Information Meeting on the
Framework Convention for the Protection of National Minorities

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The Framework Convention for the Protection of National Minorities and the Protection of Human Rights within the Council of Europe

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Ladies and Gentlemen,

Let me express my gratitude for the opportunity to attend this important meeting. I do realize how essential and sensitive this discussion is for you, as I myself come from a country where the Framework Convention caused a lot of heated debates and emotional controversies for the last ten years.

As my friend, former leading HR NGO actor and former Minister of Integration of Latvia once said, the major problem with the Convention is that minorities have unreasonable hopes, and majorities unjustified fears, about it. In any case, the only opportunity to make the Convention work is to discuss its provisions seriously, without prejudice, and involving all parties concerned.

I will not analyse all legal nuances of the Convention in details. My task at this meeting is to demonstrate the role and significance of the Framework Convention within the human rights and political context of the Council of Europe.

As a former computer scientist, I chose for this presentation quite efficient form of FAQ – Frequently Asked Questions.

1. Why adoption of the Framework Convention was necessary? What is its "added value" to minority protection?

Since its inception, the Council of Europe has seized the leading role in the development of minority rights standards. The first text in the field was adopted by PACE back in 1957, other resolutions on the issue were adopted also in 1958, 1959, 1961.

However, the work of the Council of Europe was of limited effectiveness. The main reason for this was the best formulated by John Packer, who wrote in mid-90s about the main peculiarity of the minority rights concept: neither content nor the holder of these rights were clearly defined. This is why the approach to minority rights remained largely in line with the old concept of minority rights as special privileges that a state might bestow, by its own choice, to some groups – as a rule, under the pressure of a neighbouring kin state. This selective approach, where minority rights were considered, as a matter of fact, apart from universal human rights, was characteristic for all old systems of minority protection, including "minority treaties" under the League of Nations.

Also within the Council of Europe, attitudes towards different minority situations were crucially dependent on the concrete political context, political strength of the states involved, and effectiveness of lobbying and political bargaining. Lofty rhetoric of minority rights was rarely followed by consistent and legally uniform conclusions and action in particular situations.

Adoption of the Framework Convention for the Protection of National Minorities marked a beginning of the new stage in minority protection. The Convention is the first ever legally binding instrument on minority rights. Both the adopted text and, particularly, the outstanding work of the Advisory Committee substantially clarified the ever evolving content of minority rights, and – to some extent – also gave, although indirectly, the answer to the question of the right-holder.

2. Is the Framework Convention indeed a human rights instrument?

Yes, it is. According to Art.1, minority rights are ***integral part of fundamental human rights***, and not special privileges which a state might bestow to some groups by its own choice. This is why minority rights must be implemented without any discrimination – that is unjustified and arbitrary distinction.

3. Does the Framework Convention understand minority rights as individual or collective rights?

Minority rights are understood as ***individual rights*** which, however, may often be enjoyed in community with other individuals. Minority rights are not, in nature, group rights. The general wording used in the text of the Convention is *"the persons belonging to minorities"*.

4. Are minority rights really necessary? Isn't effective non-discrimination legislation sufficient?

I highly appreciate the fact that Georgia as the first CoE member state has ratified the 12th Protocol to ECHR. However, this Protocol cannot fully replace the FCNM.

The concept of minority rights is complementary to the fundamental principle of non-discrimination. One could define minority rights as a ***second generation – or second level - of non-discrimination legislation***.

Formally equal treatment is sufficient to ensure equality only in equal situations. The main goal, as formulated by the Framework Convention, is ***full and effective equality***. Minority rights are to be applied in the situations when ***different treatment is needed to ensure full and effective equality***. This approach is reflected both in the EU Race equality directive, and in the case-law of the European Court of Human Rights, in particular, in the judgment on Thlimmenos vs Greece. Therefore, non-discrimination and equal treatment cannot be used as a pretext for non-recognition of minorities and for denial of minority rights.

5. Why the Framework Convention is considered a legal instrument while it does not envisage judicial remedy?

The Framework Convention is indeed a legal treaty, not a political declaration. In the meantime, it is ***"a document of principles"***: it offers only basic principles of minority protection that may be implemented differently in different states, according to their concrete situations. Compliance of these concrete methods with the letter and spirit of the Convention is verified through monitoring procedure carried out by competent expert body, and improved using constant dialogue,

consultations with all parties involved, and taking into account good practices.

The current monitoring procedure of the Framework Convention is legal in nature, but not judicial. Opinions of the Advisory Committee are based on diligent and careful legal analysis, however, they are not, as such, binding for the state parties. Political backing given to these opinions by the Committee of Ministers remains their main strength.

For example, Art.10 para 2 envisaged that, under certain circumstances, minority language can be used before public authorities, along with the official language. This provision is implemented in different ways in different state parties. Thus, in some countries the minority language is used in communication between private persons and public authorities, if the share of minority population within a given locality is not less than 20%. This numerical criteria is not established by the Convention and is not anyhow binding for other member states, it is selected so that to fit to the concrete situation.

The mechanism how to ensure the use of minority language can also be different. In some cases, all employees of the body obliged to provide bilingual services must be fluent in both official and minority languages. In some other cases, this is not an official requirement for each employee, and it is enough to ensure that at least someone in the office is able to communicate in the minority language.

Thus, the state parties have rather broad choice of means to implement the provisions of the Framework Convention.

6. Does the Convention contain any prompts or prescriptions in respect of how its general principles should be implemented under concrete circumstances in a given state?

Yes. The key aspect of modern understanding of minority rights, as enshrined in the Framework Convention, is the ***principle of participation of minorities in decision-making,*** particularly on the issues directly affecting them (Art.15).

Many Framework Convention's provisions mention numerous conditions for implementation of the stipulated rights, such as "*if those persons so request and where such a request corresponds to a real need*", "*if there is sufficient demand*", "*where appropriate*", etc. These provisions,

according to Art.2 of the Convention, "*shall be applied in good faith, in a spirit of understanding and tolerance"*: i.e. not as pretexts for declining minorities' claims but as an obligation to take into account minorities' views.

The rights envisaged in the Framework Convention should not be automatically imposed, the persons belonging to minorities must have the right to choose whether to be treated differently or not (Art.3). It is of crucial importance to ensure that this choice is indeed free, not made under government's pressure, and that indeed no disadvantage results from this choice.

7. Has the state party to the Convention the right to decide which persons and groups will be under the protection envisaged by the Convention?

Since minority rights are recognized as integral part of fundamental human rights, they must be implemented without any discrimination. In this view, the approach which was widespread within the Council of Europe until very recently – i.e. distinction between, on the one hand, "traditional" or "historical" minorities, and "migrant minorities", on the other – needs to be carefully re-considered.

Indeed, the scope of application – i.e. definition of those groups which qualify for the protection under the Framework Convention - remains probably the most complicated and politically sensitive issue related to its implementation. A number of state parties made declarations upon ratification which define particular groups to enjoy protection under the Convention. These declarations contain either definitions, flowing from the proposal included into the PACE Recommendation 1201 (1993) (Switzerland, Estonia), or limit the scope of application to merely citizens of the state party (Poland), or include lists of concrete groups residing within the territory of a state party to the Convention (Denmark, Germany, Sweden, Macedonia, Slovenia, Austria – the latter with the reference to corresponding national law), or, in some cases, simply deny the existence of national minorities, in the sense of the Convention, within their territories at all (Liechenstein, Malta).

Three major problems related to the scope of application of the Framework Convention could be singled out.

a. First, coherence with the UN mechanism of minority protection. All state parties to the Framework Convention are, in the meantime, state parties to the International Covenant on Civil and Political Rights (ICCPR), and as such are bound by its Art.27 on the rights of minorities. The scope of applicability of this provision is clarified by the UN Human Rights Committee's General Comment No.23 (1994). This comment explicitly denies the possibility to introduce any restrictions on enjoyment of the rights enshrined in Art.27 of ICCPR. It would be rather unfortunate if the European standards of minority protection appear to be more restrictive in nature than the universal standards - the more so that, as mentioned above, Art.27 of ICCPR is anyway binding for all state parties to the Framework Convention.

b. The second problem is of rather legalistic nature. As mentioned above, ehe Framework Convention considers minority rights as individual rights. In the meantime, the definition included in the PACE Recommendation 1201, is worded in terms of group rights – a minority is defined as a group as a whole. This makes practical application of this definition problematic, to say the least. In practice often a part of persons belonging to a certain minority group has been living in a certain country for centuries, while a substantial number of other members of the same group migrated to the country relatively recently. For example, more than 40% of ethnic Russians in Latvia have been registered as citizens on the basis of the "restored citizenship" concept, what means that their ancestors lived in Latvia for centuries. In the meantime, almost 60% of ethnic Russians arrived in Latvia after WW2. In this and a number of similar cases, the question arises whether it is appropriate to deny the protection under the Framework Convention to a number of individuals who fully qualify even under the Recommendation 1201's definition, solely because other members of the same group arrived to the country later?

c. Probably the most important problem is directly related to universal nature of fundamental human rights and the principle of non-discrimination. Minority rights, as integral part of fundamental human rights, must be implemented without any discrimination. Only the citizenship criteria is, indeed, explicitly excluded from the list of prohibited grounds for distinction in a number of international non-discrimination instruments (see e.g. Art.1 paragraph 2 of the International Convention on the Elimination of All Forms of Racial Discrimination). Any additional, besides citizenship, preconditions for enjoyment of minority rights give rise to legitimate concerns about violation of the principle of equality of citizens.

However, even with regard to the citizenship criteria, an effective approach was suggested by A.Eide in his working paper prepared for the UN Working Group on Minorities. A.Eide examines the minority rights provisions of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992 on the article-by-article basis, with the aim to analyse where limitation of minority rights merely to citizens would be discriminatory. Obviously, most of the provisions of the Framework Convention should also apply to all persons belonging to minorities, simply because they in fact transpose fundamental principles of equality, freedom of expression, freedom of association, etc to specific situations.

The experience of the Advisory Committee's work makes us conclude the following. The states, indeed, have a margin of appreciation in respect of determining persons and groups to enjoy protection as national minorities within their territories. However, this right must be exercised in accordance with general principles of non-discrimination, in consultation with those concerned, and no arbitrary or unjustified distinctions can result from this decision.

8. Should minorities meet certain conditions to qualify for the protection under the Framework Convention? Do any special rules exist about the size of a group or for how long it has been residing within the territory of the state?

Here again, the principle of non-discrimination is of crucial importance. In principle, the state party to the Framework Convention can in some way differentiate between different minority groups, but any decision of the kind cannot be arbitrary and can in no way be discriminatory.

In its most important substantive provisions, the Convention includes wording *"traditionally or in substantial numbers"*(Art.10 and 14 – on use of minority language before public authorities and in education). This means that both numerically small autochthonous minorities, and larger groups which settled in the territory of the state party more recently, can qualify for the Convention's protection mechanisms. In general, the Convention was not designed to protect the rights of immigrants, but it also does not automatically rule out its application to these groups.

The only exception, where the Convention speaks only about *"areas traditionally inhabited by substantial numbers of persons belonging to a national minority",* is Art.11 para 3 – what is quite reasonable, as this

provision speaks about "*traditional local names, street names and other topographical indications intended for the public also in the minority language"*.

Another aspect of the same issue is whether minorities have also certain obligations they must fulfil in order to claim protection under the Framework Convention. In particular, rather common accusation in several CoE member states is that minorities "do not wish to learn the state language", or more generally "resist integration in the country's society".

Here one should keep in mind that the Framework Convention, as an international legal instrument, imposes certain obligations on the state parties which sign and ratify it, and not on the persons belonging to minorities nor minority groups. What is even more important is the universality of human rights, and hence of minority rights as their integral part.

Finally, the principles suggested by the Convention are intended exactly for creating "good minorities" – as it is well known, *good minority is satisfied minority*.

9. ***Can any provision of the Framework Convention be used to challenge the territorial integrity of its state party of offer any ground for separatist or secessionist claims?***

In no way. Respect to territorial integrity of the state parties is mentioned twice in the preamble. Moreover, Art. 21 says unequivocally: "*Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States*".

Exactly the opposite, experience shows that diligent and fair implementation of the principles of the Framework Convention makes separatist or secessionist attempts much less attractive for minority communities.

10. Does the refusal to ratify the Framework Convention exempt a member state from the obligation to ensure efficient protection of its national minorities?

It does not. Respect to fundamental human rights, including the rights of persons belonging to minorities, is as such a necessary prerequisite for membership in the Council of Europe.

Although no provisions directly mentioning minority rights are included into the European Convention of Human Rights (beyond general non-discrimination clause in its Art.14), the case-law of the Court contains an increasing number of relevant cases. I already mentioned the landmark case Thlimmenos vs Greece (2000) where the Court ruled that equal treatment in the cases when different treatment is needed to ensure full equality, may constitute discrimination.

In several judgments, the Court found violation on the part of the state parties when they refused recognition of minority associations, e.g. cases Stankov vs Bulgaria (2001) and Sidiropoulos and others v. Greece (1998). However, in the case Gorzelik vs Poland (2004) the Court considered such refusal well-grounded and found no violation.

In another case of Podkolzina vs Latvia (2002) the Court concluded that the demand of the perfect command in the official language for all candidates running for parliamentary and municipal elections violated the right to free elections.

Thus, several aspects of minority protection are covered by the basic European Convention of Human Rights.

Besides, a number of other mechanisms of the Council of Europe also deal with the rights of persons belonging to minorities, such as the European Commission against Racism and Intolerance (ECRI), or monitoring conducted by the Parliamentary Assembly of the Council of Europe.

Thus, obligations to ensure protection of minorities are inherent for the CoE member states, and do not directly depend on ratification of the Framework Convention.

Conclusions

I believe we have good reasons to be proud of the Council of Europe's contribution into the development of minority protection. For the first time in history, not political statements, not states' or minorities' propaganda efforts and lobbying, but only professional and impartial legal analysis conducted by the competent bodies of the Council of Europe, gives us an objective evaluation of the respect for minority rights in this or that country.

The Framework convention, as a matter of fact, does not offer ultimate solutions – rather, it suggests certain rules of the game. If properly applied, these rules can produce an adequate response to one of the main challenges the European societies face nowadays – namely, democratic accommodation of growing ethnic, cultural, and linguistic diversity.