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Minority Rights: The Failure of International Law to Protect the Roma

By Mary Ellen Tsekos*

The Roma, also known as Gypsies, are a misunderstood population. Though few know much about the nomadic Roma minority, the history of the Roma minority is fraught with discrimination. The international community has only recently acknowledged the problem of state sanctioned discrimination against the Roma. Although there are international mechanisms established to protect minority groups, these mechanisms are often inadequate to address the problems faced by minority groups such as the Roma, which are excluded from current definitions of “minority.” This failure to protect minorities’ rights stems in large part from the international community’s inability to define the concept of “minority,” or make it more malleable to include such groups as the Roma.

The lack of a definition, however, reflects more than just a disagreement about semantics. The issue also is perceived as one of state sovereignty. States are often reluctant to grant rights to minority groups because they view such an act as a relinquishment of sovereignty. Thus, states often struggle to define minorities in ways that do not undermine their sovereignty. Some argue that minority group rights are unnecessary in a system that affords international protection to individuals. Individual rights, however, are not sufficient to protect a minority group’s culture, language, and religious beliefs. As such, discrimination against the Roma is unlikely to be eliminated without reconsidering the role minority groups play in the international system, and redefining the ways in which they can be protected.

Background

Historians disagree about the origins of the Roma. Most believe, however, that the ancestors of the Roma migrated from northwest India at around 1000 AD. Contrary to the common misconception, the name Roma did not originate in the country of Romania. Rather, the name comes from the Sanskrit-related language spoken by the Roma in which the word “Rom” is the masculine singular noun meaning “man.” “Roma” is the plural for “Rom.”

The Roma first appeared in Western Europe in the 1400s. Early tolerance soon turned to suspicion, partly due to the Roma’s unique cultural practices. Romani culture, for example, is infused with both mistrust and fear of outsiders. This distrust stems in part from their semi-religious beliefs, which divide the world into the clean and the unclean. To the Roma, the perception of the rest of the world as unclean justifies treating outsiders differently. As such, the Roma consider those who are not Roma to be irredeemably unclean because they do not follow the Roma system. Thus, while stealing would never be accepted within the Roma group, stealing from outsiders is considered acceptable so long as what is stolen is needed for subsistence. These cultural dif-

ferences have placed the Roma at great odds with citizens of the countries to which they emigrate.

Centuries of abuse and discrimination have fostered among the Roma a need to protect themselves from the rest of the world. Thus, difficulties arise when outsiders try to bridge the cultural gap. The Roma use various forms of deception and pretense to protect themselves. For one, Romanes, the Roma language, has been effectively kept a non-literary language, in part because knowing a secret language affords the Roma a degree of protection. Further, local authorities often try to control the Roma by arresting their “King.” The “King of the Gypsies,” however, is an individual, usually of low standing, who places himself in the position of an ad hoc liaison between the Roma and the *gaje* (non-Roma). Thus, the arrest of the “King” harms the Roma very little. These deceptions have increased hostile feelings toward the Roma and make it nearly impossible for outsiders to understand their culture.

The Roma’s beliefs and practices have fostered great discrimination and prejudice against them. For centuries, the Roma have endured banishment, deportation, cultural destruction, enslavement, mutilation, and murder. The Roma were considered pariahs in virtually every

country in which they arrived, and many European states enacted discriminatory laws against them. In England, for example, during the reign of Elizabeth I, a law was passed that made it illegal to be a Roma. Under this law, one could be put to death for having been born to Roma parents. In Switzerland, the Roma were legally hunted as game.

In the 20th century, acceptance of the Roma has not changed significantly. During World War II, the Roma were among the first targets of Nazi policies; at least half a million to a million Roma were killed under the Nazi regime. From 1920 to 1972, the Swiss government enacted a policy of taking Romani children from their parents to be raised by non-Roma families. Until 1954, Sweden prohibited the Roma from entering the country, and banished the Roma population already there.

Roma populations in every country have lower life expectancies, lower literacy rates, and a lower standard of living than the general population, and often their living conditions are appalling. Although international mechanisms do exist for the protection of minority rights, the problems of the Roma are often not addressed by these mechanisms.

The Definition of Minorities in International Law

Existing international mechanisms are inadequate to protect the rights of the Roma as a minority group. The issue is partly one of definition. Currently, there are no universally accepted definitions within international law for the

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terms “people,” “nation,” or “minority,” though numerous attempts have been made to define these terms. The current vagueness of the definitions means that the Roma are denied minority status, and as such, states often can ignore the problems of the Roma.

A variety of international documents have attempted to define the concept of a minority. In 1966, the International Covenant on Civil and Political Rights (ICCPR) included Article 27, which relates to “persons belonging to [ethnic, religious or linguistic] minorities,” but did not define the term. Special Rapporteur Francesco Capotorti was assigned the task of preparing a study pursuant to Article 27 of the ICCPR. In this study, Capotorti defined a “minority” as “a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the state—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.”

Other recent international human rights declarations have used the term “national minorities,” but have failed to define it. The term “national minority,” however, generally has been used to identify minority groups who fall into one of two groups: (1) minority groups who are nationals of one state but have ethnic ties to another; or (2) minority groups who reside on the territory of a state, are citizens of that state, and maintain long standing and lasting ties to the state.

The Framework Convention for the Protection of National Minorities (Framework Convention), which was adopted by thirty-nine European states in 1994, is the first legally binding multilateral instrument devoted exclusively to the protection of minorities. Despite the fact that the Framework Convention is legally binding, it fails to provide a conclusive definition of minority. The authors of the Framework Convention, like those of other international documents, used the term “national minority,” but left it undefined due to an inability to reach a consensus on the definition.

Other terms, such as “people” or “nation,” also are vaguely defined in international agreements. The ICCPR declares that “all people have the right of self-determination,” but leaves both “people” and “self-determination” undefined. In general, “people” are understood to include colonies of foreign powers. Documents that refer to a “nation” generally link the term to the concept of “nationalism,” which tends to be associated with ties to land.

While the lack of definition of the terms “minority,” “people,” and “nation” pose problems to numerous minority groups, these definitions are particularly problematic for the Roma. Current definitions remain limited in scope and apply only to minorities who are either nationals of a particular state, or those who are colonized peoples. Neither of these definitions extends minority status to the Roma. The Roma were not a colonized people, they do not have a homeland, and they do not bear ties to any currently existing state. The Roma also are not citizens of any given state, in part because of their nomadic way of life, which developed



Credit: Greek Helsinki Monitor

A Roma family in Greece.

in response to centuries of fleeing persecution. Instead, the Roma have ethnic and linguistic ties to other groups of Roma that reside in other countries.

Groups of Roma that do remain in a state for an extended period still may be refused minority status. For one, international definitions of the term “minority” are so loose that states can choose to interpret them in a variety of ways. For example, while it is clear that the authors of the Framework Convention intended the protections afforded “national minorities” to include the Roma, the German government has refused to include them. According to the German government, “national minorities” are defined as those “ethnic groups whose members are German nationals living in well-defined areas of settlement for a long period of time.” The Roma, however, do not live in a discrete area within Germany, but instead are spread across the country. Germany’s refusal to recognize the Roma as an ethnic group, then, is based on its interpretation of the definition of minorities as requiring that minority groups live in settlement areas.

Minorities as Actors in the International System

The international community’s inability to define minority status is more than merely a problem of semantics. International law, which was founded on a notion that states are the primary players in the international system, is structured around the concept of the sovereign state as the most effective organizing framework for law and order. Granting international rights to entities other than sovereign states is a modern concept. Modern history has, however, been marked by abhorrent abuses committed by states against their own citizens, and thus it has become necessary to allow individuals to have some personal redress at an international level. The modern international human rights framework has begun to afford individuals a small degree of recognition as independent actors within the international system. For example, states are bound by numerous international conventions guaranteeing individuals certain rights, and pursuant to these conventions, individuals may now

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bring claims independently to the European Court of Human Rights, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights when states violate the rights guaranteed within these conventions.

This minimal recognition of the individual as an international actor has not expanded sufficiently to effectively include minority groups as actors. The human rights system in Europe serves as a key example of the problem. Europe's primary human rights instrument is the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). This document obliges states to guarantee the protection of human rights to all persons within their jurisdiction. The rights outlined in the European Convention are similar to those included in the Universal Declaration of Human Rights and other human rights instruments. Significantly, however, the document guarantees all those rights to individuals. No rights are granted to groups. Furthermore, while an individual's right to take part in cultural life is guaranteed, there is no obligation that a state party must offer protection to a group in preserving its culture.

The European Convention also established the European Court of Human Rights (ECHR) and granted it the authority to hear cases from individuals. Notably, the Convention continues to require that all domestic remedies be exhausted before redress is sought at the ECHR. This is particularly problematic for minority groups such as the Roma, who often are not recognized as a minority group by the states in which they reside. If such unrecognized minority groups are not granted minority status, they will lack the requisite standing to bring a claim against the state based on discrimination, and thus will be unable to satisfy the exhaustion of domestic remedies requirement set by the European Convention.

Recognizing the inherent problems of the European Convention in protecting minority rights, the Council of Europe adopted the Framework Convention in 1994. Although the Framework Convention focuses considerable attention on the rights of minority groups, it fails to provide minority groups with effective international redress for their grievances, and perpetuates some of the obstacles currently facing unrecognized minority groups. Among its problems, the only mechanism for the implementation of the goals set out in the Framework Convention is the establishment of a committee to review reports sent in by states on their progress. There are no mechanisms in the Framework Convention to adjudicate individual or group complaints.

Thus, in order for discrimination against a minority group to be addressed under the Framework Convention, the discriminating state must first confer minority group status on the group seeking redress for discrimination, and then must recognize that the existing domestic laws are in fact discriminatory. The Framework Convention's current implementation mechanism is ineffective because it ignores

the fact that states can easily refuse to acknowledge or confer minority status on certain groups, such as the Roma, as has been demonstrated in the case of the Roma in Germany. Furthermore, the implementation mechanism fails to provide redress if the reporting state has refused to acknowledge that discrimination in fact exists.

While monitoring a state's progress in implementing the goals of the Framework Convention is important, it is not the most effective way for a minority group to improve their conditions. It is important for minority groups to have the ability to seek redress at an international level, not only to deal with discrimination against their individual members, but also to deal with discrimination that affects the group as a whole.

Collective Rights of Minorities in International Law

Some might argue that the international human rights regime, which is increasingly granting individuals standing as actors within the international system, is sufficient to protect members of a minority group against discrimination and abuse. This approach, however, ignores the necessity of protecting group identity, and disregards the fact that the rights to develop a group's culture, religion, language, traditions, and cultural heritage are fundamental in protecting their human rights.

The 1935 advisory opinion of the Permanent Court of International Justice (Court) concerning minority schools in Albania

highlights the importance of fundamental group rights, and conveys the Court's opinion that protection of individual rights alone is not sufficient to protect minorities. In this case, the Albanian Constitution was amended to abolish all private schools in 1933. The Albanian government asserted that this amendment was non-discriminatory since it applied equally to all private schools. In effect, however, the amendment disproportionately discriminated against the minority Greeks since the group relied heavily on its private school system to protect its identity, faith, and culture. The Court found that the abolition of the private school system denied the Greeks equal treatment as a culture, and that without the ability to teach their children, the Greek minority's culture would slowly be eradicated.

The *Minority Schools in Albania* case is analogous to the problems faced by the Roma population today in protecting their group culture. The current system continues to emphasize protection of individual rights, which includes the right to practice one's own cultural beliefs, but fails to include state protection of group practices. Thus, under the current individual rights-based system, the Roma are not allowed to have a separate legal system, nor are they guaranteed that their children would learn Romanes in school. The Roma culture, language, and traditions exist within groups, and a failure to protect their group rights essentially undermines the rights of the Romani individual to practice his or her beliefs.

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Despite the *Minority Schools in Albania* decision, a number of international conventions, including the ICCPR and, more recently, the European Framework Convention, fail to afford special protection to minority groups. Instead, these international instruments continue to recognize only the rights of individuals within minority groups the ability to maintain and develop their culture.

Disentangling Sovereignty

In order for the Roma to be able to flourish as a group, they must be granted certain group rights. Granting them these rights, however, will mean that states will have to give up some measure of sovereignty over the Roma. Thus, solving the problems faced by the Roma requires rethinking the notion of sovereignty. One proposed alternative is to disentangle the notion of sovereignty, or group autonomy, from the concept of land.

The notion of disentangling sovereignty and land is not new. Gidon Gottlieb, author of *Nation Against State*, has referred to this concept “national autonomy,” and Allen Ross, author of *Internal Self Determination*, has called it “internal self determination.” Their ideas are based on the belief that dividing sovereignty into power over people and power over land could solve many ethnic conflicts. In this way, minority groups could be granted status as a “nation” without destroying the physical jurisdiction of the state. Although the concept may sound radical, it is not novel. In the United States, for example, Native American tribes retain their own legal traditions and their own schools, while the U.S. government retains ultimate jurisdiction. Diplomatic and consular immunities show the same type of division, and allow the state to retain territorial control.

Fred Bertram, in his 1997 article “The Particular Problems of the Roma,” published in the *UC Davis Journal of International Law and Policy*, discusses this proposed solution in depth, and examines the probable effects on the Roma. Granting some form of national autonomy to the Roma, Bertram argues, would allow them the right to live according to their own legal, social, and cultural system without threatening the state’s sovereignty over land. Bertram’s analysis, however, continues to focus on the authority of the individual states to grant minority groups this autonomy, acknowledging the unlikelihood that states would relinquish their sovereign control over people within their territory.

One argument is that the international community as a whole should attempt to change structurally in order to recognize a level of self-determination for minority groups. Although the international system has already acknowledged the rights of minority groups to promote their way of life, minority groups still require an effective outlet for dealing with their problems. If international law could disentangle the notion of sovereignty from control over land, minority groups could acquire the autonomy necessary to protect their rights within the international system.

Conclusion

It is clear that the international system, with the sovereign state as its main actor, is not going to change quickly. The

international system, however, increasingly has begun to operate outside the realm of state control, and the panoply of players in the international system has expanded significantly. The development of international legal frameworks that allow individuals to have a personal voice in the international system, as well as the creation of supra-national associations that are composed of entities that are not sovereign states, suggest an increasing role for non-state actors in the international system.

Fred Bertram argues that the problems of the Roma are particularly unique because they have no homeland, face barriers to recognition and implementation of their rights, and because modern human rights instruments are tangential to their needs and problems. While it is true that the Roma are severely restricted in asserting their rights, their problems are not entirely unique. In today’s increasingly global world, certain groups are beginning to act as subjects in the international system. The internationalization of corporate organizations, finance and trade, environmental and security problems, and social movements are slowly eroding the notion of the sovereign state. Nonetheless, the international system continues to operate within a framework in which states are the only legitimate international actors. The problems of the Roma, among other groups, demonstrate the need for a new conception of what constitutes a legitimate international actor, and the need to redefine this notion to include minority groups as actors. ☉

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