karen Henderson (ed.): Back to Europe: Central and Eastern Europe and the European Union. Routledge, London/New York, 1999, p. 246.
[223] Special Protection Law. In: Gazetta Ufficiale (Rome), No. 56., 2001. Cited Klemenčič – Zupančič (2004), supra fn. 219, p. 886., fn. 120.
[224] It played a role especially in the maritime delimitation dispute between Slovenia and Croatia. In 2006, the Slovenian Ministry of Foreign Affairs published a note in which it expresses its official opinion on the border dispute between Croatia and Slovenia. In this note, Slovenia confirms that "Croatia has not (yet) succeeded to the Osimo Treaty". See: White Paper on the Border between the Republic of Slovenia and the Republic of Croatia, p. 11., par. 2. Cited by Vladimir-Djuro Degan: Consolidation of Legal Principles on Maritime Delimitation: Implications for the Dispute between Slovenia and Croatia in the North Adriatic. In: 6(3) Chinese Journal of International Law 601 (2007), p. 622.; Latter, as stated below, Croatia recognized the validity of the Osimo Treaty in the 2000s several times.

Croatia[225] accepts all the recognized international boundaries of Croatia.[226] Later, in the 2000s, Croatia confirmed several times that it had succeeded to the Osimo Treaty.[227]

The present thesis cannot analyze in its framework whether and how far the three concerned States ensure the standard of the Osimo Treaty within their territory other than the Trieste region.[228] Briefly, it is sufficient to mention that Slovenia has extended the rights enshrined in the Osimo Treaty to all of its territory.[229] The Italian "Law on the Protection of the Slovenian Minority" adopted in 2001 extended the earlier minority protection applicable to Slovenes living in Trieste and Gorizia to the Udine province as well.[230] Finally, from the fact that the Croatia concluded an additional bilateral minority agreement with Italy in 1996,[231] one can presume that it wanted to extend the standards of the Osimo Treaty to Croatia, i.e. outside the Trieste region.[232] In sum, the Osimo Treaty, an originally bilateral minority treaty with a

[225] Art. V of the decision of the Croatian Parliament of 25 June 1991.
[226] Jonathan I. Charney – Lewis M. Alexander (eds.): International Maritime Boundaries. Volumes 3. The American Society of International Law, Martinus Nijhoff Publishers, The Netherlands, 1998, p. 2437.
[227] See e.g. La Charte Européenne des Langues Régionales ou Minoritaires. Deuxième rapport périodique présenté au Secrétaire Général du Conseil de l'Europe conformément à l'article 15 de la Charte. Croatie. MIN-LANG/PR (2003) 4, Strasbourg, 14 January 2003, p. 4.; Press Release 280/06 (Zagreb, 2 December 2006); Press Release 85/05 (Zagreb, 2 May 2005); Press Release 281/09 (Zagreb, 1 July 2009), all press releases available on the website of the Ministry of Foreign Affairs and European Integration, Republic of Croatia, see at http://www.mvpei.hr/custompages/static/hrv/templates/_frt_Priopcenja_en.asp?id=4902 (15.10.2009) .
[228] Croatia, Slovenia and Italy have became parties to all relevant international treaties protecting minority rights, namely to the Framework Convention for the Protection of National Minorities, the European Charter for Regional or Minority Languages.
[229] See the Constitution of Slovenia, Art. 5 (1), Art. 11 ("In those municipalities where Italian or Hungarian national communities reside, Italian or Hungarian shall also be official languages"), Art. 64 (Special Rights of the Autochthonous Italian and Hungarian National Communities in Slovenia), Art. 80 (3) which provisions do not narrow the territorial scope of minority rights of Italians.
[230] Antonija Petricusic: Slovenian Legislative System for Minority Protection: Different Rights for Old and New Minorities. In: Autumn 2004 Noves SL, Revista de Sociolingüística/Noves SL, Journal on Sociolinguistics (2004), p. 5., fn. 22. See at: http://www6.gencat.cat/llengcat/noves/hm04tardor/docs/petricusic.pdf (19.10.2009)
[231] Treaty between the Republic of Croatia and the Italian Republic concerning minority rights (signature: 5 November 1996; entry into force: 8 July 1998), Collection of International Treaties. List of international treaties and international acts signed between the Republic of Croatia and the Italian Republic. Republic of Croatia, Ministry of Foreign Affairs and European Integration. See at: http://www.mvpei.hr/customPages/Static/HRV/templates/_frt_bilateralni_odnosi_po_drzavama_en.asp?id=98 (14.10.2009)
[232] Croatia does not narrow the minority protection to a given territory. See the Constitution of Croatia, Art. 15, Art. 82 (1) or the "Constitutional Law on Human Rights and Freedoms and on the Right of Ethnic and National Communities and Minorities in the Republic of Croatia" of 1991, which law was suspended until 2000 during an authoritarian regime and newly restored in 2000. For the details of the national legislation on Croatian minority protection see The Protection of National Minorities by their Kin-State. La protection des minorités nationales par leur Etat-parent. European commission for Democracy through Law. Commission

relatively high standard continues to apply in the interested successor States, with an extended territorial scope.

Having summarized the international minority rights obligations of the SFRY assumed before 1990, one can conclude that while the Osimo Treaty applied in a restricted territory, Art. 27 of the ICCPR bound the SFRY without territorial limitation. However, the weakness of the ICCPR is that its Art. 27 does not expressly require States to ensure the detailed minority rights identified by this thesis. Under the litterary interpretation of Art. 27, the State is obliged to provide for a minimum protection for minorities whereas under the practice of the Human Rights Committee, the SFRY had to exercise affirmative action in several minority rights. Both the Osimo Treaty and the ICCPR seem to reach the standard required by the Minorities Treaty of 1919 which, although it lapsed, shall continue to form a necessary threshold to be guaranteed. As the next point will prove, the vague text of the ICCPR and its minimalist standard was exceeded by a proliferation of international minority rights standards imposed by the international community on the successor States of the SFRY.

3.2. International standards of minority protection imposed on successor States of the SFRY after 1991

The collapse of the SFRY is characterized by a sequence of violent humanitarian conflicts which started in 1992 with the Balkan War (1992-1995) and continued in the Kosovo crisis which can hardly be said to be solved even in the 2000s. The almost two decades of the

européenne pour la democratie par le droit. Council of Europe Publishing, Editions du Conseil de l'Europe, 2002, p. 301-307.

collapse of Yugoslavia entailed a series of international dispute settlement proposals and projects on the constitutional transformation of the concerned States.

These international proposals provided for human rights as an unavoidable element of conflict settlement: they usually incorporated a reference to the application of a mixture of international human rights instruments and sometimes included material provisions on human rights as well (e.g. the Carrington Draft). Most international instruments to which these proposals referred to were universal human rights conventions, sometimes non-binding declarations, European instruments adopted under the auspices of the Council of Europe and even less frequently non-binding reports like the documents adopted by the Organization on Security and Cooperation in Europe (CSCE).[233] Considering the major role of ethnic tensions in the events of the dissolution of the SFRY, nearly all of these proposals dealt with minority rights.

Szasz collected three major purposes why these proposals were adopted:

- to require the successor States to become parties to these instruments if they were not yet parties;
- to apply the listed international instruments immediately in domestic constitutional systems;
- finally, to impose the international monitoring mechanisms of the concerned human rights treaties and supplement the domestic mechanisms with these international proceedings.[234]

In the examination of the standards imposed by the international documents on the successor States of the SFRY, one can distinguish three main periods. The declaration of independence of Slovenia and Croatia led to the first conflicts with Belgrade (1991-1992), which entailed the involvement of the European Community setting very high minority standards by the EC Conference and then by the Recognition Guidelines (point 3.2.1.). Secondly, since the Balkan

War could not be prevented by the EC efforts, the conflict settlement talks continued with US involvement and led through various peace plans to the Dayton Agreement, which set minority standards in accordance with the international human rights conventions in force (point 3.2.2.). In a third period from the signature of the Dayton Agreement (1995-2000s), the reaction of the international community to the humanitarian crisis was ambiguous: although the EU did not require any recognition criteria from Montenegro or from Kosovo, the international dispute settlement plans related to Kosovo continued to reflect strict minority rights requirements, comparable to the standard of the Carrington Draft (point 3.2.3.). These three phases of international involvement will lead to the conclusion that the minority rights standards imposed on the post-Yugoslav successor States proved to be consistently high, requiring in most types of minority rights well defined positive obligations.

3.2.1. The first independence wave (1991-1992): the minority rights requirements of the EC

Just before the break-up of the SFRY started, the European Community (EC) decided to include minority protection in its foreign policy. Namely, in June 1991, the Luxembourg Summit adopted the "Declaration of Human Rights" which expressly called for the protection of minorities in one of its paragraphs.[235] This first sign of an increased "internationalization" of minority rights was certainly influenced by the dangers of the upcoming dissolution of the Soviet Union and the SFRY and gave rise to a subsequent minority rights policy from the part

[233] P. C. Szasz: Protecting Human and Minority Rights in Bosnia: A Documentary Survey of International Proposals. In: 25 California Western International Law Journal 237 (1995) [hereinafter: Szasz (1995)], p. 246-247.
[234] See Szasz (1995), supra fn. 233, p. 247-249.
[235] European Council in Luxembourg, 28-29 June 1991, Presidency Conclusions, SN/151/2/91, Annex V, p. 26.

of the EC, focusing on Eastern Europe.[236] Two months later, as the civil war climate was perceptible, the EC decided to try to prevent the collapse of Yugoslavia by convening a Peace Conference on Yugoslavia (point 3.2.1.1.). After the EC realized that it is unrealistic to stop the dissolution of the Federation, it chose to try to stabilize the region by requiring from the new States democratic standards through the Recognition Guidelines (point 3.2.1.2.) of which fulfillment was examined by the Badinter Commission (point 3.2.1.3.).

3.2.1.1. The EC Peace Conference on Yugoslavia

The EC Peace Conference on Yugoslavia was convened in September 1991 and intended to maintain the SFRY by democratizing its laws. The conference not only set up the Arbitration Commission of the Conference on Yugoslavia (Badinter Commission) which gave significant non-binding opinions on legal matters, but elaborated a proposed text called "Treaty Provisions for the Convention", which served as a model for the subsequent international proposals.[237] From the point of view of minority rights, this proposal has a double importance: firstly, it set very high international standards in respect of minority rights and secondly, the EC attempted to impose them on the new States even in the absence of a signature of the convention.

The Treaty Provisions for the Convention (Carrington Draft)[238] includes minority rights provisions forming a complexity of norms: firstly, the draft refers to several human rights instruments of which provisions it incorporates (A) and secondly, the Carrington Draft itself provides for minority rights which the republics of Yugoslavia shall respect (B). After

[236] See Pentassuglia (2004), supra fn. 129, p. 163.
[237] See Szasz (1995), supra fn. 233, p.
[238] See Treaty Provisions for the Convention, 4 November 1991, reproduced in the collection of the University of Liverpool at: http://sca.lib.liv.ac.uk/collections/owen/boda/ecco4.pdf (24.10.2009) [hereinafter: Carrington Draft], Art. 2 b) 2.

summarizing their standards, the thesis will resume the overall standard of the Carrington Draft (C).

A) The international instruments incorporated in the Carrington Draft

The Carrington Draft stipulates that the republics of Yugoslavia shall guarantee all rights enshrined in thirteen international human rights instruments enumerated by the Draft. Among these documents, the following have particular relevance in the definition of a minority rights: the ICCPR, the CSCE documents and two other non-binding instruments, which shall be "appropriately" taken account – the proposal of the "Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities" (the 1992 UN Declaration) and the Proposal for a Convention for the Protection of Minorities.[239] Hereinafter, the minority protection standard of these instruments will be briefly evaluated, under the same criteria as applied before.

- The ICCPR: as analyzed before, the extensive interpretation of Art. 27 in the practice of the Human Rights Committee created a non-binding, but authentic understanding of the obligations of States, very frequently with positive obligations expressed by the Committee (see point 3.1.2.).
- The OSCE documents: the Carrington Draft speaks about the human rights enshrined in the OSCE documents especially referring to the Helsinki Final Act, the Charter of Paris for a New Europe, the Copenhagen Document, the document of the Moscow meeting of the Conference on the Human Dimensions of the CSCE and the report of the CSCE meeting of experts in Geneva on national minorities. Except for the access

[239] Treaty Provisions for the Convention, 4 November 1991, reproduced in the collection of the University of Liverpool at: http://sca.lib.liv.ac.uk/collections/owen/boda/ecco4.pdf (24.10.2009) [hereinafter: Carrington Draft], Art. 2 b) 2.

to press in minority language, the OSCE standards provide for all the minority rights categorized by this thesis, although using a soft wording. The right to use minority language before administrative authorities and before courts has a particularly flexible wording, whereas other minority rights are general State obligations without expressed affirmative action. Furthermore, the strength of OSCE documents is weakened by their non-binding nature, but scholarly writers usually add that they are politically binding.[240] As they are bare political documents, they do not establish a monitoring body. Nevertheless, the Copenhagen document of 1990, no matter how softly is worded, was the first human rights instrument after the Second World War which expressly provided in details for the minority rights which were covered by the activist interpretation Art. 27 of the ICCPR.

- The proposal of the later adopted 1992 UN Declaration: The UN General Assembly decided in 1992 to issue a declaration on the rights of minorities in order to supplement Art. 27 of the ICCPR.[241] Except for the access to press in minority language, the text requires States to guarantee all categories of minority rights identified by the present thesis. However, beyond the solemn declaration of these rights, the text very softly refers to positive obligations, sometimes weakened by flexibility clauses ("wherever possible", "where appropriate" etc.), so no one of them can be considered as expressly defining affirmative action.
- Proposal for a Convention for the Protection of Minorities: The European Commission for Democracy through Law (Venice Commission), an expert body created by the Council of Europe in order to provide advices in constitutional issues, prepared a draft on the protection of minorities in 1991 and proposed to the Committee of Ministers to

[240] See e.g. Åkermark (1996), supra fn. 175, p. 256.

adopt it as a convention.[242] Most of its minority rights provisions are weakened by flexibility clauses. As an exception, it requires States to provide for the instruction of the minority language in public schools "whenever a minority reaches a substantial percentage of the population of a region or of the total population" (Art. 9, 1st sentence). It is also remarkable that the Proposal provides for a petition procedure which is similar to that of the Human Rights Committee (Art. 24-26). Although the draft was rejected by the Committee of Ministers because of its constraining nature, its merit is that it extended the catalog of minority rights by new types of State duties, although in a flexible wording and not covering all the rights identified by this thesis.

If one combines the substantial provisions of these instruments, one can conclude that their summed standard protects all minority rights identified by this thesis. Although the right to instruction of the minority language under the Venice Commission's Proposal clearly requires affirmative action, the positive obligations of States are usually either not or not clearly expressed, or followed by flexibility clauses. Nevertheless, their common standard reflects well defined positive obligations due to the practice of the Human Rights Committee which imposed affirmative action duties on States.

[241] See UN Doc. A/RES/47/135, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.
[242] See Council of Europe Doc. MC (91) 29, reproduced in: 3 (5) RUDH 189 (1991), p. 189-192.

B) Substantial minority rights provisions of the Carrington Draft

The Carrington Draft itself recognizes all the categories of minority rights examined before, although without defining positive obligations [Art. 2. b) 3]: the non-discrimination, cultural, religious and educational rights, the free language use in public means and the access to media.

Although the before mentioned rights do not or vaguely define positive obligations, as an exception, minority rights of political nature impose well defined affirmative action on the republics, first and foremost due to its autonomy provisions under the title "special status" (Art. 3-5). In republics where members of the same minority form "a substantial percentage of the population" but not a majority, the minority members shall enjoy "a general right of participation" in public affairs, "including participation in the government of the republics concerning their affairs" (Art. 4). Furthermore, in areas where members of the same minority form a regional majority, they shall enjoy a special status (Art. 5). This includes the right to show national emblems, a minority educational system and own legislative, executive, judiciary bodies and police. It provides for an international monitoring and a permanent international body to monitor but does not go in any details and leaves it to the republics to decide (Art. 5B).[243]

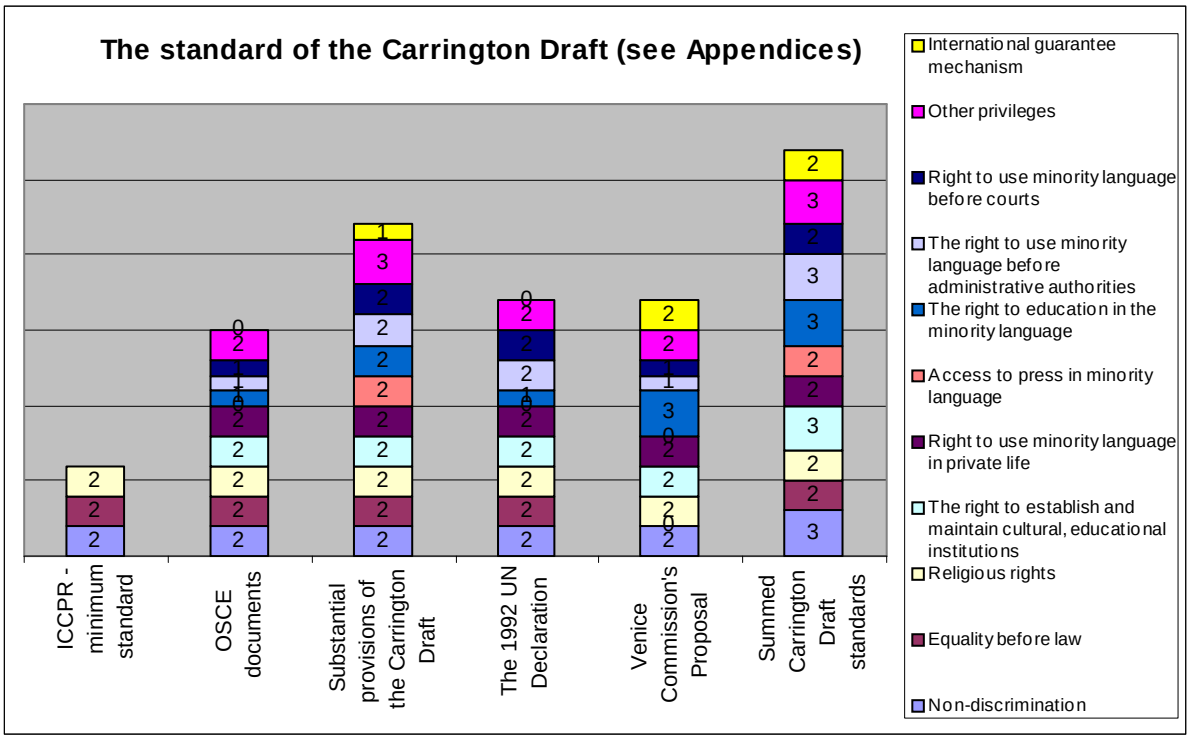
In sum, the substantial provisions of the Carrington Draft not only confirmed the main categories of minority rights, but went further by requiring considerable political privileges under the notion of "special status".

C) Summary of the standard of the Carrington Draft

The most significant merit of the Carrington Draft is the express catalog of minority rights which were not yet listed in any multilateral human rights convention before. Although the

[243] The concerned areas were to be enumerated in the annex, but after the failure to adopt the Carrington Draft, they were never specified According to Caplan, this special status was motivated by the Alto Adige/South Tirol

international instruments that it incorporates usually do not exceed the general declaration of each minority right and do not define positive obligations, they were supplemented by the practice of the Human Rights Committee and the minority rights of political nature ensured by the Carrington Draft. This summarized Carrington standard is visualized on the table below. However, the Carrington Draft was finally not adopted since Milošević vetoed it. Nevertheless, after the EC realized that it is unrealistic to maintain Yugoslavia, it attempted to ensure the implementation of the Carrington Draft in the ex-Yugoslav successor States by the mechanism of recognition.



3.2.1.2. The EC conditions of recognition of the post-Yugoslav States

After Belgrade refused to sign the Carrington Draft, it became clear that the object of the EC Conference on Yugoslavia, the redefinition of the Yugoslav federation failed. In order to

autonomy settlement – a solution which largely respects minority rights and which brought stability in the region See Caplan (2002), supra fn. 247, p. 166.

resolve this dead end, the extraordinary EPC ministerial meeting on 16 December 1991 decided to try to achieve the stabilization of the region by prescribing the conditions of recognition of the new States in a common position called "Declaration on Yugoslavia" and Declaration on the "Guide-lines on the Recognition of New States in Eastern Europe and in the Soviet Union" (Guidelines).[244]

The Guidelines were an innovatory political document of the European Community since it made the recognition dependent on criteria transcending the traditional conditions of statehood. The aim of the conditions was to ensure the implementation of the essence of the Carrington Draft even in the absence of unanimity of the parties by requiring the ex-Yugoslav successor States to embrace the provisions of the draft convention unilaterally.[245] Furthermore, under these conditions, human rights and especially minority protection played a major role, inspired by the Badinter Commission.[246] As for the reason of the minority protecting criteria, the EC member States took into account that the independence of the Yugoslav republics would threaten communities which differ in their ethnicity from the dominant nation.[247] The Guidelines required concretely:

- […] the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human right
- guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE.[248]

As for the "Declaration on Yugoslavia", the EC required the successor States striving for recognition to respect the above-mentioned guidelines and in addition, to "accept the

[244] Declaration on Yugoslavia, Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (16 December 1991). In: 4 (1) EJIL 65 (1993) [hereinafter: Guidelines (1991)], p. 65.
[245] See Weller (1992), supra fn. 6, p. 587.
[246] Dominic McGoldrick: From Yugoslavia to Bosnia: Accommodating National Identity in National and International Law. In: 6 International Journal on Minority and Group Rights 1 (1999) [hereinafter: McGoldrick (1999)], p. 17.
[247] Richard Caplan: Conditional recognition as an instrument of ethnic conflict regulation: the European Community and Yugoslavia. In: 8 (2) Nations and nationalism 157 (2002) [hereinafter: Caplan (2002)], p. 165.
[248] See Guidelines (1991), supra fn. 244, p. 65.

provisions laid down in the draft Convention [i.e. the Carrington Draft] – especially those in Chapter II on human rights and rights of national and ethnic groups – under consideration by the Conference on Yugoslavia."[249] The European Community invited all concerned States to confirm by December 23 whether they accepted the Guidelines and the provisions of the Carrington Draft, especially those on human rights and national or ethnic groups.

The importance of minority rights proves that the EC went beyond the traditional conditions of statehood and, as Caplan noted, "has given new definition to what it means to be a State today – in Europe, at least".[250]

3.2.1.3. Opinions of the Badinter Commission on the fulfillment of the Guidelines

Since it was vague what "commitment" and "guarantees" mean, the requests of successor States for recognition were forwarded to the Badinter Commission which was asked to give a non-binding opinion about the fulfillment of the criteria.

After the separating republics filed their request for recognition, the requirements concerning minority protection had practical relevance in two cases where the Commission found deficiencies in the fulfillment of the criteria: in case of Croatia and Bosnia-Herzegovina.

As for the later, the Commission stated that the peoples of Bosnia-Herzegovina had no possibility to express their opinion about the independence of the State and required a referendum. It claimed that minorities have a right to equal participation in government and held that a referendum about the independence should be open to all citizens without

[249] See Guidelines (1991), supra fn. 244, p. 65.; Furthermore, these conditions were equally applied to Serbia-Montenegro which at that time did not consider itself successor State needing recognition. See Presidency Statement, 12 May 1992, Europe, No. 5728 (N.S.), 13 May 1992, p. 3. Cited by C. Warbrick: Recognition of States. In: 42(2) ICLQ 433 (1993), p. 439.

discrimination in order to give a voice for minorities.[251] Bosnia-Herzegovina decided shortly after the Commission's opinion to organize a referendum and consequently, it was recognized by the EC on 6 April 1992.

As for Croatia, the Badinter Commission expressed its concern in its Opinion 5 about the lack of adequate constitutional status of minorities. Concretely, the Badinter Commission held that the Croatian Constitutional Act on Minorities (4 December 1991) – which was itself adopted due to European pressure – did not guarantee the "special status" under the Carrington Draft, especially for Croatian Serbs and concluded that the recognition of Croatia is subject to the reservation that it should comply with the special status requirement.[252]

Croatia's President promised in a letter on 13 January 1992 to amend its legislative framework in order to ensure the special status for Croatian Serbs. However, Croatia did not immediately provide for the promised modifications. Moreover, the European Community did not seem to follow the opinions of the Badinter Commission, since EC States recognized Croatia on 15 January 1992 irrespective of the lack of compliance with the Badinter Commission's Opinion 5.[253] Furthermore, Germany recognized Croatia and Slovenia already in December 1991, notwithstanding the EC Guidelines. According to Weller, the indifference of EC member States with respect of the Commission's opinion was due to the fact that the "special status" requirement exceeded the constitutional guarantees of some EC members.[254]

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[250] See Caplan (2002), supra fn. 247, p. 174.

[251] Opinion No. 4 on the Recognition of the Socialist Republic of Bosnia-Herzegovina (SRBH) by the EC and its Member States. Reproduced in: E. Lauterpacht – C. J. Greenwood: 92 International Law Reports 175 (1993), p. 175-179. Grotius Publications Limited, Cambridge, 1993.; See also Weller (1992), supra fn. 6, p. 592.

[252] See Opinion No. 5 on the Recognition of the Republic of Croatia by the European Community and its Member States. Reproduced in: 92 International Law Reports 179 (1993) (eds.: E. Lauterpacht – C. J. Greenwood), p. 179-181. Grotius Publications Limited, Cambridge, 1993.

[253] Germany declared its intention to recognize Croatia already on 23 December 1991 adding that it would not implement it until 15 January, the date determined by the Declaration on Yugoslavia. On the other hand, France declared after the Badinter Commission issued Opinion 5 that the recognition of Croatia by France was conditional on the implementation of the reforms promised by the Croat government. See Warbrick (1992), supra 126, p. 479.

[254] See Weller (1992), supra fn. 6, p. 593.

After the Croatian Constitutional Act was amended, the Badinter Commission reexamined Croatia's request for recognition on 4 July 1992 and expressed still a reservation about its non-conformity with the "special status" requirement.[255] While welcoming the positive improvements in the act, it criticized the law claiming that the autonomy granted to certain areas was limited in the material scope of the jurisdiction of the local authorities, by the final word of the central authorities in the nomination of the political and judicial officials of the autonomous area and by the judicial, political and budgetary control on local authorities.

After these critics, the final conclusion of the Badinter Commission seems surprising: it holds that Croatia fulfilled the recognition criteria – an opinion which is exactly the opposite of its earlier view. The Commission concludes that although Croatia does not comply with its obligations under the Carrington Draft, it nevertheless "satisfies the requirements of general international law regarding the protection of minorities". Thus, the Badinter Commission became content of the guarantees offered by Croatia even if they did not satisfy the Guidelines' standard. It "lowered the bar" by accepting a lower standard corresponding to the "general international law" which guarantees only the basic non-discrimination and existence requirements protecting minorities, but no specific privileges.[256] Nevertheless, the Council of Europe insisted on the fundamental amendment of the Croatian minority law and until 1996, it refused the admission of Croatia.[257]

Although the EC inconsistently followed the Guidelines and later abandoned them which led to massive minority rights violations in the next years, one can nevertheless observe the following long-term effects of the Guidelines:

[255] Observations on Croatian Constitutional Law (Comments on the Republic of Croatia's Constitutional Law of 4 December 1991, as last amended on 8 May 1992). Reproduced in: 92 International Law Reports 209 (1993) (E. Lauterpacht – C. J. Greenwood), p. 209-212. Grotius Publications Limited, Cambridge, 1993.
[256] For the content of the standard of the customary law content of minority rights, see supra point 2.3.4.
[257] Rahim Kherad: La reconnaissance des Etats issus de la dissolution de la République socialiste fédérative de Yougoslavie par les membres de l'Union Européenne. In: 101 (3) RGDIP 663 (1997), p. 680.

- They had a real effect on the legislation of ex-Yugoslav successor States by political pressure, due to the common action of the EC member States.[258] The amendment of the Croatian Constitutional Act was achieved by the EC pressure and similarly, the Slovenian Constitution of 23 December 1991 and the Macedonian Constitution were prepared in accordance with the minority rights requirements of the Carrington Draft.[259]
- The recognition criteria served as promoters of "legal culture" and qualified new international instruments as "international standards".[260]
- The recognition criteria contributed in long term to the stability of new States.
- They influenced the admission policy of the Council of Europe which, since 1993, consistently requires a certain degree of minority protection from candidate States (see below, point 3.2.3.3.).

In sum, the European Community expressed very high minority rights requirements *vis-à-vis* the successor States gaining independence in 1991-1992. The non-compliance with the standard of the Carrington Draft did not prevent the recognition of Croatia, but the Guidelines served as a political constraining mechanism to improve minority protection in the successor States. As the next point will explain, the Carrington standards were also taken into account during the negotiations on the Bosnian conflict settlement and were supplemented by two

[258] See Caplan (2002), supra fn. 247, p. 172.; Even States which at the time were not members of the European Community, e.g. Austria, Finland or Sweden, referred to the European Community and European Community Guidelines when they recognized Croatia and Slovenia. Switzerland's Federal Council, when recognized Croatia and Slovenia, took into account the Badinter Commission's opinions on the protection of national minorities. See State Practice Regarding State Succession and Issues of Recognition: The Pilot Project of the Council of Europe. Ed. By Jan Klabbers – Martti Koskenniemi – Olivier Ribbelink – Andreas Zimmermann. Kluwer Law International. The Hague/London/Boston. 1999, p. 68.
[259] The Albanian Community of Macedonia invoked also the Carrington Draft as reference in its negotiations with the Macedonian government continuously until 2001. See Caplan (2002), supra fn. 247, p. 172.
[260] See Hillgruber (1998), supra fn. 2, p. 502.

meanwhile adopted international conventions, the Framework Convention and the European Charter for Regional and Minority Languages.

3.2.2. Conflict settlement in Bosnia-Herzegovina: international standards of minority protection

The European Community's minority standards influenced a number of international conflict settlement drafts in the Balkan war, among which two documents can be highlighted: the Vance-Owen Plan proposed in 1992 (point 3.2.2.1.) and the Dayton Agreement ending the Balkan war in 1995 (point 3.2.2.2.).

3.2.2.1. The Vance-Owen Plan

The EC Conference on Yugoslavia was replaced in August 1992 by the International Conference on the Former Yugoslavia (ICFY) which became one of the most significant reaction of the international community to the Yugoslav crisis.

In the framework of the of the ICFY, the Co-Chairmen of the Steering Committee, Cyrus Vance and Lord Owen presented a draft agreement devoted to settle the Bosnian conflict by a tripartite agreement between the Bosnian Government, the Bosnian Serbs and the Bosnian Croats.[261] The Vance-Oven Plan is significant since it indicates the organic transition from the EC's minority standards to the finally adopted Dayton Agreement.

Firstly, it has few substantial provisions on minority rights. The draft requires as source of human rights "the highest level of internationally recognized rights, as set out in

[261] See UNDoc. S/24795 (11 November 1992).

instruments" listed below.[262] It highlights "group, especially 'minority' rights, including obligation to maintain group balance in governmental decision-making bodies as well as in the various central and provincial civil, police and other services (or, at the minimum, strict non-discrimination)."[263] It proves that the International Conference expressed the need of the representation of minorities in public authorities, with a positive obligation which was attenuated by the second part of the phrase – the minimum rule of non discrimination as an alternative. Thus, the representation of the ethnic groups at all levels of public life is a less stricter requirement than in case of the Carrington Draft ("special status") or in the practice under Art. 27 of the ICCPR (affirmative action is required for the representation of minority members at all levels of public life). As for the monitoring mechanism, the Vance-Owen Plan intends to establish "International Commission on Human Rights for Bosnia and Herzegovina" with a complaint procedure, but of which opinions are not binding.[264]

Secondly, like the Carrington Draft, the Vance-Owen Plan enumerates nineteen international human rights documents which the constitution of Bosnia-Herzegovina shall incorporate. Among these instruments, the conference required Bosnia-Herzegovina to be party to the ICCPR, the CSCE instruments, the 1992 UN Declaration and the Recommendation 1134 (1990) of the Parliamentary Assembly of the Council of Europe. Compared to the Carrington Draft, there is little difference in the *corpus* of minority rights instruments: instead of the Venice Commission's Proposal, the Recommendation 1134 (1990) is required to be respected. This latter recommendation of the Parliamentary Assembly of the Council of Europe was one of the first reactions protecting minorities to the challenges of the end of the Cold War. However, its provisions usually do not specify or vaguely express the State's positive obligations but codifies "minimum standards".

[262] UN Doc. S/24795 (11 November 1992), Annex VII.: Proposed constitutional structure for Bosnia and Herzegovina, Section VI.

If one combines the minority rights enshrined in these instruments and compares it to the standard of the Carrington Draft, one can conclude that two important elements are missing that the Carrington Draft required: the political type rights ("special status") of the Carrington Draft and the right to learn the minority language in areas inhabited by the minority (Venice Commission's Proposal). Nevertheless, the catalog of minority right is very similar to that of the Carrington Draft and due to the active interpretation of Art. 27 of the ICCPR by the Human Rights Committee, most minority rights necessitate affirmative actions of the State.

In sum, although the Vance-Owen Plan has few substantial provisions on minority rights – due to its humanitarian conflict settlement nature – , it requires a standard comparable to that under the Carrington Draft. Finally, the Plan was refused by the Bosnian Serb Assembly and a national referendum in Bosnia-Herzegovina, but its provisions nevertheless influenced the later international proposals for the Bosnian conflict settlement like the Dayton Agreement.[265]

3.2.2.2. The Dayton Agreement

The General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement) was drafted in large part by the international community and concluded as the peace ending the Balkan war.[266] It not only defined the constitutional structure and boundaries of Bosnia-Herzegovina, but contained an "Agreement on Human Rights" in one of its annexes. This Agreement on Human Rights was concluded between the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska and applies

[263] Ibid, Section VI., par. A.2 (b).
[264] Ibid, Annex VII, Art. VI.B.3.
[265] See P. C. Szasz: The Protection of Human Rights Through the Dayton/Paris Peace Agreement on Bosnia. In: 90 AJIL 301 (1996) [hereinafter: Szasz (1996)], p. 302.

within their jurisdiction. Like the Vance-Owen Plan, the Dayton Agreement aimed also at the peace settlement in Bosnia-Herzegovina and does not provide for minority rights in details, but refers instead to international conventions.

Namely, the parties to the peace treaty shall ensure the respect of certain international conventions enumerated in the agreement, among others of the ICCPR, the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities. Apparently, the framers of the Dayton Agreement abandoned the non-binding instruments (OSCE documents, the Recommendation 1134 or the 1992 UN Declaration). This narrowing of the number of international instruments did not lessen the protection because since the proposal of the Carrington Draft, two international conventions were adopted:

- the Framework Convention, which codified all minority rights identified above for the purpose of this thesis, in the form of "programme-type provisions":[267] it leaves for the State parties a wide margin of appreciation in defining their obligations. Minority rights are softly worded and positive measures, if any, are usually followed by flexibility clauses ("as far as possible", "undertake to promote the conditions necessary" etc.). Therefore, its provisions can be considered as lacking well-defined positive obligations. As most of its provisions, the implementation mechanism is similarly soft: there is an obligation to submit periodic reports, the Committee of Ministers is responsible for the supervision which is assisted by an Advisory Committee.[268] Nevertheless, the Framework Convention is significant since it codified

[266] See R. C. Slye: The Dayton Peace Agreement: Constitutionalism and Ethnicity. In: 21 Yale Journal of International Law 459 (1996) [hereinafter: Slye (1996)], p. 461.
[267] See Explanatory Report of the the Framework Convention for the Protection of National Minorities, par. 11.
[268] Ibid, Art. 25, 26.

a broad catalog of minority rights, sometimes declaring rights which had not been enshrined in other instruments.[269]

- the European Charter for Regional or Minority Languages, which allows States parties to pick and choose among its provisions, therefore this thesis cannot evaluate its scope as a "standard". However, it is also significant as defines – at least as possibilities for States – linguistic rights of minority members in details.

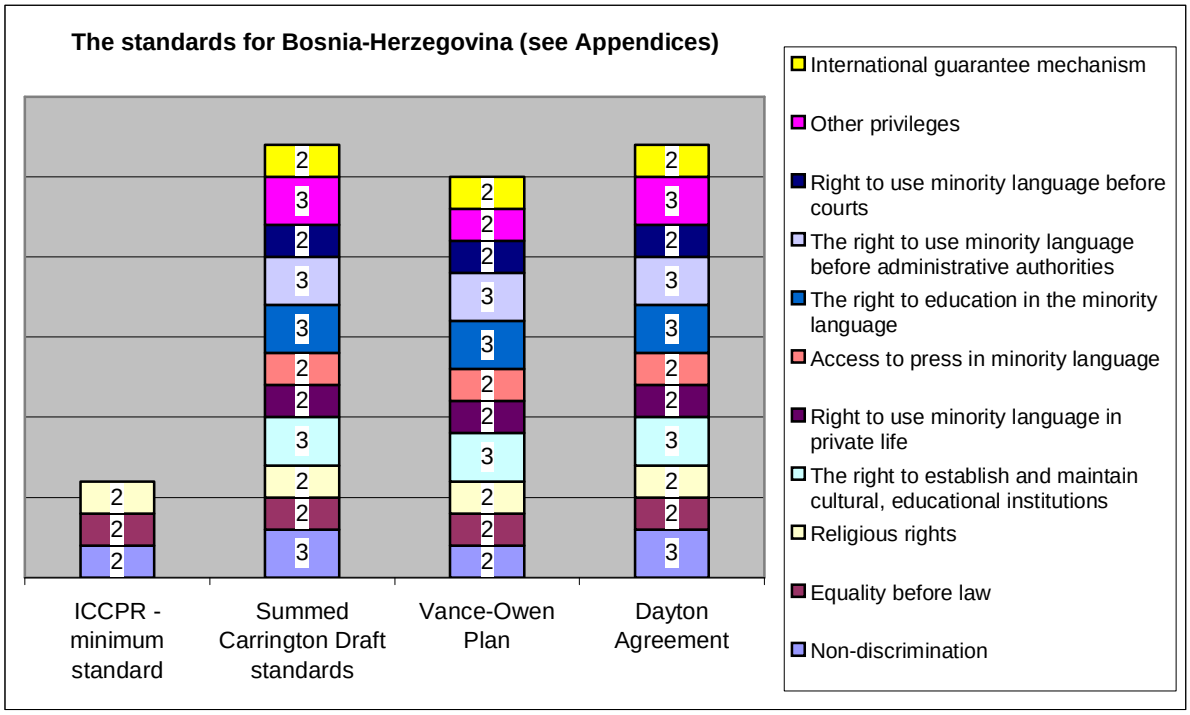
The requirements of the Carrington Draft, namely the "special status" can be said to have been incorporated in the constitution of Bosnia-Herzegovina, since it provided for a federal structure where each ethnic group has its entity where it dominates (Croats and Bosniacs in the Federation and Serbs in Srpska). Furthermore, two bodies monitoring human rights were established: the Ombudsman and the Human Rights Chamber.[270] It is commendable that the Dayton Agreement followed in its substance the Carrington standards and provided for the monitoring mechanism ensuring the respect for minority rights.

Nevertheless, Slye criticizes the Dayton Agreement claiming that it created a constitutional structure where minority members of the entity (Serbs in the Federation and Croats or Bosniacs in Srpska) are discriminated in their political rights, e.g. a Serb cannot be elected in the Federation as delegate to the House of People, an upper chamber which is ethnically determined.[271] Thus, it seems that the international community did not care of the implementation of minority rights and approved "authoritarian and ethnically pure areas" in the Constitution of Bosnia-Herzegovina, maybe giving birth to new ethnic conflicts and intolerance. The example of the Dayton Agreement shows that even if the standards more or

[269] E.g. the right to use one's name in the minority language and its official recognition, the right display signs and inscriptions publicly in minority language and, under restricted conditions, the right to use local and street names in minority language, see Art. 11.
[270] See General Framework Agreement for Peace in Bosnia and Herzegovina (14 December 1995), Chapter Two. See the web site of the Office of High Representative and EU special Representative: http://www.ohr.int/dpa/default.asp?content_id=374
[271] See Slye (1996), supra fn. 266, p. 464.

less corresponding to the Carrington standards are legally imposed on a successor State, it does not in itself guarantee the protection of minorities if international supervision and internal solidarity is lacking.

In sum, the international community laid emphasis on minority protection obligations of a newly created State, Bosnia-Herzegovina and imposed standards which are approximately similar to those of the Carrington Draft. Nevertheless, the case of Bosnia-Herzegovina proves that the formal requirement of the respect for international minority rights standards does not suffice in itself to protect *de facto* the rights of minorities: either some form of conditionality (as the recognition criteria) or a long term international supervision is necessary. As the next point will prove, the recent decade brought examples both for the conditionality mechanism (admission criteria of European organizations) and for the international supervision (Kosovo).



3.2.3. Reactions of the international community to the second wave of independence: the 2000s

The period following the signature of the Dayton Agreement did not bring peace for the remaining FRY: the oppression of the Kosovar Albans by Belgrade provoked a humanitarian conflict which led to the international administration and latter the declaration of independence of Kosovo (point 3.2.3.1.) and to the dissolution of the State Union Serbia-Montenegro (point 3.2.3.2.). The international community did not require any minority rights standards for the recognition, but instead, the international administration in Kosovo and the incentives of the EU and the Council of Europe seem to have certain success. Hereinafter, the thesis will summarize the minority rights requirements of the international community as a reaction of this second wave of independence.

3.2.3.1. The standards required as a reaction of the Kosovo crisis

The oppression of the Kosovo Albanians by Belgrade led to the intervention of the international community in 1998. The negotiations about the settlement of the Kosovo conflict between Belgrade and the Kosovar Albanian community with the mediation of an international Contact Group started in October 1998 and led to the Rambouillet Agreement, a document aiming at the establishment of a certain autonomy for Kosovo. During the conference, the EU considerably influenced the drafting of the agreement through its negotiator and the representatives of the Commission.[272]

The Rambouillet Agreement, as opposed to the Vance-Owen Plan or the Dayton Agreement, includes substantial minority rights provisions, whereas the reference to

international minority rights instruments is missing. It provides that "national communities and their members shall lave additional rights […] in accordance with international standards […]"[273] and refers to its commitment to OSCE principles and the direct applicability of the ECHR, but it does not mention international minority rights conventions which could define these "international standards".[274]

As for its material minority rights provisions, the Rambouillet Agreement aimed mainly at the political settlement of a humanitarian crisis and its substantial provisions do not require as high minority rights standards as the standards imposed on ex-Yugoslav successor States in the early 1990s. It does not mention the right to use minority language in the communication with authorities and courts. Nevertheless, some of its minority rights provisions require defined affirmative action: the right to establish religious and cultural institutions is linked with the State duty to provide public funds,[275] "other privileges" like the preservation of historical sites similarly necessitate the State's action.[276] Its other strong point is the extension of minority rights by "other privileges": the national communities' right to inscriptions of localities and streets in the minority language (in addition to the Serbian and Albanian inscription), to use national symbols,[277] the privilege of respect for the family law of the minority, the protection of the historical sites of the minority[278] and the right of the national community to tax its members.[279]

As for the implementation and monitoring mechanism, the role of the OSCE and the EU in the Implementation Mission or the Ombudsman with the complaint mechanism can be

[272] See Marc Weller: The Rambouillet Conference on Kosovo. In: 75 (2) International Affairs 211 (1999), p. 248.
[273] Rambouillet Agreement. Interim Agreement for Peace and Self-Government in Kosovo, Constitution [hereinafter: Rambouillet Agreement], Chapter 1, Art. VII, par. 1. The web site of the State Department of the USA, see at: http://www.state.gov/www/regions/eur/ksvo_rambouillet_text.html (30.10.2009)
[274] See Ringelheim (1999), supra fn. 119, p. 528.
[275] See Rambouillet Agreement , supra fn. 273, Art. VII. 5 (f).
[276] Ibid, Art. VII. 5 (d), Art. VII. 4 (a) (v)-(vii), Art. VII. 4 (a) (v)-(vii), Art. VII. 4 (c).
[277] Ibid, Constitution, Art. VII. 5 (d).

understood as an "internationally supervised" implementation with a complaint procedure, but whose decisions reports are without binding force.[280]

Although the minority rights standard of the Rambouillet Agreement does not reach the previous above mentioned standards, it is nevertheless a significant instrument because of the defined affirmative action related to the cultural and religious rights of minority members and the wide scope of "other privileges".

The Agreement was finally rejected by Milošević whose unwillingness to cooperate with the international community and the continuous atrocities in Kosovo led in 1999 to the military intervention in Kosovo.

As a result of the NATO intervention, the Security Council established by its Resolution 1244 (1999) an international administration in Kosovo called United Nations Interim Mission in Kosovo (UNMIK). In 1999, a regulation of the UNMIK detailed the international human rights conventions that all persons exercising public functions in Kosovo shall particularly respect.[281] Among these treaties, the ICCPR was listed and in 2001, the Constitutional Framework added the Framework Convention and the European Charter for Regional or Minority Languages as well.[282] Furthermore, the provisionally applicable Constitutional Framework declared these conventions directly applicable in Kosovo for whose monitoring the Special Representative of the Secretary-General is responsible.[283] It is remarkable that the UNMIK expected Kosovo authorities to apply these minority rights instruments to which at that time the FRY was not State party. As for their implementation, the UNMIK quickly adopted minority rights provisions which detail all the rights classified by

[278] Ibid, Constitution, Art. VII. 4 (a) (v)-(vii).
[279] Ibid, Constitution, Art. VII. 4 (c).
[280] Ibid, Implementation I, Art. I.1., II.1.
[281] See UNMIK/REG/1999/24 (12 December 1999), Regulation No. 1999/24, Art. 1.3.
[282] See UNMIK/REG/2001/29 (15 May 2001), Regulation No. 2001/9, Art. 3.2.
[283] Ibid, Art. 3.3.; Art. 4.6.

this thesis.[284] The UNMIK regulations specify the positive obligations of Kosovar authorities, especially the linguistic rights entail clear affirmative action. Thus, the standard reached by the UNMIK regulations are very high and correspond to the requirements of the Carrington Draft. Furthermore, a later international proposal, the Ahtisaari Plan followed similarly high standards.

In 2007, the Special Representative of the Secretary-General, Martti Ahtisaari presented a draft on the final status of Kosovo (Ahtisaari Plan).[285] It confirms the direct applicability of the ICCPR and the Framework Convention and the respect for the European Charter for Regional and Minority Languages.[286] Moreover, the Ahtisaari Plan not only provides for all minority rights identified by this thesis, but also expressly requires positive obligations related to non-discrimination,[287] equality,[288] religious rights,[289] cultural and associational life of the minority,[290] the communication with public authorities[291] and the minority's representation in public bodies.[292] As for the guarantee mechanism, the draft provides for a cooperation of international bodies supervising the implementation of the conflict settlement,[293] but no specialized human rights bodies. Due to its defined positive obligations, the standard of the Ahtisaari Plan is comparable to that of the UNMIK regulations and that of the Carrington Draft.

Whereas both the EU and the US backed the Ahtisaari Plan, it was not accepted by Belgrade and Russia because of the independence impliedly guaranteed to Kosovo by the draft.

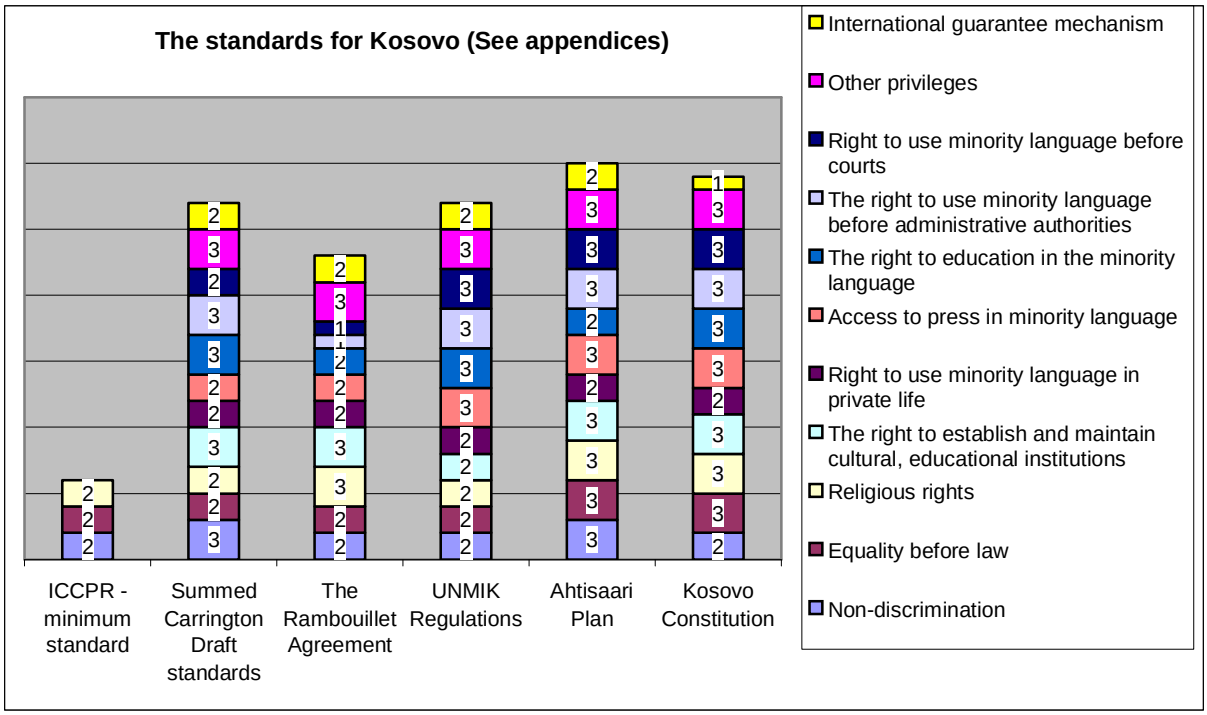
[284] Ibid, Art. 4; See also UNMIK/REG/2006/51 (20 October 2006), Regulation No. 2006/51 on the promulgation of the Law on the use of languages adopted by the Assembly of Kosovo.
[285] See UN Doc. S/2007/168/Add.1 (26 March 2007), Comprehensive Proposal for the Kosovo Status Settlement [hereinafter: Ahtisaari Plan].
[286] Ibid, Annex I, Art. 2.1.; Annex II., Art. 2.2.
[287] Ibid, Annex II, Art. 2.2., 2.3.
[288] Ibid, Annex II, Art. 2.3-4.
[289] Ibid, Annex II, Art. 2.5.; Annex V.
[290] Ibid, Annex II, Art. 2.1., Art. 2.5., Art. 3.1. n).
[291] Ibid, Annex II, Art. 3.1. e)-f).
[292] Ibid, Annex II, Art. 4.

After the unilateral declaration of independence by Kosovo on 17 February 2008, the US and two-third of European States recognized its statehood, without requiring the implementation of any minority rights standards. However, similarly to the 1991 Recognition Guidelines, it would have been recommendable to base democratic recognition criteria on the Ahtisaari Plan which seems similar in its constraining nature to the standards of the Carrington Draft. It must be noted that even in lack of such recognition criteria, the Constitution adopted by Kosovo seems not only to follow the wording of the Ahtisaari Plan, but sometimes specifies the positive obligations of the State (e.g. education in minority language shall have a threshold lower of students than normally stipulated).[294] At least on the level of positive law, due to a decade of internationalized administration and the UNMIK regulations detailing minority rights, Kosovo seems to respect the standard required by the Ahtisaari Plan.[295]

[293] Namely, the International Civil Representative, the European Security and Defence Policy mission and the international military presence, see ibid, Annex IX-XI.

[294] The Constitution retains the direct effect of these instruments (ECHR, ICCPR, Framework Convention) and the European Charter for Regional or Minority Languages shall also be taken account, without direct effect. See Kosovo's Constitution, Art. 22, 58 (2); Art. 59 (detailed minority rights). See at: http://www.kushtetutakosoves.info/?cid=2,250 (10.11.2009).

[295] Although recent human rights reports highlight that these rights exist only on paper. See Clive Baldwin: Minority Rights in Kosovo under International Rule. Minority Rights Group International, 2006. See at: www.minorityrights.org/download.php?id=158 (25.10.2009); See also Serbia and Montenegro (Kosovo/Kosova): Minority communities: fundamental rights denied. Amnesty International, see at: http://www.amnesty.org/fr/library/asset/EUR70/011/2003/fr/2b7447bd-d702-11dd-b0cc-1f0860013475/eur700112003en.html (27.10.2009)



3.2.3.2. The standards required with respect of the independence of Montenegro

The independence of Montenegro, as opposed to that of the other four ex-Yugoslav republics gaining independence in the 1990s, was a peaceful process.

After the referendum on its independence held on 21 May 2006, the EU, the US, Russia and other States quickly recognized Montenegro without requiring any democratic or minority rights criteria to fulfill. However, it must be admitted that basic democratic conditions were ensured in Montenegro. After its proclamation of independence on 3 June 2006, Montenegro succeeded to the treaties of the State Union Serbia and Montenegro, such as to the Framework Convention.[296] After its recognition, the EU and the Council of Europe

[296] Technically, in the pre-accession period before the admission to the Council of Europe, the Committee of Ministers acknowledged Montenegro as an acceded party to the Framework Convention which is open for accession for non-member States. After having admitted to the Council of Europe, Montenegro notified its succession to the treaties of its predecessor State, such like to the Framework Convention. See First Report of

exercised a pressure on Montenegro by requiring a certain standard of minority protection through their admission criteria, another form of incentive which constitutes a new form of conditionality.[297]

3.3. Conclusion

Although the treaty of Saint-Germain imposed a wide range of minority rights including positive actions, it is regrettable that the international community refused its continuation after 1945. During the Cold War, there were no detailed minority rights catalog in universal human rights treaties. Customary law elements and the corresponding minimalist standard of Art. 27 of the ICCPR was the only requirement that all State parties had to ensure, without expressed positive obligations. Nevertheless, Yugoslavia assumed detailed duties of minority protection under the Osimo Treaty, a bilateral agreement of restricted territorial scope which was succeeded by the two concerned republics, Croatia and Slovenia. Furthermore, the Human Rights Committee has started to interpret Art. 27 in an activist manner, requiring concrete positive obligations from States which contributed to the proliferation of detailed minority rights instruments in the 1990s.

It was principally the dissolution of the SFRY which entailed the attention of the international community to minority rights. The detailed minority rights standards have started to crystallize a well defined catalog of minority rights which were classified by this thesis.

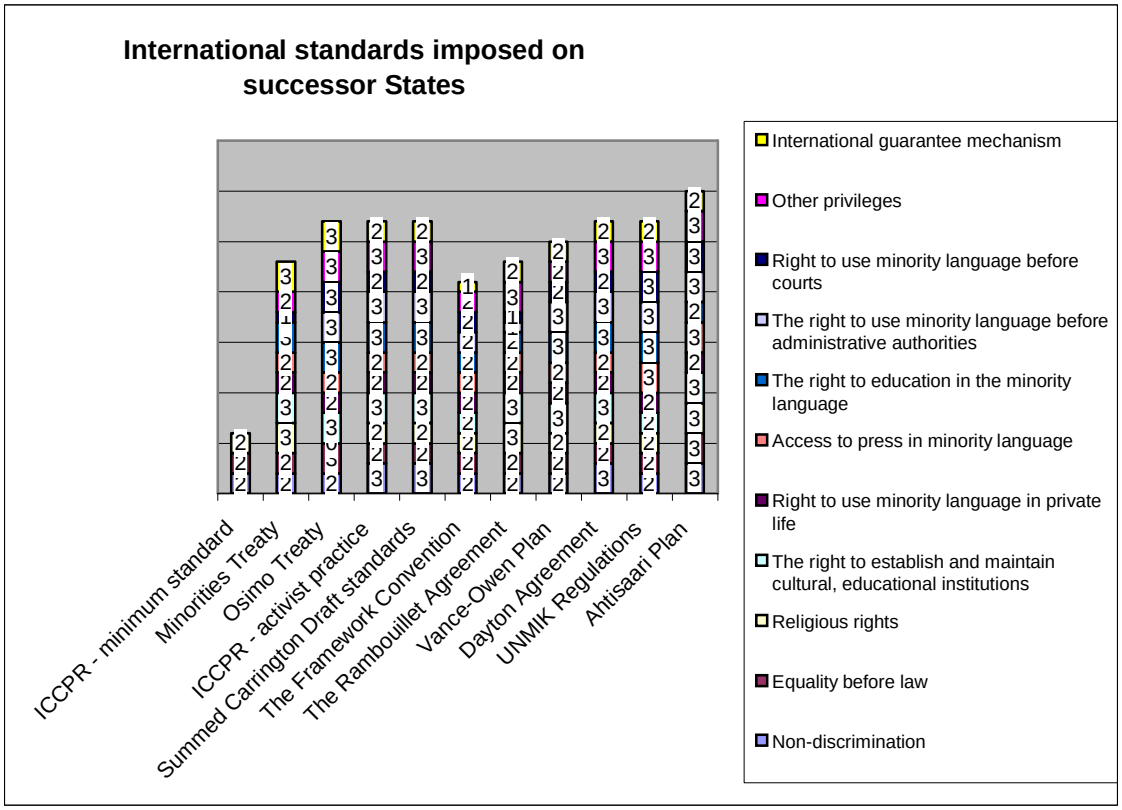
the Republic of Montenegro pursuant to Article 25 paragraph 1 of the Framework convention for the Protection of National Minorities, Council of Europe Doc. ACFC/SR(2007)002, 27 July 2007, p. 4.

[297] The Council of Europe requires the respect for Recommendation 1201 as an admission criteria. The EU requires the adoption of the Council Directive 2000/43 on the non-discrimination, the Framework Convention and – in States having a Roma minority – the adoption of governmental programs for the integration of the Roma minority and sometimes the Recommendation 1201 of the Parliamentary Assembly of the Council of Europe. See Pentassuglia (2004), supra fn. 129, p. 167.; Bernd Rechel: What Has Limited the EU's Impact on Minority Right in Accession Countries? In: 22 East European Politics and Societies 171 (2008), p. 177.;

The first step which undoubtedly contributed to the improvement of minority rights in the successor States was the Carrington Draft and more efficiently when the EC decided to put the Carrington standards in a conditionality mechanism.

The humanitarian conflicts, the Balkan War and the Kosovo crisis, led to the involvement of the international community in the political settlement. The drafts and international instruments produced during these dispute settlements (Vance-Owen Plan, Dayton Agreement, Rambouillet Agreement) also provided for minority rights, although without detailed State obligations, referring to international instruments. Nevertheless, they are significant since they incorporated the current developments of international law regarding to minority rights, referring to the Framework Convention or also to the European Charter for Regional or Minority Languages. It seems that the Framework Convention has became a "European minimum standard" of minority rights since most dispute settlements refer to this convention.

The dynamic of the standards required by the international community in the recent two decades is a clear development compared to the minimalist standard: the examined international instruments provide for all special minority rights elements classified by this thesis and even more and more of them define positive State obligations. As a top of this development, one can mention the standards imposed on Kosovo. Finally, the case of Kosovo indicates that the international supervision can contribute to the long term stabilization of minorities. However, the immediate application of international standards does not suffice in itself, only if it is followed by national legislation.



Conclusions of the thesis

A dissolution or separation cannot leave minorities without protection. As a general protection, they are entitled to the protection guaranteed by the human rights treaties to which the predecessor State was party. As Chapter One proved, there is a strong support for automatic State succession in respect of human rights treaties. Especially the prevention of any legal *vacuum* and the stability of human rights necessitate such a rule which is developing to become a customary rule. Central and Eastern European States especially felt to be bound by such a rule and succeeded *ipso jure* to the quasi totality of human rights treaties, constituting a regional customary rule in the 1990s. Recently, Montenegro consistently followed this rule and it is expected that the independent Kosovo, if its statehood is generally accepted, automatically succeeds to the human rights treaties of its predecessor.

As Chapter Two explained, minority rights are particularly threaten at the time of dissolutions or separations. Their protection is in the interest of both the successor and the predecessor State as well as of the international community. Even in lack of any treaty obligation, there is a minimum scope of minority rights, based on customary law, which provides for non-discrimination, equality before the law and the right of the minority to existence. However, these customary rules do not cover the essence of minority rights, the special privileges ensured to minority members. The special elements of minority protection are guaranteed either by treaties undertaken by the State, or imposed on it by the international community.

Consequently, Chapter Three examined what were the obligations of minority protection undertaken by the SFRY and imposed by the international community on its successor States. The Minorities Treaty of 1919, a detailed minority rights catalog was

abandoned after 1945 and is considered by this thesis as a historical threshold to be reached. The Osimo Treaty, while creating similarly high standards, continued to apply only in Croatia and Slovenia. Finally, Art. 27 of the ICCPR constituted the third main source of Yugoslavia's international obligation. Although the Human Rights Committee interprets it in an activist way, requiring in many special minority rights clearly defined positive State actions, the article's wording still remains vague and leaves for the State a wide liberty.

The dissolution of the SFRY led to the adoption and multiplication of international minority rights instruments. The two recent decades could answer two basic questions: what minority rights standard should the international community require from Successor States and how should it require this standard?

1. As for the first question, there is a clear trend of crystallization and heightening of the standard. The ethnic tensions and atrocities during the dissolution process of the SFRY involved the dispute settlement mechanism of the international community. It required successor States to succeed automatically to human rights treaties of the predecessor State and set defined standards which could only be found before in the practice of the Human Rights Committee, but in no universal human rights convention. The international community imposed these standards on the successor States of the SFRY either through the recognition criteria or in the framework of humanitarian crisis settlements (Dayton, Rambouillet). All of these standards exceed by far the minimalist threshold of Art. 27, often reach the threshold of the Minorities Treaty and led to a crystallization of a detailed minority rights catalog. It seems that in the recent decade, the Framework Convention became a kind of "European minimum standard" which provides for all minority rights identified by this thesis, but without clearly defining positive obligations. It is recommended that future minority rights instruments should be based on this catalog, but while specifying the positive duties of the State and hopefully establishing a petition mechanism before an

international court whose decisions are binding on States. Since the lapse of the Minorities Treaties, such a mechanism could not be realized, mainly because States keep minority rights as a subject belonging to their reserved sovereign competences.

2. As for the second question on the method of standard setting, two mechanism were applied recently. The first is the conditionality. The practice of recognition conditionality, no matter how inconsistently the EC followed its own expectations, is an efficient political means to make successor States to comply with international standards. It is regrettable that the EU could not agree in such a common policy in respect of recent State successions. Nevertheless, it is commendable that the conditionality continues to exist in the admission procedure of the EU and the Council of Europe – an incentive which could motivate new States to comply with recent minority rights standards.

   In addition, States concerned by humanitarian conflicts, where the gravity of ethnic tensions led to the involvement to the international community, were often placed under international supervision (Bosnia-Herzegovina, Kosovo) which directly made them adopt minority rights provisions. Although the immediate application of international standards cannot resolve ethnic tensions, one can hope that it can have long term positive effects, especially if it leads to further national laws implementing these standards. This is expected to improve the situation of minorities in Kosovo.

Finally, the conclusions of the thesis can be broadened by assuming that detailed and liberally granted minority rights contribute not only to the stability and legitimacy of successor States, but can prevent ethnic tensions in all States. Thus, Western democracies and developing countries should equally adopt and implement the minority rights standards of the two recent decades which would contribute to their stability and prevent separatist movements.

Appendices

A) Table on the practice of the Central-European successor States to become parties to human rights treaties I-II.

B) Evaluation of the minority rights standards of each cited international instruments:

1. The Minorities Treaty
2. The ICCPR
3. The Osimo Treaty
4. OSCE documents
5. The substantial provisions of the Carrington Draft
6. The 1992 UN Declaration
7. Proposal for a Convention for the Protection of Minorities of the European Commission for Democracy through Law (Proposal of the Venice Commission)
8. The summed Carrington Draft standard
9. Recommendation 1134 (1990)
10. Vance-Owen Plan
11. The Framework Convention
12. Dayton Agreement
13. Rambouillet Agreement
14. Ahtisaari Plan
15. UNMIK regulations
16. Kosovo's Constitution
17. Recommendation 1201 (1993)

A) Table on the practice of the Central-European successor States to become parties to human rights treaties I.

The dates indicate the date of the notification of succession and not the starting date of the binding force of the treaty obligations in respect of the successor State.
Modalities: a – accession; d – succession

Treaty → Successor State ↓	GC[298]	CERD[299]	ICESCR[300]	ICCPR[301]	CSLWC[302]	ICSPCA[303]	CEDAW[304]	CAT[305]	ICAS[306]
Bosnia-Herzegovina	29 Dec 1992 d	16 Jul 1993 d	1 Sep 1993 d	1 Sep 1993 d	1 Sep 1993 d	1 Sep 1993 d	1 Sep 1993 d	1 Sep 1993 d	1 Sep 1993 d
Croatia	12 Oct 1992 d	12 Oct 1992 d	12 Oct 1992 d	12 Oct 1992 d	12 Oct 1992 d	12 Oct 1992 d	9 Sept 1992	12 Oct 1992 d	12 Oct 1992 d
Czech Republik	22 Feb 1993 d	22 Feb 1993 d	22 Feb 1993 d	22 Feb 1993 d	22 Feb 1993 d	22 Feb 1993 d	22 Feb 1993 d	22 Feb 1993 d	22 Feb 1993 d
Montenegro	23 Oct 2006 d	23 Oct 2006 d	23 Oct 2006 d	23 Oct 2006 d	23 Oct 2006 d	23 Oct 2006 d	23 Oct 2006 d	23 Oct 2006 d	23 Oct 2006 d
Serbia	**12 Mar 2001 a**	12 Mar 2001 d	12 Mar 2001 d	12 Mar 2001 d	12 Mar 2001 d	12 Mar 2001 d	12 Mar 2001 d	12 Mar 2001 d	12 Mar 2001 d
Slovakia	28 May 1993 d	28 May 1993 d	28 May 1993 d	28 May 1993 d	28 May 1993 d	28 May 1993 d	28 May 1993 d	28 May 1993 d	--
Slovenia	6 Jul 1992 d	6 Jul 1992 d	6 Jul 1992 d	6 Jul 1992 d	6 Jul 1992 d	6 Jul 1992 d	6 Jul 1992 d	**16 Jul 1993 a**	--
The FYROM	18 Jan 1994 d	18 Jan 1994 d	18 Jan 1994 d	18 Jan 1994 d	18 Jan 1994 d	18 Jan 1994 d	18 Jan 1994 d	12 Dec 1994 d	--

Source: UN Treaty Collection, See at: http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en (02.06.2009)

[298] Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948
[299] International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966
[300] International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966
[301] International Covenant on Civil and Political Rights, New York, 16 December 1966
[302] Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, New York, 26 November 1968
[303] International Convention on the Suppression and Punishment of the Crime of Apartheid, New York, 30 November 1973
[304] Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979
[305] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984
[306] International Convention against Apartheid in Sports, New York, 10 December 1985

Table on the practice of the Central-European successor States to become parties to human rights treaties II.

The dates indicate the date of the notification of succession and not the starting date of the binding force of the treaty obligations in respect of the successor State.
Modalities: a – accession; d – succession

Treaty → Successor State ↓	CC[307]	SC[308]	CSTP[309]	CSSP[310]	CSR[311]
Bosnia-Herzegovina	1 Sep 1993 d	1 Sep 1993 d	1 Sep 1993 d	1 Sep 1993 d	1 Sep 1993 d
Croatia	12 Oct 1992 d	12 Oct 1992 d	12 Oct 1992 d	12 Oct 1992 d	12 Oct 1992 d
Czech Republik	22 Feb 1993 d	22 Feb 1993 d	30 Dec 1993 d	19 Jul 2004 a[312]	11 May 1993 d
Montenegro	23 Oct 2006 d	23 Oct 2006 d	23 Oct 2006 d	23 Oct 2006 d	10 Oct 2006 d
Serbia	12 Mar 2001 d	12 Mar 2001 d	12 Mar 2001 d	12 Mar 2001 d	12 Mar 2001 d
Slovakia	28 May 1993 d	28 May 1993 d	28 May 1993 d	3 Apr 2000 a[313]	4 Feb 1993 d
Slovenia	6 Jul 1992 d	6 Jul 1992 d	6 jul 1992 d	6 jul 1992 d	6 jul 1992 d
The FYROM	2 Dec 1993 d	18 Jan 1994 d	18 Jan 1994 d	18 Jan 1994 d	18 Jan 1994 d

Source: UN Treaty Collection, See at: http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en (02.06.2009)

[307] Convention on the Rights of the Child, New York, 20 November 1989
[308] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Geneva, 7 September 1956, see: http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=UNTSONLINE&id=366&chapter=18&Temp=mtdsg3&lang=en
[309] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Lake Success, New York, 21 March 1950
[310] Convention relating to the Status of Stateless Persons, New York, 28 September 1954
[311] Convention relating to the Status of Refugees, Geneva, 28 July 1951
[312] Czechoslovakia did not ratify the Convention relating to the Status of Stateless Persons.
[313] Czechoslovakia did not ratify the Convention relating to the Status of Stateless Persons.

B) Evaluation of the minority rights standards of each cited international instruments

1. The Minorities Treaty

Analyzed provision	Stringency of the requirement I – a minority right with flexibility clause; II – other obligations without expressed positive obligation or expressed positive obligation with a flexibility clause; III - the rights with expressed positive obligations; i – A monitoring body with advisory power; ii – A monitoring body whose resolutions are non binding, but with a petition procedure; iii - International guarantee mechanism with binding force, with a complaint procedure
International guarantee mechanism	iii: Art. 11 (Council's decision, latter a petition mechanism)
Other privileges	II: Art. 6, Art. 3-5 (right to citizenship, the right to opt for citizenship)
Right to use minority language before courts	I: Art. 7 (3) ("adequately")
The right to use minority language before administrative authorities	0
The right to education in the minority language	III: Art. 9 (equitable share of public sums , but only in the transferred territories!, where a "considerable proportion" belongs to the minority)
Access to press in minority language	II: Art. 7 (3)
Right to use minority language in private life	II: Art. 7 (3)
The right to establish and maintain cultural, educational institutions	III: Art. 8 ("at their own expense"), Art. 9 (equitable share of public sums, but only in the transferred territories!,)
Religious rights	III: Art. 10 (religious privileges of the Muslim community, religious foundations and establishments assured by the State)
Equality before law	II: Art. 7, Art. 8
Non-discrimination	II: Art. 2

2. The ICCPR

Analyzed provision	Strength of the requirement I – a minority right with flexibility clause; II – other obligations without expressed positive obligation or expressed positive obligation with a flexibility clause; III - the rights with expressed positive obligations; i – A monitoring body with advisory power; ii – A monitoring body whose resolutions are non binding, but with a petition procedure; iii - International guarantee mechanism with binding force, with a complaint procedure
International guarantee mechanism	ii: petition procedure (Art. 41), special treaty body, its statements are without binding force
Other privileges	III: clearly determined by the practice of the Committee (legally recognized status of minorities, positive measures)

Right to use minority language before courts	II: clear requirement in criminal proceedings [+ Art. 14.3. (f)], but unclear in which other procedures
The right to use minority language before administrative authorities	III: required several times + the voting procedure shall be available in minority language
The right to education in the minority language	III: consistent requirement of affirmative actions
Access to press in minority language	II: no positive measures are expressly required
Right to use minority language in private life	II: recognized by Art. 17 of the ICCPR (right to privacy), discrimination prohibitions on the basis of language [Art. 2 (1) of the ICCPR]
The right to establish and maintain cultural, educational institutions	III: positive measures required to preserve the culture of the minority
Religious rights	II: The right to establish religious institutions, religious freedom is ensured by Art. 18
Equality before law	II: Ensured also by Art. 14
Non-discrimination	III: affirmative action is required, the representation of minority members at all levels of government, public offices, army etc. + Art. 26

3. The Osimo Treaty

Analyzed provision	Strength of the requirement I – a minority right with flexibility clause; II – other obligations without expressed positive obligation or expressed positive obligation with a flexibility clause; III - the rights with expressed positive obligations; i – A monitoring body with advisory power; ii – A monitoring body whose resolutions are non binding, but with a petition procedure; iii - International guarantee mechanism with binding force, with a complaint procedure
International guarantee mechanism	iii: Art. 8 (a Mixed Yugoslav-Italian Committee, individual complaint procedure)
Other privileges	III: Art. 5 (Locality, street, public institution names also indicated in the minority language)
Right to use minority language before courts	III: Art. 5 (+ the obligation of the authority to reply in the same language, official documents with translation)
The right to use minority language before administrative authorities	III: Art. 5 (+ the obligation of the authority to reply in the same language, official documents with translation)
The right to education in the minority language	III: Art. 4 (c) („kindergarten, primary, secondary and professional school teaching in the mother tongue shall be accorded to both groups." + the obligation to maintain the minority schools listed in the Annex)
Access to press in minority language	II: Art. 4 (a)
Right to use minority language in private life	II: Art. 5
The right to establish and maintain cultural, educational institutions	III: Art. 4 (b) (public financial support under the same conditions as for other corresponding organizations)
Religious rights	0
Equality before law	III: Annex II, Art. 2 (e.g. facilitating the access to and fair representation of minority members in administrative positions,

	especially as inspectorates of schools; professional qualification exemptions for minority members during a transitional period)
Non-discrimination	II: Art. 6,8, Annex II, Art. 1

4. OSCE documents

Analyzed provision	Strength of the requirement I – a minority right with flexibility clause; II – other obligations without expressed positive obligation or expressed positive obligation with a flexibility clause; III - the rights with expressed positive obligations; i – A monitoring body with advisory power; ii – A monitoring body whose resolutions are non binding, but with a petition procedure; iii - International guarantee mechanism with binding force, with a complaint procedure
International guarantee mechanism	0
Other privileges	II: Copenhagen doc., par. 35., "effective participation in public affairs", leaving a wide liberty for States how to realize it.
Right to use minority language before courts	I: Copenhagen doc., par. 43., very soft wording ("wherever possible and necessary, for its use before public authorities")
The right to use minority language before administrative authorities	I: Copenhagen doc., par. 43., very soft wording ("wherever possible and necessary, for its use before public authorities")
The right to education in the minority language	I: Copenhagen doc., par. 43., soft wording ("have adequate opportunities for instruction of their mother tongue or in their mother tongue")
Access to press in minority language	0
Right to use minority language in private life	II: Copenhagen doc., par. 32.1.
The right to establish and maintain cultural, educational institutions	II: (pos. obligations very softly drafted, "facilitate" the minority culture, possibility of public funds)
Religious rights	II: freedom of religion including the use of minority language in religious educational activities, the right to establish and maintain religious institutions
Equality before law	II: Copenhagen doc., par. 31. (pos. obligations very softly drafted, "where necessary")
Non-discrimination	II: Copenhagen doc., par. 31. (pos. obligations very softly drafted, "where necessary")

5. The substantial provisions of the Carrington Draft:

Analyzed provision	Strength of the requirement I – a minority right with flexibility clause; II – other obligations without expressed positive obligation or expressed positive obligation with a flexibility clause; III - the rights with expressed positive obligations; i – A monitoring body with advisory power; ii – A monitoring body whose resolutions are non binding, but with a petition procedure; iii - International guarantee mechanism with binding force, with a complaint procedure
International guarantee mechanism	i: Art. 5B, an international monitoring mechanism
Other privileges	III: Art. 4 ("a general right of participation" in public affairs for the minority of substantial percentage of the population), Art. 5 ("special status")

Right to use minority language before courts	II: Art. 2. b) 3., soft wording (the right to "use of language and alphabet, both in public and in private, and education")
The right to use minority language before administrative authorities	II: Art. 2. b) 3., soft wording (the right to "use of language and alphabet, both in public and in private, and education")
The right to education in the minority language	II: Art. 2. b) 3., soft wording (the right to "use of language and alphabet, both in public and in private, and education"), Art. 5c
Access to press in minority language	II: Art. 2. b) 3.
Right to use minority language in private life	II: Art. 2. b) 3.
The right to establish and maintain cultural, educational institutions	II: Art. 2. a) 1. I), Art. 2. b) 3.
Religious rights	II: Art. 2. a) 1. g)
Equality before law	II: Art. 2 a) 1. l)
Non-discrimination	II: Art. 2 b) 3.

6. **The 1992 UN Declaration**

Analyzed provision	**Strength of the requirement** I – a minority right with flexibility clause; II – other obligations without expressed positive obligation or expressed positive obligation with a flexibility clause; III - the rights with expressed positive obligations; i – A monitoring body with advisory power; ii – A monitoring body whose resolutions are non binding, but with a petition procedure; iii - International guarantee mechanism with binding force, with a complaint procedure
International guarantee mechanism	0
Other privileges	II: Art. 2.3. (the right to effectively participate in the decision making, "in a manner not incompatible with national legislation")
Right to use minority language before courts	II: soft wording ("to use their own language, in private and in public")
The right to use minority language before administrative authorities	II: soft wording ("to use their own language, in private and in public")
The right to education in the minority language	I: soft wording (the right to education in the minority language or of the minority language, "wherever possible"), soft positive obligation
Access to press in minority language	0
Right to use minority language in private life	II: Art. 2.1.
The right to establish and maintain cultural, educational institutions	II: Art. 4., Art. 5.
Religious rights	II: Art. 2.1.
Equality before law	II: Art. 3.2.
Non-discrimination	II: Art. 3.1.

7. Proposal for a Convention for the Protection of Minorities of the European Commission for Democracy through Law (Proposal of the Venice Commission)

Analyzed provision	Strength of the requirement I – a minority right with flexibility clause; II – other obligations without expressed positive obligation or expressed positive obligation with a flexibility clause; III - the rights with expressed positive obligations; i – A monitoring body with advisory power; ii – A monitoring body whose resolutions are non binding, but with a petition procedure; iii - International guarantee mechanism with binding force, with a complaint procedure
International guarantee mechanism	ii: petition procedure (Art. 24-26), special treaty body, its statements are without binding force
Other privileges	II: Art. 13 (State shall facilitate the effective participation of minorities in the decision making of the region inhabitated by the minority), Art. 14 (2) ("as far as possible")
Right to use minority language before courts	I: Art. 8, with a a flexibility clause ("as far as possible")
The right to use minority language before administrative authorities	I: Art. 8, with a a flexibility clause ("as far as possible")
The right to education in the minority language	III: Art. 9, 1st sentence (the right to learn the minority language in the regions substantially inhabitated by the minority), II: Art. 9, 2nd (a flexible right to learn in the minority language)
Access to press in minority language	0
Right to use minority language in private life	II: Art. 7 + Explanatory Report par. 31.
The right to establish and maintain cultural, educational institutions	II: Art. 5, Art. 6
Religious rights	II: Art. 10
Equality before law	0
Non-discrimination	II: Art. 4, Art. 16

8. The summed Carrington Draft standards

Analyzed provision	Strength of the requirement I – a minority right with flexibility clause; II – other obligations without expressed positive obligation or expressed positive obligation with a flexibility clause; III - the rights with expressed positive obligations; i – A monitoring body with advisory power; ii – A monitoring body whose resolutions are non binding, but with a petition procedure; iii - International guarantee mechanism with binding force, with a complaint procedure
International guarantee mechanism	ii: petition procedure (Art. 41) under ICCPR; a similar petition procedure (Art. 24-26) under the Venice Commission's Proposal
Other privileges	III: Art. 4 ("a general right of participation" in public affairs for the minority of substantial percentage of the population), Art. 5 ("special status") of the substantial provisions

Right to use minority language before courts	II: Ensured by Art. 2 b) 3 of the substantial provisions, Art. 14.3. (f) of the ICCPR
The right to use minority language before administrative authorities	III: ICCPR practice
The right to education in the minority language	III: ICCPR practice, Art. 9, 1st sentence of the Venice Commission's Proposal (the right to instruction of the minority language)
Access to press in minority language	II: Ensured e.g. by Art. 2. b) 3 of the substantial provisions
Right to use minority language in private life	II: Ensured e.g. by Art. 2. b) 3 of the substantial provisions
The right to establish and maintain cultural, educational institutions	III: ICCPR practice
Religious rights	II: Ensured e.g. by Art. 2 a) 1. l) of the substantial provisions
Equality before law	II: Ensured e.g. by Art. 2 a) 1. l) of the substantial provisions
Non-discrimination	III: ICCPR practice

9. **Recommendation 1134 (1990)**

Analyzed provision	**Strength of the requirement** I – a minority right with flexibility clause; II – other obligations without expressed positive obligation or expressed positive obligation with a flexibility clause; III - the rights with expressed positive obligations; i – A monitoring body with advisory power; ii – A monitoring body whose resolutions are non binding, but with a petition procedure; iii - International guarantee mechanism with binding force, with a complaint procedure
International guarantee mechanism	0
Other privileges	II: Art. 11 (iv) (the right to fully participate in decision-making, without expressed positive obligations of the State)
Right to use minority language before courts	0
The right to use minority language before administrative authorities	0
The right to education in the minority language	I: Art. 12 (i), soft wording ("have access to adequate types and levels of public education in their mother tongue")
Access to press in minority language	II: Art. 12 (ii)
Right to use minority language in private life	0
The right to establish and maintain cultural, educational institutions	II: Art. 11 (iii)
Religious rights	II: Art. 11 (iii) (right to maintain religious institutions)
Equality before law	II: Art. 10 (i) (equal access to courts)
Non-discrimination	II: Art. 10 (ii) (reference to the non-discrimination rule)

10. **Vance-Owen Plan**

Analyzed provision	**Strength of the requirement** I – a minority right with flexibility clause; II – other obligations without expressed positive obligation or expressed positive obligation with a flexibility clause; III - the rights with expressed positive obligations; i – A monitoring body with advisory power; ii – A monitoring body whose resolutions are non binding, but with a petition procedure; iii - International guarantee mechanism with binding force, with a complaint procedure
International guarantee mechanism	ii: Art. VI.B.3. ("International Commission on Human Rights for Bosnia and Herzegovina") + ICCPR mechanism
Other privileges	II: Section VI., par. A.2 (b) (obligation to maintain group balance, but as a minimum non-discrimination)
Right to use minority language before courts	II: Art. 14.3. (f) of the ICCPR
The right to use minority language before administrative authorities	III: ICCPR practice
The right to education in the minority language	III: ICCPR practice
Access to press in minority language	II: ICCPR practice (no positive measures are expressly required)
Right to use minority language in private life	II: recognized by Art. 17 of the ICCPR (right to privacy), discrimination prohibitions on the basis of language [Art. 2 (1), ICCPR]
The right to establish and maintain cultural, educational institutions	III: ICCPR practice
Religious rights	II: The right to establish religious institutions, religious freedom is ensured by Art. 18 of the ICCPR
Equality before law	II: ICCPR + an "internationalized" human rights monitoring system
Non-discrimination	II: Section VI., par. A.2 (b) (obligation to maintain group balance, but as a minimum non-discrimination)

11. **The Framework Convention**

Analyzed provision	**Strength of the requirement** I – a minority right with flexibility clause; II – other obligations without expressed positive obligation or expressed positive obligation with a flexibility clause; III - the rights with expressed positive obligations; i – A monitoring body with advisory power; ii – A monitoring body whose resolutions are non binding, but with a petition procedure; iii - International guarantee mechanism with binding force, with a complaint procedure
International guarantee mechanism	i: Art. 25-26.
Other privileges	II: Art. 11.
Right to use minority language before courts	II: Art. 10.3. (criminal proceedings), but not in other proceedings
The right to use minority language before administrative authorities	II: Art. 10.1., Art. 10.2.

The right to education in the minority language	II: Art. 14.1. (the right to learn the minority language), Art. 14.2. (a very limited right to learn in the minority language)
Access to press in minority language	II: Art. 9. + Explanatory Report, par. 61-62., flexible positive obligation ("they shall ensure, as far as possible")
Right to use minority language in private life	II: Art. 10.1.
The right to establish and maintain cultural, educational institutions	II: Art. 5.1. (the State's soft duty to promote minority culture and identity), Art. 7, Art. 17, Art. 13.1.
Religious rights	II: Art. 7-8.
Equality before law	II: Art. 4.2.
Non-discrimination	II: Art. 4.2., Art. 6.2.

12. **Dayton Agreement**

Analyzed provision	**Strength of the requirement** I – a minority right with flexibility clause; II – other obligations without expressed positive obligation or expressed positive obligation with a flexibility clause; III - the rights with expressed positive obligations; i – A monitoring body with advisory power; ii – A monitoring body whose resolutions are non binding, but with a petition procedure; iii - International guarantee mechanism with binding force, with a complaint procedure
International guarantee mechanism	ii: constitutional mechanism (Chapter Two), ICCPR procedure
Other privileges	II: Framework Convention; but III: ICCPR practice
Right to use minority language before courts	II: Framework Convention
The right to use minority language before administrative authorities	II: Framework Convention, but III: ICCPR practice
The right to education in the minority language	II: Framework Convention, but III: ICCPR practice
Access to press in minority language	II: Framework Convention
Right to use minority language in private life	II: Framework Convention
The right to establish and maintain cultural, educational institutions	II: Framework Convention, but III: ICCPR practice
Religious rights	II: Framework Convention
Equality before law	II: Framework Convention
Non-discrimination	II: Framework Convention, but III: ICCPR practice

13. **The Rambouillet Agreement**

Analyzed provision	**Strength of the requirement** I – a minority right with flexibility clause; II – other obligations without expressed positive obligation or expressed positive obligation with a flexibility clause; III - the rights with expressed positive obligations; i – A monitoring body with advisory power; ii – A monitoring body whose resolutions are non binding, but with a petition procedure; iii - International guarantee mechanism with binding force, with a complaint procedure
International guarantee mechanism	ii: Implementation I, Art. I.1. (Implementation Mission); Chapter I, Art. I. (Ombudsman), complaint procedure, Art. II.2.
Other privileges	III: Art. VII. 5 (d), Art. VII. 4 (a) (v)-(vii), Art. VII. 4 (a) (v)-(vii), Art. VII. 4 (c). II: "effective participation in public affairs" under the OSCE duty
Right to use minority language before courts	I: not expressed, OSCE standards
The right to use minority language before administrative authorities	I: not expressed, OSCE standards
The right to education in the minority language	II: Art. 14.1. (the right to learn the minority language), Art. 14.2. (a very limited right to learn in the minority language)
Access to press in minority language	II: Art. VII. 4 (b).
Right to use minority language in private life	II: Art. VII. 5 (c) + ECHR Art. X.
The right to establish and maintain cultural, educational institutions	III: Art. VII. 5 (f) (public funds)
Religious rights	III: Art. VII. 5 (f) + ECHR, Art. X + Art. VII. 5 (f) (public funds to religious associations)
Equality before law	II: Art. I.3.
Non-discrimination	II: Art. I.1. + equal representation in public life, Art. II.1, Art. IV.1 (a), Art. V.4 (c).

14. **Ahtisaari Plan**

Analyzed provision	**Strength of the requirement** I – a minority right with flexibility clause; II – other obligations without expressed positive obligation or expressed positive obligation with a flexibility clause; III - the rights with expressed positive obligations; i – A monitoring body with advisory power; ii – A monitoring body whose resolutions are non binding, but with a petition procedure; iii - International guarantee mechanism with binding force, with a complaint procedure
International guarantee mechanism	ii: International monitoring mechanism (Art. IX-XI, international judges, Art. IX, Art. 2.2. c, but no specialized human rights bodies), however, it provides that all Kosovar authorities shall cooperate with the international human rights bodies (Art. 2.6.), the Advisory Committee under the Framework Convention, + the ICCPR mechanism

Other privileges	III: Annex II, Art. 4. (representation in public bodies like police); II: Art. 3.2. (representation and "effective participation" in public affairs), Annex II, Art. 3.1. h) (registration of personal names in the minority language), Annex II, Art. 3.1. i), (street and local names)
Right to use minority language before courts	III: Annex II, Art. 3.1. e)-f). (public financing of the translation costs)
The right to use minority language before administrative authorities	III: Annex II, Art. 3.1. e)-f). (public financing of the translation costs)
The right to education in the minority language	II: Annex II, Art. 3.1. e).
Access to press in minority language	III: Annex II, Art. 3.1. j)-k). (a concrete duty to allow the Kosovo Serbs access to a licenced Kosovo-wide Serbian channel)
Right to use minority language in private life	II: Art. VII. 5 (c) + ECHR Art. X.
The right to establish and maintain cultural, educational institutions	III: Annex II, Art. 2.1., Art. 2.5., Art. 3.1. n). (financial assistance for the minority culture), Annex II, Art. 3.1. l) (free contact with the kin State)
Religious rights	III: Annex II, Art. 2.5. (promotion of religious heritage), Annex V (special privileges of the Serbian Orthodox Church)
Equality before law	III: Art. 2.3-4. (Kosovo should reinforce tolerance and promote equality)
Non-discrimination	III: Annex II, Art. 2.2., 2.3.

15. **UNMIK regulations [Regulation No. 2001/9 on A constitutional framework for provisional self-government in Kosovo (CFSG) and Regulation No. 2006/51 on the promulgation of the Law on the use of languages adopted by the Assembly of Kosovo (LUL)]**

Analyzed provision	Strength of the requirement I – a minority right with flexibility clause; II – other obligations without expressed positive obligation or expressed positive obligation with a flexibility clause; III - the rights with expressed positive obligations; i – A monitoring body with advisory power; ii – A monitoring body whose resolutions are non binding, but with a petition procedure; iii - International guarantee mechanism with binding force, with a complaint procedure
International guarantee mechanism	ii: CFSG, Art. 3.2. (PISG) + ICCPR mechanism
Other privileges	III: CFSG: (l) (the right of the Communities to preserve cultural sites); LUL, Art. 19-24 (personal names, language commission, media, education in minority language with affirmative action)
Right to use minority language before courts	II: CFSG, Art. 4.4; III: LUL, see e.g. Art. 4.2 (translation duty in any official language + in the municipality official languages)
The right to use minority language before administrative authorities	II: CFSG, Art. 4.4 III: LUL, see e.g. Art. 4.2 (translation duty in any official language + in the municipality official languages)
The right to education in the minority language	II: CFSG, Art. 4.4 (b); (b) (the possibility of financial assistance for the establishments and education in minority language, "may be provided") III: LUL, Art. 20.1 ("the right to receive instruction in their mother tongue in public school education")
Access to press in minority language	III: CFSG, Art. 4.4(c), (l), (o) ("be guaranteed access to, and representation in, public broadcast media, as well as programming in relevant languages" (=positive duty on the public media)
Right to use minority language in private life	II: ICCPR, LUL
The right to establish and maintain cultural, educational institutions	II: CFSG, Art. 4.4 (e) (contact with the kin State), (g) (the right to establish associations), (p) (the possibility to receive public funds)
Religious rights	II: CFSG, Art. 4.4 (n) (the right to operate religious institutions)
Equality before law	II: CFSG, Art. 4.4 (m)
Non-discrimination	II: CFSG, Art. 4.4 (b) (the equal opportunity to employment in public bodies), (m)

16. **Kosovo's Constitution**

Analyzed provision	Strength of the requirement I – a minority right with flexibility clause; II – other obligations without expressed positive obligation or expressed positive obligation with a flexibility clause; III - the rights with expressed positive obligations; i – A monitoring body with advisory power; ii – A monitoring body whose resolutions are non binding, but with a petition procedure; iii - International guarantee mechanism with binding force, with a complaint procedure
International guarantee mechanism	i: Art. 132 (Ombudsman)
Other privileges	III: Art. 59 (7)-(9), Art. 60 (Consultative Council for Communities), Art. 61 (equitable representation of community members in employment in public bodies at all levels), Art. 62 (representation of minorities in local governments)
Right to use minority language before courts	III: Art. 59 (6) (the same wording as in the Ahtisaari-plan)
The right to use minority language before administrative authorities	III: Art. 59 (6) (the same wording as in the Ahtisaari-plan)
The right to education in the minority language	III: Art. 59 (2), Art. 59 (3) (education with a threshold lower than normally stipulated!), Art. 59 (4) (possibility of public funds)
Access to press in minority language	III: Art. 42 (freedom of media), Art. 59 (10)-(11) (granted access for communities to public broadcast media, the same wording as in the Ahtisaari Plan)
Right to use minority language in private life	II: Art. 59 (5)
The right to establish and maintain cultural, educational institutions	III: Art. 44 (freedom of association), Art. 58 (public funds for cultural initiatives of communities), Art. 59 (14), Art. 59 (4) (possibility of public funds)
Religious rights	III: Art. 38, Art. 39 (Kosovo "protects religious autonomy and religious monuments")
Equality before law	III: Art. 24, Art. 58 (4) (adoption of adequate measures to promote "effective equality")
Non-discrimination	II: Art. 57 (2)

17. **Recommendation 1201 (1993)**

Analyzed provision	Strength of the requirement I – a minority right with flexibility clause; II – other obligations without expressed positive obligation or expressed positive obligation with a flexibility clause; III - the rights with expressed positive obligations; i – A monitoring body with advisory power; ii – A monitoring body whose resolutions are non binding, but with a petition procedure; iii - International guarantee mechanism with binding force, with a complaint procedure
International guarantee mechanism	iii: ECHR mechanism
Other privileges	III: Art. 6 (the right to set up political parties), Art. 7 (2) (official

	recognition of names in minority language), Art. 7 (4) ("local names, signs, inscriptions »), Art. 11 (special status: "In the regions where they are in a majority") – an autonomy provision requiring affirmative action
Right to use minority language before courts	II: Art. 7 (3) ("In the regions in which substantial numbers of a national minority are settled")
The right to use minority language before administrative authorities	II: Art. 7 (3) ("In the regions in which substantial numbers of a national minority are settled")
The right to education in the minority language	II: Art. 8 (1) ("right to learn his/her mother tongue and to receive an education in his/her mother tongue at an appropriate number of schools")
Access to press in minority language	II: Art. 7 (1) (the right to use minority language "in publications and in the audiovisual sector")
Right to use minority language in private life	II: Art. 7 (1)
The right to establish and maintain cultural, educational institutions	II: Art. 6 (the right to set up organizations, including political parties), Art. 8 (2) (educational institutions), Art. 10 (free contact with the kin State)
Religious rights	II: Art. 3 (freedom of religion)
Equality before law	II: Art. 4
Non-discrimination	II: Art. 4

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