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Minority Rights
Instruments and Mechanisms

Minority Protection along the Conflict Continuum
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Minority Rights Instruments and Mechanisms: Minority Protection along the Conflict Continuum

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1. Part One - Introduction and Overview

“It is in times of fear and anger, even more than in times of peace and tranquility, that you need universal human rights, and a spirit of mutual respect.”

Kofi Annan, UN Secretary General, June 2004

1.1. Introduction

As part of the multi-year research project ‘MIRICO: Human and Minority Rights in the Life Cycle of Ethnic Conflicts’, this report attempts to identify and analyze the international standards for the protection of ethnic identities and describe the institutions implementing them. In order to provide a baseline to determine the role for international minority rights in inter-ethnic conflict prevention and management, the report will look at three dimensions:

1. The legal content of the international standards for the protection of minority rights thus far developed.
2. The role of the mechanisms of international organizations (UN, OSCE, CoE, and EU) and how these encourage the states to comply with the underlying norms.
3. The role of international instruments and mechanisms in relation to three different stages of a conflict: pre-conflict, during a conflict period and in a post conflict stage.

The report provides an overview of the role that international instruments can play in preventing ethnic conflict. While different mechanisms should ideally complement each other in the different phases of conflict, what are the comparative advantages between CoE and UN state reporting based mechanisms and those designed to assist with diplomatic approaches, peace negotiations, coercive measures, as well as to ensure sustainable peace-building efforts in post-conflict environments?

What rights are particularly relevant in the different phases of conflict, and what is the role of international law among mechanisms founded on human rights vis-à-vis conflict resolution and security mandates? One early observation is that the OSCE High Commissioner on National Minorities provides a particularly innovative and effective mechanism to combine approaches and methods; while institutionally located as a security mandate, he bases his recommendations and involvement upon human rights instruments of both hard and soft law.

The Report is structured as follows: Part I provides an overview of the contents and international standards of minority rights. Part II reviews the primary applicable and relevant instruments and mechanisms of the United Nations (UN), the Organization for Security and Co-operation in Europe (OSCE), the Council of Europe (CoE) and the European Union (EU). Part III explores the comparative advantages of these organizations in different stages of a conflict: before, during and after a violent conflict. This concluding part will also present a case study with some observations about the opportunities and limitations of legal standards in resolving ethnic conflicts: the role of the OSCE High Commissioner on National Minorities (HCNM) in the Former Yugoslav Republic of Macedonia (FYROM).

1.2. Historic Overview

International norms on the protection of the rights of persons belonging to minorities can be traced back to the 17th century, in particular provisions in the 1648 Peace of Westphalia Treaty and rules applicable in Transylvania. Similar provisions aiming at protecting the religious freedom of persons living on territories which, as a result of peace treaties, were ceded to another state can be found in a number of treaties such as the Treaty of Oliva (1660), the Treaty of Nijmegen (1678) or in the Austrian-Polish Treaty of 1773, concluded as a part of the treaties resulting in the first cession of Polish territories to Austria, Prussia and Russia.

Such treaties on the protection of religious minorities were not only concluded among Christian powers, but also between Christian states and the Ottoman Empire in order to protect Christians living in Ottoman territories (the 1615 Treaty of Vienna, the 1699 Treaty of Karlowitz and the 1774 Treaty of Koutchouk-Kainardji). These treaties might be seen as predecessors of those treaties concluded in the second half of the 19th century such as the 1878 Treaty of Berlin concerning the rights of the Christian population in the Ottoman Empire, on the one hand, and of the Muslim population in the Christian states of the Balkan region, on the other. In particular, the latter treaty provided not only for the prohibition of discrimination on religious grounds, but also for guarantees to publicly manifest one’s religion and a qualified right to self-government concerning the internal affairs of such religious communities. While it is clear that these treaties have become obsolete, it is interesting to note that there is still one treaty in force which, although concluded after World War I, seems to belong, as to its contents, to this category of pre-World War I treaties on the protection of the rights of persons belonging to religious minorities: the 1923 Lausanne Treaty concluded between Greece and Turkey. It addresses the rights of the “Muslim inhabitants of Western Thrace” and the “non-Muslim minorities” in Turkey; persons belonging to these groups are not only protected against discrimination, but are also accorded the right to have and publicly manifest their religion and, which is quite unusual for “religious” minorities, the right to publicly financed schools where, at least to some extent, the instruction is provided in the respective minority language.

On the other hand, it is well-known that the first system of international protection of the rights of national minorities was created after World War I and assumed a certain degree of unity within the framework of the League of Nations. This system was built on treaties concluded by Poland, Yugoslavia, Czechoslovakia, Romania and Greece with the principal Allied and Associated Powers and pertinent provisions in the peace treaties concluded by Austria, Bulgaria, Hungary, and Turkey. It was further completed by a set of bilateral treaties such as those concluded between Finland and Sweden concerning the Åland Islands (which are still in force) or between Germany and Poland concerning Upper Silesia, as well as unilateral declarations made by Albania, the Baltic States and Iraq upon their

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admission to the League of Nations. This system provided for the recognition of group rights (and not only individual rights), included a right to non-discrimination but, above all, provided for a wide set of additional rights in the fields of state administration, culture, and education. It failed, however, due to an increasing reluctance among the states concerned to abide by their treaty obligations in a period characterized by a growing atmosphere of aggressive nationalism, and to the lack of competences and political will of the League of Nations to enforce the implementation of this system.³

After World War II, the United Nations did not endeavour to recreate the League of Nations system nor did they substitute it with a system of their own. This absence of action reflected the then prevailing attitude that international protection of minority rights, construed as group rights, could be supplemented by an effective system of human rights protection based on individual rights, in particular the prohibition of discrimination on grounds such as ethnicity, language, race, and religion. Therefore, the 1948 Universal Declaration of Human Rights contains, in Article 2, a guarantee of non-discrimination but no provision on minority rights. The same is the case for the 1950 European Convention on Human Rights which provides, in Article 14, for an accessory right to non-discrimination.

On the universal level, this approach changed considerably in the 1960s.⁴ The first step taken was the adoption of the 1965 Convention on the Elimination of all Forms of Racial Discrimination (CERD). Its provisions, in particular Article 5, have been used by the CERD Committee as an important tool to safeguard the rights of minorities going far beyond protection against discrimination.⁵ Nonetheless, Article 27 of the 1966 International Covenant on Civil and Political Rights (ICCPR) is generally considered to be the most relevant provision on the protection of the rights of persons belonging to national minorities on the universal level.⁶ In the present context, it must be stressed that since, in Article 26, the ICCPR provides for a non-accessory right to non-discrimination, the ICCPR was the first international instrument to embrace both a provision on non-discrimination and a provision on minority rights. This fact should be seen as an important argument in favour of the position that a right to non-discrimination is not sufficient to guarantee the effective protection of minority rights.

With respect to Europe, it is important to note that the demise of the socialist regimes in Europe resulted in the conclusion of many bilateral treaties on the protection of national minorities by practically all Central and Eastern European states.⁷ Despite this development, it must be stressed that the virtual renaissance of international minority rights protection in the post-1989 era also led to a surge in multilateral efforts in the field of minority protection. This was mainly due to the fact that the international community came to understand that unsettled majority-minority situations constitute a serious threat not only to internal peace and security of the states primarily concerned, but also to peace and security in Europe as a whole. Consequently, both the CSCE/OSCE and the Council of Europe, as the two most relevant international organizations in the human rights field in Europe, have since the early 1990s been actively engaged in

³ See Thornberry, ibid., 46.
⁴ See Eide, ibid., 39; and Thornberry, ibid., 257.
⁶ On this provision see for instance Manfred Nowak, UN Covenant on Civil and Political Rights. CCPR Commentary (2nd ed. 2005), 635.
stabilizing majority-minority situations with a potential to result in ethnic violence or even civil strife and war.

The first step was taken by the then CSCE was the adoption, on 29 June 1990, of the Copenhagen Document of the Conference on the Human Dimension, Part IV, which contains detailed standards relating to minorities. Although it is not a legally binding instrument, it served as an important basis for the further development of minority-related affairs in Europe. An even more important step, however, was taken when the OSCE established the position of a High Commissioner on National Minorities (HCNM) as an instrument of “conflict prevention”. Both Max van der Stoel and Rolf Ekéus have applied “quiet diplomacy” in order to prevent disputes between minorities and governments from escalating into serious and violent tensions, which will be elaborated later in the text\(^8\).

In contrast to this policy based on “quiet diplomacy” and the exercise of political pressure, the Council of Europe, with its strong tradition of initiating negotiations aimed at, and providing a forum for, the drafting of legally binding instruments, chose to maintain this approach which eventually resulted in the adoption of two legally binding treaties, the European Charter on Regional and Minorities Languages and the FCNM. The FCNM entered into force on 1 February 1998 and acquired within a very short period of time one of highest rates of membership of Council of Europe human rights treaties: As of 1 August 2006, it was in force for 38 of the 46 Council of Europe Member States and for Montenegro.

The unequally relevance of the FCNM as concerns the protection of minority rights in Europe is also reflected by the fact that, on 23 August 2004, the United Nations Interim Administration Mission in Kosovo (UNMIK) and the Council of Europe concluded an Agreement whereby the UNMIK accepted to be bound not only by the substantive provisions of the FCNM, an obligation which already resulted from the pertinent unilateral acceptance to be found in Article 1.3 of UNMIK Regulation 1991/1, but also to be bound by the provisions on the monitoring of the implementation of the FCNM by the UNMIK in Kosovo.\(^9\) This act is the first time a United Nations Interim Administration has accepted to be bound not only by the substantive provisions of a human rights instrument but also by its provisions on monitoring. It should be stressed that the UNMIK, abiding by its obligation resulting from that Agreement, submitted its Report on 2 June 2005 and, subsequent to a visit to Kosovo in October 2005, the Advisory Committee adopted its pertinent Opinion on 25 November 2006. After this Opinion had been introduced to the GR-H on 21 February 2006, the UNMIK decided to make the Opinion publicly accessible on 2 March. On 21 June 2006, the Committee of Ministers adopted its pertinent Resolution.\(^10\)

Finally, it is important to note that the issue of minority rights has, at least so far, not been of major relevance for the internal policies and legislative activities of the European Communities/Union. It remains to be seen whether the introduction of a reference to minority rights in the Treaty on a now uncertain Constitution for Europe will have an impact on the future legislative work of the EU and EC. In this context it must be mentioned, however, that the absence of pertinent legislative activities might not only be due to an absence of political will to engage in such activities, but also to the absence of pertinent powers

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\(^8\) See, e.g., Max van der Stoel, *The Role of the OSCE High Commissioner on National Minorities in the Field of Conflict Prevention*, (Recueil des Cours 296, 2002), 9.

\(^9\) On this Agreement see Rainer Hofmann, Protecting Minority Rights in Kosovo, in: Klaus Dicke et al. (eds.), Weltinnenrecht, Liber amicorum Jost Delbrück (2005), 347.

\(^10\) As discussed in Part III, the practice of requesting UNMIK to submit a report and stand international scrutiny was subsequently followed by examination of the UN Human Rights Committee, which submitted its Concluding Observations on 27 July 2006.
specifically attributed to the EU/EC. This situation contrasts starkly to the importance of minority issues for the external policies of the EU: minority rights constitute a central point of the Copenhagen Criteria applicable to the previous and present enlargement-process, and have been of essential relevance for EU stabilization efforts in the West Balkans, the implementation of the European Neighbourhood Policy, and for policy toward other regions of the world.

To conclude this overview, it seems important to note that all international actors in Europe seem to concur that the goal of adequately accommodating the needs of persons belonging to national minorities in order to ensure peaceful relations between majority and minority populations based on the acceptance of diversity requires more than just respect for, and implementation of, the right to non-discrimination; it requires the establishment of a specific set of additional rights or special rights of persons belonging to national minorities. This set of special rights will be presented in the following part.

1.3. Overview of Rights for the Protection of Minorities

1.3.1 Defining a Minority

The long-running and unresolved controversy of the definition of a ‘minority’ has been the subject of a number of studies. Despite the difficulty in arriving at a universally acceptable definition, various characteristics of minorities have been identified, which, taken together, cover most minority situations. The most commonly used description of a minority in a given State can be summed up as a non-dominant group of individuals who share certain national, ethnic, religious or linguistic characteristics that are different from those of the majority population. In addition, it has been argued that the use of self-definition which has been identified as “a will on the part of the members of the groups in question to preserve their own characteristics” and to be accepted as part of that group by the other members, combined with certain specific objective requirements, could provide a viable option.11

Some groups of individuals may find themselves in situations similar to those of minorities. These groups include migrant workers, refugees, stateless persons and other non-nationals, who do not necessarily share certain ethnic, religious or linguistic characteristics common to persons belonging to minorities. These particular groups are, however, protected against discrimination by the general provisions of international law, and have additional rights guaranteed in, for example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; the Convention relating to the Status of Stateless Persons; the Convention relating to the Status of Refugees; and the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.

1.3.2 Special Rights for the Protection of Minorities

Special rights are not privileges, but they are granted to make it possible for minorities to preserve their identity, characteristics and traditions. Special rights are just as important in achieving equality of treatment as non-discrimination. Only when minorities are able to use their own languages, benefit from services they have themselves organized, as well as take part in the political and economic life of States can they begin to achieve the status which majorities take for granted. Differences in the treatment of such groups, or individuals belonging to them, are

justified if they are exercised to promote effective equality and the welfare of the community as a whole (see UN Fact Sheet No.18_Minority Rights). This form of affirmative action may have to be sustained over a prolonged period in order to enable minority groups to benefit from society on an equal footing with the majority.

Several UN human rights instruments refer to national, ethnic, racial or religious groups and some include special rights for persons belonging to minorities. These include: the Convention on the Prevention and Punishment of the Crime of Genocide (art. II); the Convention on the Elimination of All Forms of Racial Discrimination (arts. 2 and 4); the International Covenant on Economic, Social and Cultural Rights (art. 13); the International Covenant on Civil and Political Rights (art. 27); the Convention on the Rights of the Child (art. 30); the UNESCO Convention against Discrimination in Education (art. 5); the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; and the UNESCO Declaration on Race and Racial Prejudice (art. 5). As will be outlined in section II of this report, regional instruments that contain special rights for minorities include the Framework Convention for the Protection of National Minorities (FCNM), the European Charter for Regional or Minority Languages (Council of Europe), and the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE.

The following list of eleven specific rights of persons belonging to minority groups has been elaborated on the basis of the United Nations Declaration on the rights of persons belonging to minorities, of international minority rights standards and of specific European instruments and documents, including commentaries thereto:12

(a) The Application of Specific Rights for the Protection of Minority Identities

The application of these rights shall apply to all groups and persons without distinction, irrespective of any citizenship, disenfranchised or other status.

(b) Non-Discrimination and Affirmative Action

Minorities are often in a disadvantaged, marginalized and vulnerable position, and therefore require special measures to ensure that they benefit from the same rights on a basis of equality with the rest of the population. Non-discrimination covers not only the usual grounds of non-discrimination but also those which are specific to minorities such as language, religion, and culture. In addition, this right ensures full equality of all persons before the law, equal protection of the law and equal benefit of the law, and refers to the enactment of laws prohibiting genocide, hate speech and hate crimes. It also covers special measures of affirmative action, which shall however be discontinued after the objectives for which they were taken have been achieved.

(c) The Identity and Characteristics of Minorities

This right goes beyond article 1 of the Declaration on the rights of persons belonging to minorities, in that a reference to personal laws is added, whereby measures to ensure that minorities enjoy their right to identity and characteristics shall not be taken where practices are contrary to international and regional standards, norms and principles or are in violation of national law. Furthermore,

12 For further elaboration on this list of minority rights applied in the context of South Asia, see Working Group on Minorities, Statement of Principles on Minority and Group Rights in South Asia, 9th Session, May 2003.
this right allows a person belonging to a minority to be treated or not to be treated as such, an element drawn from the FCNM.

(d) The Promotion of Diversity and Intercultural Education

Intercultural education, as reflected in school curricula, has been identified as a means to encourage the active participation of minorities in sharing knowledge and perspectives of their history, culture, traditions, customs, languages and practices. It also allows both minorities and majorities to appreciate their differences and similarities, and better understand each other through mutual respect and tolerance. Promotion of diversity and intercultural education is aiming at combating prejudices and discrimination, and promoting tolerance intercultural dialogue and respect among all groups in society.

(e) The Right of Minorities to Freedom of Religion

This principle details the particular activities which amount to freedom of religion, including: the right to receive or impart instruction of the religion or belief of the minority; the right to freely change one’s religion or belief; to publish and disseminate religious materials; to establish, manage and maintain religious institutions; to train, appoint, elect or designate by succession appropriate religious leaders; and to observe religious holidays. The right of minorities to profess and practice their own religion is of particular relevance in the regions where religious issues and factionalism have come to dominate much of the political discourse, and have sharpened the expression of identity.

(f) The Right of Minorities to use their own Language in Private and in Public

The use of minority language represents one of the principal means by which minorities can assert and preserve their identity, and the use of language bears on many aspects of the functioning of many States. This right includes the right of minorities to freely express opinions and beliefs, and receive and impart information in their own language, and to use their language in private and public sphere, for the production and airing of public and private radio and television programmes, as well as in the creation, development and use of written materials. Minorities may also use their own language in their relations with administrative authorities and shall have the right to acquire civil documents and certificates, both in the official and minority languages. This right also allows minorities to use their own surnames and first names in the minority language, and to post signs, inscriptions, commercial and other information in their own language.

(g) The Right to be Taught their own Language and Have Instruction in their Language

This right ranges from making available kindergarten, pre-school, primary, secondary, university, higher and vocational education in the minority language, to making available only a substantial part of primary, secondary and vocational education in the minority language, to teaching the minority language at all levels of the educational system. The implementation of this right will depend on the context of the particular situation, including whether the number of students in part of a territory warrant such measures, there is a demand for such measures, and the State is able to commit the necessary resources to respond to such demands. This principle reflects a sliding scale, drawn from the European Charter for Regional or Minority languages, regarding the extent to which minorities may be taught and have instruction in their own language.
(h) The Right to Establish and Manage their own Unions, Associations and Institutions

Granting minorities the right to freely associate and to establish and maintain their own institutions contributes to their effective participation in public and political life, and to the maintenance of their own identity and characteristics. Article 14 of the FCNM, for instance, particularly refers to establishment of educational institutions. Reference is made to the prohibition of any form of discrimination or interference in the establishment and maintenance of such institutions, and the freedom of minorities to seek funding for such institutions from the State, and local, regional and international sources, as well as from the private sector.

(i) Effective Participation of Minorities in Public Affairs and Economic, Cultural and Political Life

Effective participation is necessary to ensure that minorities are respected, recognized and heard. This right focuses on various options for minorities to effectively participate in social, cultural and economic life. This ranges from consultations to the preparation, implementation and assessment of national and regional programmes, plans to participate in decisions and elections, as well as the right to be represented and to hold office. The right also grants minorities the right to participate in public and political affairs directly or through freely chosen representatives, and lists a whole range of measures which could be taken to this effect. Reference is also made to the prohibition of measures which alter the proportions of the population in areas inhabited by minorities with the aim of influencing minority representation in elections or for other political purposes.

(j) The Devolution of Power, Autonomy and Federalism

Devolution of power, autonomy and federalism may be necessary to ensure effective participation of minorities in decision-making. These arrangements, which affect the political organization of multicultural States, allow for the accommodation of minorities and a degree of independence of minority communities in managing their own affairs, in accordance with circumstances at the local level. This right covers a variety of arrangements, ranging from self-administration on a non-territorial basis, to decentralized or local forms of self-government or autonomous arrangements, to a federal system of government.

(k) Effective Implementation and Redress

This right concerns effective implementation and redress, ensuring that the rights guaranteed in international conventions and declarations and in domestic legislation are effectively implemented and protected. When confronted with violations of their rights, minorities must often overcome significant obstacles in order to access the judicial system and other domestic human rights protection mechanisms. This right provides for institutions to be established and strengthened that are responsible for implementing rights, addressing violations and providing redress. It also grants to members of minorities effective remedy and compensation for violations of their rights and easy access to all courts and tribunals, at national and international levels, as well as conciliation and mediation mechanisms. A reference is also made to easy access to the United Nations and other regional treaty bodies and complaints procedures.
2. Part Two - International Instruments and Mechanisms for the Protection of Minority Rights

2.1. The United Nations

When the foundation of modern international human rights was laid with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, the majority of UN members were opposed to the inclusion of specific provisions on minority protection.\(^\text{13}\) While this departed from the prior minority regime under the League of Nations, the United Nations General Assembly did, as a political compromise, adopt a 1948 resolution noting that “the UN cannot remain indifferent to the fate of minorities”.\(^\text{14}\) While proper implementation of all human rights covers many needs of minorities, important developments have occurred since. Through the development of the non-discrimination rule enshrined in the UN Covenants, the dedicated provisions on minority protection of ICCPR Article 27 and CRC Article 30, to the 1992 Declaration of Rights belonging to National or Ethnic, Religious and Linguistic Minorities (hereinafter UN Declaration on the Rights of Minorities), have all contributed, together with the interpretation of treaty-monitoring and other dedicated mechanisms guiding their implementation, towards a fuller body of international minority law.\(^\text{15}\)

2.1.1. UN standards for the Protection of Minority Rights

The UN standards relevant to minority protection include a wide range of international treaties, from the Convention on the Prevention and Punishment of the Crime of Genocide, which in Article 2 defines genocide as a number of acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group. While all seven core human rights treaties also contribute to the protection of minority rights, specific provisions are included in Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and Article 30 of the Convention on the Rights of the Child (CRC), with also highly relevant provisions and monitoring under the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Elimination of Discrimination Against Women (CEDAW) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The most elaborate instrument specifically dedicated to the protection of minorities is the 1992 UN Declaration on the Rights of Minorities, which is inspired by ICCPR Article 27, both of which are further elaborated below.


\(^{14}\) See General Assembly Resolution 217 III(c) on the ‘Fate of Minorities’, adopted on 10 December 1948.

\(^{15}\) The Commission on Human Rights’ working group started to work on a draft declaration on the rights of minorities with the crisis of Yugoslavia, with the Commission’s draft adopted by consensus by the General Assembly on 18 December 1992 (General Assembly Resolution 47/135). For an overview of the work of the United Nations on minority protection, see UN Fact Sheet on Minority Rights, available at http://www.ohchr.org/minorities.
(a) Article 27 of the International Covenant on Civil and Political Rights

The most widely-accepted legally-binding provision on minorities is Article 27 of the ICCPR, which states:

"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 practice their own religion, or to use their own language".

Article 27 of the ICCPR grants persons belonging to minorities the right to national, ethnic, religious or linguistic identity, or a combination thereof, and to preserve the characteristics which they wish to maintain and develop. Although article 27 refers to the rights of minorities in those States in which they exist, its applicability is not subject to official recognition of a minority by a State. Article 27 does not call for special measures to be adopted by States, but States that have ratified the Covenant are obliged to ensure that all individuals under their jurisdiction enjoy their rights. This may require specific action to correct inequalities to which minorities are subjected.\(^\text{16}\)

The Human Rights Committee monitoring the implementation of ICCPR has over the years developed a significant jurisprudence through country reporting and individual complaints (on the basis of an optional protocol) in its interpretation of Article 27, as well as through thematic work. In particular, its General Comment 23 provides an authoritative interpretation of Article 27 and expands on the normative contents of this right.\(^\text{17}\) The Committee observes that Article 27 establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the ICCPR. The obligations placed upon States parties under Article 27 is different but builds upon the duty under Article 2.1 to ensure the enjoyment of the rights guaranteed under the ICCPR without discrimination and also with equality before the law and equal protection of the law under Article 26. The ICCPR draws a distinction between the right to self-determination (article 1) and the rights protected under Article 27; the former is expressed to be a right belonging to peoples, and is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the articles relating to other personal rights conferred on individuals, in Part III of the ICCPR, and is cognizable under the Optional Protocol.\(^\text{18}\)

In paragraph 3.2 of General Comment 23, the Committee states that the enjoyment of the rights to which Article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely

\(^{16}\) General Comment of the Human Rights Committee 18 (37). For the full text see United Nations Document HRI/GEN/1 of 4 September 1992. (Fact sheet No. 18 (Rev.1), Minority Rights.htm.)

\(^{17}\) See: General Comment No. 23: The rights of minorities (Art. 27): 08/04/94. CCPR/C/21/Rev.1/Add.5, General Comment No. 23, (Fiftieth session, 1994).

associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority. It further says (para. 4) that the Covenant also distinguishes the rights protected under article 27 from the guarantees under articles 2.1 and 26. The entitlement, under article 2.1, to enjoy the rights under the Covenant without discrimination applies to all individuals within the territory or under the jurisdiction of the State, whether or not those persons belong to a minority. In addition, there is a distinct right provided under article 26 for equality before the law, equal protection of the law, and non-discrimination in respect of rights granted and obligations imposed by the States. It governs the exercise of all rights, whether protected under the ICCPR or not, which the State party confers by law on individuals within its territory or under its jurisdiction, irrespective of whether they belong to the minorities specified in article 27 or not. The terms (para. 5.1.) used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party. In this regard, the obligations deriving from article 2.1 are also relevant, since a State party is required under that article to ensure that the rights protected under the ICCPR are available to all individuals within its territory and subject to its jurisdiction, except those very few rights which are expressly made to apply to citizens, for example, certain political rights under article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone.

The Committee in the paragraph 5.2 says that Article 27 confers rights on persons belonging to minorities which "exist" in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term "exist" connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practice their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights, according to the Human Rights Committee. As any other individual in the territory of the State party, they would, also for this purpose, have the general rights, for example, to freedom of association, of assembly, and of expression. Furthermore, and in line with jurisprudence stemming from the prior Permanent Court of International Justice, the existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria, in accordance with international law.

In paragraph 5.3 of the General Comment 23, the Committee further states that the right of individuals belonging to a linguistic minority to use their language among themselves, in private or in public, is distinct from other language rights protected under the Covenant. Further, the right protected under article 27 should be distinguished from the particular right which Article 14.3 (f) of the ICCPR confers on accused persons to interpretation where they cannot understand or speak the language used in the courts. Article 14.3 (f) does not, in any other circumstances, confer on accused persons the right to use or speak the language of

their choice in court proceedings. Further it states that although Article 27 is expressed in negative terms, that article, nevertheless recognizes the existence of a “right” and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party. In paragraph 6.2 the Committee writes that although the rights protected under Article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of Articles 2.1 and 26 of the ICCPR both as regards the treatment between different minorities, and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under Article 27, they may constitute a legitimate differentiation under the ICCPR, provided that they are based on reasonable and objective criteria.

With regard to the exercise of the cultural rights protected under Article 27, the Committee (in paragraph 7 of General Comment 23) observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. The Committee further observes that none of the rights protected under Article 27 of the ICCPR may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant.

(b) 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

The only universal instrument addressing the special rights of minorities in a dedicated United Nations document is the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (hereinafter Declaration on the Rights of Minorities). The declaration ensures the rights of persons belonging to minorities to maintain and develop their own identity and characteristics and the corresponding obligations of States. This declaration at the same time safeguards the territorial integrity and political independence of a state as a whole. The Declaration on the Rights of Minorities contains the principles (in addition to other human rights instruments which are protecting the rights of persons belonging to minorities).

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23 Adopted by the General Assembly on 18 December 1992 (General Assembly resolution 47/135).
individuals belonging to minorities) which protect the identities of the minority groups.24

The Declaration grants to persons belonging to minorities:

- protection, by States, of their existence and their national or ethnic, cultural, religious and linguistic identity (art. 1);
- the right to enjoy their own culture, to profess and practice their own religion, and to use their own language in private and in public (art. 2.1);
- the right to participate in cultural, religious, social, economic and public life (art. 2.2); the right to participate in decisions which affect them on the national and regional levels (art. 2.3);
- the right to establish and maintain their own associations (art. 2.4);
- the right to establish and maintain peaceful contacts with other members of their group and with persons belonging to other minorities, both within their own country and across state borders (art. 2.5); and
- the freedom to exercise their rights, individually as well as in community with other members of their group, without discrimination (art. 3).

States are to protect and promote the rights of persons belonging to minorities by taking measures:

- to create favourable conditions to enable them to express their characteristics and to develop their culture, language, religion, traditions and customs (art. 4.2);
- to allow them adequate opportunities to learn their mother tongue or to have instruction in their mother tongue (art. 4.3);
- to encourage knowledge of the history, traditions, language and culture of minorities existing within their territory and ensure that members of such minorities have adequate opportunities to gain knowledge of the society as a whole (art. 4.4);
- to allow their participation in economic progress and development (art. 4.5);
- to consider legitimate interests of minorities in developing national policies and programmes, as well as in planning and implementing programmes of cooperation and assistance (art. 5);
- to cooperate with other States on questions relating to minorities, including the exchange of information and experiences, in order to promote mutual understanding and confidence (art. 6);
- to promote respect for the rights set forth in the Declaration (art. 7);
- to fulfill the obligations and commitments States have assumed under international treaties and agreements to which they are parties.

Finally, the specialized agencies and other organizations of the United Nations system are encouraged to contribute to the realization of the rights set forth in the Declaration (art. 9).25

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24 See article 8 of the Declaration.
The General Assembly, on the adoption of the Declaration, stressed the need to make the standards effective through international and domestic mechanisms. These, inter alia, included the dissemination of information on and promotion of the Declaration but also appropriate mechanisms for the effective promotion and consideration of the Declaration within the mandates of the relevant organs and bodies of the United Nations. However, a dedicated legally binding instrument protecting persons belonging to minorities on the universal level is still lacking; this declaration is only a politically binding instrument. The UN Working Group on Minorities and the Independent Expert on minority issues (both mechanisms will be explained later in the text) are tasked to promote the implementation of the provisions of this declaration.

While the provisions of the Declaration on the Rights of Minorities are less detailed and comprehensive than CoE and OSCE standards (referred to below), arguably due to the diversity of states that unanimously approved it, the instrument holds significant importance in linking minority issues to the human rights and security missions of the United Nations. 26

2.1.2. United Nations Mechanisms for the direct and indirect protection of Minority Rights

The protection of minorities has been the subject of a number of studies commissioned by the UN since the 1960s, which were undertaken principally by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. These studies pertain to: the legal validity of undertakings relating to the protection of minorities placed under the guarantee of the League of Nations; 27 the definition and classification of minorities; 28 the problem of the juridical treatment of minorities; 29 and ways and means for facilitating the resolution of situations involving racial, national, religious and linguistic minorities. 30

Since the adoption of the 1992 Declaration on the Rights of Minorities, the Secretary-General has prepared a number of reports for the General Assembly and the (former) Commission on Human Rights, describing the measures undertaken by States, international organizations, organs and bodies of the UN, specialized agencies, and NGOs to give effect to the principles contained in the Declaration and, more generally, to protect and promote the rights of persons belonging to minorities.

Additionally, the activities of the New York based institutions of the UN have direct or indirect effects on minority protection. These include actions by: the Security Council, tasked to maintain international peace and security through the peaceful resolution of disputes, and as a last resort, coercive enforcement action; the Secretary-General, through his and his Representatives’ peace-building,

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26 See General Assembly resolution 47/135, paragraphs 2-6.
27 Cf. also General Comment 18 of the Human Rights Committee on non-discrimination under the Covenant on Civil and Political Rights, United Nations document HRI/GEN/1/Rev.2 of 29 March 1996.
30 “Rights of persons belonging to ethnic, religious and linguistic minorities”, by Francesco Capotorti (United Nations Study Series No. 5).
31 “Possible ways and means to facilitate the peaceful and constructive solution of problems involving racial minorities”, by Mr. Asbjørn Eide (E/CN.4/Sub.2/1993/34 and Add.1-4).
mediation and good office efforts; and the recently instituted Peace-Building Commission, which aims to support post-conflict countries from sliding back to violent conflict.\textsuperscript{32} The section below, however, is focused on the Geneva based human rights mechanisms, though the Department of Political Affairs (DPA) and the Department of Peacekeeping Operations (DPKO) are also listed towards the end.

(a) The UN High Commissioner for Human Rights

The post of the High Commissioner for Human Rights was established in 1993 by the General Assembly, following the Vienna World Conference on Human Rights. The High Commissioner has been entrusted with the task, among others, of promoting and protecting human rights, including the rights of persons belonging to minorities.\textsuperscript{33} More specifically, the General Assembly has entrusted the High Commissioner to promote implementation of the principles contained in the UN Declaration on the Rights of Minorities and to continue to engage in a dialogue with governments on these issues.\textsuperscript{34} To this end, a comprehensive three-pronged programme has been elaborated to promote and implement the principles contained in the Declaration on the rights of persons belonging to minorities, to cooperate with other organs and bodies of the UN, including the international human rights community, and programmes of technical assistance and advisory services, and to engage in dialogue with Governments and other parties concerned with minority issues. These three activities are interrelated and have preventive functions as their common denominator.

During visits to countries and in ongoing dialogue with governments, the High Commissioner may encourage implementation of the principles contained in the Declaration and discusses problems and possible solutions concerning situations involving minorities. The High Commissioner further contributes to strengthening minority protection by providing guidance in respect and support to the activities of the other bodies and organs of the UN. This includes, among other things, following up on minority-related resolutions of legislative bodies and the recommendations of the treaty bodies, of the Working Group on Minorities, and of the Special Rapporteurs. It remains to be seen whether the current High Commissioner will place increased attention on minority issues, which would fit well in line with the expressed desire for stronger country engagement strategies outlined in its own OHCHR Plan of Action.\textsuperscript{35}

The advisory services and technical assistance offered by the Office of the High Commissioner constitute a comprehensive programme for building national and regional human rights infrastructure funded through the Voluntary Fund for Advisory Services and Technical Assistance in the Field of Human Rights. Assistance is provided only in agreement with the Governments concerned, on the basis of requests received from them. In the area of minority protection, Governments may request qualified expertise on minority issues, including the prevention of disputes, to assist in existing or potential situations involving minorities. Assistance has been provided in drafting laws to protect and promote the identity and characteristics of

\textsuperscript{32} For information of the work of the Department of Political Affairs (DPA), assisting the Secretary-General and his Representatives in their preventive diplomacy function, see www.un.org/Depts/dpa/about_dpa/fr_dpa_mission.htm. Under the tenure of Secretary-General Kofi Annan, human rights were identified as one of the core issues concerning the U.N. See Reform at the UN, UN Reform Dossier 1997-2002, available at www.un.org/reform/dossier.htm. in, and
\textsuperscript{33} See General Assembly resolution 48/141.
\textsuperscript{34} See General Assembly resolution 49/192.
\textsuperscript{35} For information of the activities of the High Commissioner for Human Rights, including the text of the OHCHR Plan of Action, see http://www.ohchr.org.
minorities, the organization of training seminars on minority rights and workshops on peaceful conflict resolution techniques, the strengthening of confidence-building measures for different groups in society, and the provision of fellowships and scholarships. Further assistance is being provided in the field of constitutional and electoral assistance, human rights education and curriculum development, police training, the establishment and strengthening of national institutions, the administration of justice, the training of the military, and the support of non-governmental organizations.  

(b) The UN Human Rights Treaty Monitoring Bodies

In order to implement the rights of persons belonging to minorities as enunciated in the International Conventions, committees have been established to monitor the progress made by state parties in implementing their obligations in national legislation as well as in practice. The Committees which are of particular relevance to the implementation of minority rights are the Committee on Human Rights (which oversees implementation of the ICCPR); the Committee on Economic, Social and Cultural Rights (which oversees implementation of the ICESCR); the Committee on the Elimination of Racial Discrimination (which oversees implementation of the CERD); and the Committee on the Rights of the Child (which oversees implementation of the CRC). State parties undertake to submit periodic reports to the respective Committees outlining the legislative, judicial, policy and other measures which they have taken to ensure the enjoyment of, inter alia, the minority-specific rights contained in the relevant instruments.

The State Reporting Procedure

When a state report comes before the respective Committee for examination, a representative of the country concerned may introduce it, answer questions from the expert members of the Committee, and comment on the observations made. The Committees provide states with a detailed set of reporting guidelines specifying the type of information required for the Committees to monitor a State’s compliance with its obligations. The state reporting procedure can in many ways be considered as the less effective approach to human rights implementation compared to judicial proceedings. Most UN human rights treaty bodies provide for reporting mechanisms accompanied, in several cases, by individual complaints procedures.

The respective human rights treaty-monitoring bodies consist of independent expert members who are elected by secret ballot by the state parties and serve in their personal capacity, convening in general three times a year for sessions of three weeks duration, at the UN offices in Geneva or in New York. The committees employ various means when monitoring state compliance, including a state reporting system, general comments and an inter-state compliant mechanism.

For reporting under Article 27 of the ICCPR, for example, information contained in the report must be provided about minorities in a state, their

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36 For further details see Fact Sheet No. 3 (Rev.1) on advisory services and technical cooperation in the field of human rights.


38 Cf. the practice of the Human Rights Committee, which is composed of 18 members and meets annually twice in Geneva and once in New York. See http://www.unhchr.ch/html/menu2/6/a/introhrc.htm.
respective numbers as compared to the majority and the concrete measures
adopted by the reporting state to preserve minorities' ethnic, religious, cultural
and linguistic identity as well as other measures to provide minorities with equal
economic and political opportunities. 39 Particular reference should be made to
their representation in central and local government bodies. 40 On the basis of the
information they receive, the Human Rights Committee holds interactive dialogues
with the reporting state. Once consideration of a state report has been concluded,
the Committee issues “concluding observations” which may state that violations of
the rights of minorities have taken place, urge state parties to desist from any
further infringements of the rights in question, or call on the respective
Governments to adopt measures to improve the situation.

UN Human Rights Complaints Procedures

Complaints against the violation of human rights, including minority-specific rights,
can be brought to the attention of the United Nations. They may be submitted by
an individual, a group or a State under a number of procedures, namely:

- The confidential “1503 Procedure”, which allows a working group of the
Sub-Commission on the Promotion and Protection of Human Rights, and ultimately
the Economic and Social Council, to receive communications pertaining to
situations that constitute a “consistent pattern of gross violations” of human rights,
including those of particular importance to minorities. Individuals or groups who
claim to be victims of violations, or a person or group of people with direct,
reliable knowledge of such violations (including NGOs) may submit
communications. 41

- Inter-state complaints can also be made, as exemplified under the ICCPR
Article 41 which provides for state-to-state complaints, if the state party has
recognized the competence of the Committee on Human Rights to receive and
consider such complaints. In this case, the Committee may consider
communications to the effect that a state party claims that another state party is
not respecting the rights set out in the Covenant, including Article 27.

- Several of the core human rights treaties enable individual
communications alleging violations of the instruments to be submitted to the
respective Committee. The Human Rights Committee receives individual
complaints on violations allegedly committed by a state party of the ICCPR of any
of the articles contained therein, including Article 27. The Convention on the
Elimination of Racial Discrimination also permits communications from individuals
or groups who claim to be victims of a violation of their rights as set out in the
Convention (and for state-to-state complaints under Article 11 of the
Convention). 42 Also CAT (monitoring the Convention against Torture) and CEDAW
are accompanied by individual complaints systems.

Further complaints procedures with relevance to minority protection are
established by the specialized agencies, in particular by the International Labour

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rights, with particular emphasis on the Human Rights Committee”, in Council of Europe
Publishing (ed.), Mechanisms for the implementation of minority rights, (ECMI/Council of
Europe, 2004), 30-32.
40 Ibid., 119.
41 For further information about how to submit communications, see Fact Sheet No. 7
titled “Communication Procedures”, 4-8.
42 While in place when in early 2007, and similar to uncertainties regarding UN special
procedures, the effects of the current reform of the UN human rights machinery on the
1503 procedure remain to be clarified.
43 So far, no State party has taken advantage of the procedure, which provides - unless the
matter has been settled in another way - for the appointment of a conciliation commission.
Organization (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

(c) Working Group on Minorities

In 1995, a five-member Working Group on Minorities (hereafter Working Group) was established by the Sub-Commission on the Promotion and Protection of Human Rights (then called Sub-Commission for the Prevention of Discrimination and the Protection of Minorities). The Working Group was initially constituted for a three-year period, in order to promote the rights as set out in the Declaration on rights of Minorities, and in particular to: review the promotion and practical realization of the Declaration; to examine possible solutions to problems involving minorities, including the promotion of mutual understanding between and among minorities and Governments; and to recommend further measures, as appropriate, for the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities.  

The Working Group is a forum for dialogue that has two interdependent objectives or goals. Firstly, the Working Group provides the framework within which Governments, minorities and scholars meet to discuss issues of concern and seek solutions to problems identified. This leads to greater awareness of the differing perspectives on minority issues and consequently, also to increased understanding and mutual tolerance among minorities and between minorities and Governments. Secondly, it acts as a mechanism for arriving at peaceful and constructive solutions to problems involving minorities and for the elucidation and elaboration of the principles contained in the Declaration.

The unique characteristic of the Working Group is the access of persons belonging to minorities and their representatives – the only such forum available for their direct interaction in the United Nations system. Minorities are represented, nominally as observers, but in practice the observers have full speaking rights and can submit proposals. Any representative of a minority group can be given accreditation to participate in the sessions, which are usually attended by some 60-70 NGOs and minority representatives. NGOs can attend irrespective of whether they have consultative status with the Economic and Social Council (ECOSOC). Participation in the sessions is also open to Government representatives, inter-governmental organizations and to scholars versed in the subject.

During its annual sessions, the Working Group focused on the meaning and application of the principles contained in the Declaration, the different measures adopted to enable persons belonging to minorities to enjoy their own culture, profess and practice their own religion and use their own language, the role of multicultural and intercultural education in fostering tolerance and understanding between various groups in society, the contribution of regional and other mechanisms, as well as national institutions and non-governmental organizations, to minority protection, conciliation and early-warning mechanisms to prevent the escalation of tensions and conflict, and the definition of a minority.

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48 For resolutions and reports concerning the Working Group, see:
The UN Working Group on Minorities held its 11th annual session in June 2005 during which changes to it were discussed, most significantly in the form of a cut in its duration from five to three working days, and of a change to its pre-sessional status to make it an inter-sessional Working Group of the Sub-Commission. The Sub-Commission held during the August session of the Working Group on Minorities, held in August 2006, general and specific situations concerning minorities from different regions of the world were raised, and a number of Governments provided information on best practices for addressing them. Various documents were presented and discussed, including the Minority Profile and Matrix, a workshop report on minorities and conflict prevention and resolution, a working paper offering guidance on “integration with diversity in policing, security and criminal justice,” and the recommendations of the HCNM of the OSCE on policing in multi-ethnic societies. Information on the new mandate of the independent expert on minority issues was presented by the mandate holder, Gay McDougall. In the light of Human Rights Council decision 2006/102, particular attention was focused on the future activities of the Working Group and cooperation with the independent expert. Section VII of the present report contains the recommendations adopted at the twelfth session, including a proposed two-year programme of work drawn up jointly by the Working Group and the independent expert, which would encompass the organization of a series of regional seminars on the application of integration with diversity in policing, security and criminal justice.

The continuation of the Working Group remains uncertain in the light of overall reform of the UN human rights machinery, which could result in the Sub-Commission evolving into a different advisory body to the Human Rights Council with repercussions for its Working Group.

(d) Special Procedures Mandates: Independent Expert on Minority Issues

The holders of Special Procedures mandates - established by the former UN Commission on Human Rights, and assumed by the new Human Rights Council - investigate and report on the human rights situation in specific countries, as well as on thematic issues. While there exist some 41 such ‘Special Rapporteurs’, ‘Special Representatives’ and ‘Independent Experts’ on a variety of themes, they have often indirectly through country visits and communications addressed concerns pertaining to the rights of persons belonging to minorities or confronted with violations of minority rights. It should be noted that the title of a special-procedures mandate does not reflect any hierarchy of powers, and that of primary consideration are the actual terms of the mandate as formulated. The conclusions and recommendations of these Special Rapporteurs are published and debated, bringing the issues they address to international attention and serving either as guidance for the Governments concerned, or as a means of pressure to ease or eliminate the problems which have been identified. Of particular relevance are the reports on countries where minority rights are not respected, often resulting in


49 See the latest report of the Working Group: A/HRC/Sub.1/58/19, from 24 August 2006. Pursuant to General Assembly resolution 60/251 of 15 March 2006 entitled “Human Rights Council”, all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, including the Sub-Commission, were assumed, as of 19 June 2006, by the Human Rights Council. For review the performance and effectiveness of the independent expert on minority issues and the Working Group on Minorities after two years and to report to the Commission on the matter, see http://www.ohchr.org/english/bodies/hrcouncil/4session/docs/A-HRC-4-109.doc.

50 For an overview of UN special procedures, see www.ohchr.org/english/bodies/chr/special/index.htm.
ethnic and religious tensions and inter-communal violence and those on thematic issues such as religious intolerance and racial discrimination.\textsuperscript{51}

The report of the High Commissioner for Human Rights on the rights of persons belonging to minorities, submitted to the sixtieth session of the Commission before the establishment of the independent expert’s mandate stated: ‘Numerous observers... are of the opinion that some challenges facing minorities have not been appropriately covered by existing mandates, for structural or functional reasons. As minority issues do not constitute the main focus of the existing mandates, inevitably the mandates are unable to reflect the full range of concerns relevant to minorities.’\textsuperscript{52}

In 2005, the first Special Procedure mandate dedicated to address minorities, the UN Independent Expert on minority issues, was established through Commission on Human Rights Resolution 2005/79.\textsuperscript{53} The first mandate-holder, Ms. Gay McDougall, was appointed in July 2005 by the United Nations High Commissioner for Human Rights, Ms. Louise Arbour. The mandate, as provided in the 2005/79 resolution, includes:

- promoting the implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, including through consultations with Governments, taking into account existing international standards and national legislation concerning minorities;
- the Office of the United Nations High Commissioner for Human Rights identifying best practices and possibilities for technical cooperation at the request of Governments;
- applying a gender perspective in one’s work;
- cooperating closely, while avoiding duplication, with existing relevant United Nations bodies, mandates and mechanisms, as well as regional organizations;
- taking into account the views of NGOs on matters pertaining to the mandate.

The Commission on Human Rights also requested the Independent Expert to submit annual reports on her activities, including recommendations for effective strategies for better implementation of rights of persons belonging to minorities. Since the abolition of the Commission on Human Rights in 2006, the mandates of special procedures have been assumed by the newly established Human Rights Council, which now reviews the reports of special procedures mandate-holders.\textsuperscript{54}

The Independent Expert is tasked with promoting the implementation of the 1992 UN Declaration the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (hereafter UN Declaration on the Rights of Minorities) in consultation with States, offering the opportunity for direct constructive engagement on minority issues in country situations. This function of direct consultation with Governments regarding minority issues is a particularly important method of work, which does not fall under the mandate of the (above-mentioned) Working Group on Minorities. In addition to the 1992 UN Declaration on the Rights of Minorities, the Independent Expert notes that her work is also informed by the

\textsuperscript{51} Such reports are submitted to the General Assembly, the Commission on Human Rights and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. They are available from the Document Section of the United Nations.

\textsuperscript{52} See UN. Doc. E/CN.4/2004/75.


rights guaranteed in all other United Nations human rights conventions that apply equally to members of minority groups, including Article 27 of the ICCPR, from which the Declaration was inspired, and Article 30 of the Convention on the Rights of the Child.

The Independent Expert signals in her initial annual report that her work benefits from other existing regional human and minority rights instruments and mechanisms including, for example, the Council of Europe’s 1995 Framework Convention for the Protection of National Minorities (FCNM). She also states a clear intention to collaborate with the Advisory Committee on the FCNM and the OSCE High Commissioner on National Minorities (HCNM), in order to benefit from their significant experience addressing minority issues in Europe, as well as relevant bodies in other regions.55 One of the primary benefits of the global mandate of the Independent Expert lies in the possibility of encouraging such a cross-regional sharing of experiences to inform minority situations in regions including Africa, Asia, Europe and Latin America. The Independent Expert has focused her initial work on certain thematic priorities, including poverty alleviation and the Millennium Development Goals of promoting social inclusion and ensuring stable societies, citizenship, access to quality education and the improving the situation of minority women. In conducting her work, the Independent Expert has early established that she would receive information from a variety of sources, conduct country visits at the invitation of states, and make communications directly to states.

One of the important tools available to the Independent Expert is the ability to conduct country visits at the invitation of states, thus enabling a direct engagement with these states to provide assistance and advice on the implementation of the 1992 Declaration on the Rights of Minorities. The Independent Expert undertook the first such official visits to Hungary in June 2006, and to Ethiopia in December 2006, and will report on these to the 43rd session of the Human Rights Council in March 2007.56 These are discussed during a session of the Human Rights Council, together with findings and recommendations of official visits submitted through mission reports.

Another component of the work methods of the Independent Expert is the practice of sending communications directly to states on specific minority issues. In her first annual report, the Independent Expert reflected two such communications sent in the early months of her appointment: one addressing the ethnic situation in Myanmar and one communication concerning the situation of minorities of Haitian decent in the Dominican Republic.57

The establishment of the mandate of the Independent Expert on minority issues offers significant potential for the work of the OHCHR and the broader UN system to focus greater attention on minority issues globally. Through dialogue with UN treaty bodies, collaborations with the Working Group on Minorities and UN agencies, identifying opportunities for technical cooperation by the OHCHR, and by reporting directly to the Human Rights Council, the mandate of the Independent Expert offers promising prospects for a truly constructive UN engagement on minority issues.58

58 For an account of the initial year of the work of the Independent Expert on minority issues, see Graham Fox and Erik Friberg, “The Minority Rights Activities of the UN
(e) Special Advisor to the Secretary-General on the Prevention of Genocide

On 7 April 2004, on the 10th anniversary of the 1994 Genocide in Rwanda, UN Secretary General Kofi Annan announced that he would be appointing a Special Advisor on the Prevention of Genocide, and launched an Action Plan to Prevent Genocide. The Five Point Action Plan includes 1) preventing armed conflict which usually provides the context for genocide, 2) protection of civilians in armed conflict including mandates for UN peacekeepers to protect civilians, 3) ending impunity through judicial action in both national and international courts, 4) information gathering and early warning through a UN Special Advisor for Genocide Prevention making recommendations to the UN Security Council, and 5) swift and decisive action along a continuum of steps, including military action.59 The Special Advisor on the Prevention of Genocide, Mr. Juan Mendez, was appointed on 12 June 2004, and given a mandate to act as an early-warning mechanism to the Secretary-General and the Security Council about potential situations that could develop into genocide, and to make recommendations to the Council about how the UN can prevent these events. As outlined by Mr. Mendez, his role is not to qualify situations to as whether or not they could be defined as genocide, but focus on preventive action and recommend measures.60 Since his appointment, Mr. Mendez has visited Sudan and Cote d’Ivoire, and issued a number of recommendations to the Security Council. However, he has not been able to directly address the Security Council in his own right, but has accompanied the UN High Commissioner for Human Rights, Ms. Louise Arbour. The work of the Special Advisor has been hampered by being only a part-time position, with limited human and other resources (he is assisted by one DPA staff and one OHCHR staff). An Advisory Committee was appointed in 2006 that developed proposals to reform the function and mandate of the Special Advisor, which included calls to elevate the position into a full-time position and to rename the title to the Special Advisor on the Responsibility to Protect. At the time of writing, it remained to be seen how the new Secretary-General, who took up his function on 1 January 2007 would act upon these recommendations and maintain or alter the position and mandate of the Special Advisor.

(f) UN Secretariat: Department of Political Affairs (DPA) and Department of Peacekeeping Operations (DPKO)

The Department of Political Affairs (DPA) follows political developments throughout the world and identifies potential conflicts. Part of the preventive work of this department is done through special representatives and envoys of the Secretary General, as well as field based missions and offices, which assist governments in building their capacity to govern. An example is the UN Electoral Assistance Division, which has provided help to more than 150 electoral processes. To assist in this role, a Policy Planning Unit was established in 1998. The Conflict Prevention Team is an internal mechanism of the Policy Planning Unit and provides an interdepartmental forum for the development of preventive options. As part of the implementation of the Brahimi Report and the 2005 Outcome Document of the World Summit, Kofi Annan has overseen the development of a Mediation Support

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59 UN Secretary General website: (www.un.org/sg/ ) For this press release, see Press Release SG/SM/9245

60 Cf. interview with Mr. Mendez, see http://sudanwatch.blogspot.com/2006/04/juan-mendez-un-special-adviser-on.html.
Unit to provide system-wide policy and analysis. The SG calls for more funds so that the DPA can more effectively coordinate and resource its preventive efforts.  

Relevant to the preventive deployment of troops and peace operations is the UN Department of Peace Keeping Operations. Three times in the past decade Peacekeeping Operations have been sent before violence has broken out: UNPREDEP - the UN Preventive Deployment Force in Macedonia, MINURCA - the UN Mission in the Central African Republic, and also others in Haiti. However, member states have been reluctant to expend political and financial capital before the outbreak of violence. The UN Secretary-General has often encouraged member states and the Security Council to deploy forces more often before the outbreak of violence, and to strengthen the capacity of peacekeeping operations in civilian policing with a conflict prevention role in the post-cold war conflicts.

2.2. The Organization for Security and Cooperation in Europe

A pan-European institution that has made significant contributions to the development of the protection of minorities is the Organization for Security and Cooperation in Europe (OSCE, previously Conference for Security and Cooperation in Europe, CSCE). Created in 1975 during the Cold War as a forum for communication regarding European security, the OSCE with its current 56 participating States (including European states, former Soviet Union republics, as well as Canada and the United States) is the largest intergovernmental security organization in the world. The OSCE never had a constitutive instrument or charter on human rights, but has rather gradually enlarged its structures and functions as political will has permitted, subject to the condition that all its decisions be based on a consensus of its member states. The OSCE has in this context, and during a relatively short period of time, developed a set of documents and institutions addressing human rights and minority rights.

2.2.1. OSCE Standards on Minority Protection

An important set of standards created by OSCE for the protection of persons belonging to minorities is enshrined in the Document produced at the 1990 Copenhagen Meeting of the Conference on the Human Dimension (hereafter ‘Copenhagen Document’). Besides the rule of law and other basic human rights provisions, the Copenhagen document laid down a detailed list of provisions for safeguarding minority rights. The Copenhagen Document introduced minority rights by a general statement on the right to persons belonging to minorities to ‘express, develop, and preserve’ their identity, the right to use the mother tongue in public, the right to establish specialized institutions of learning or culture, and the right to maintain contacts with members of the group residing in other states. Although the

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64 Document of the Copenhagen Meeting of the Conference on Human Dimension, June 29, 1990, 29 I.L.M. 1305 It should be noted that the OSCE’s term “human dimension” is the term for human rights and humanitarian issues, which it regards as one of several dimensions of comprehensive security.
Copenhagen Document is not a treaty, it has strong political significance due to its adoption by consensus of the OSCE participating states. Its political significance lies in the willingness of the OSCE states to accept that the protection afforded to national minorities in all the OSCE participating states is a legitimate concern for all. The Helsinki Final Act (1975), which constituted the original CSCE, also includes a duty to uphold international law and in this Act, for instance, is an extensive section on ‘Co-operation and Exchanges in the Field of Education’, which contains the following paragraph on minorities: “The participating states, recognizing the contribution that national minorities or regional cultures can make to co-operation among them in various fields of education, intend, when such minorities or cultures exist within their territory, to facilitate the contribution, taking into account the legitimate interests of their members.” Shortly thereafter, the OSCE heads of states issued the Charter of Paris for a New Europe, in which democracy is declared to be “the only system of government” of their states. With these documents, the OSCE significantly elaborated basic norms and political commitments for the treatment of minorities.

In order to implement these commitments, the CSCE states established three formal processes. The first two entailed the Vienna Mechanism of 1989 (which sets up an elaborate procedure for states to bring to the CSCE’s attention instances of violations of standards relating to human rights), and the Moscow Mechanism of 1991 (which allowed one country to invite a mission of experts to visit it, or, with the consent of all other states, required it to accept a mission). The third process, the so called Review Meetings of the Human Dimension, allows states to confer publicly and regularly to hear criticisms regarding their human rights practices. The formality of these mechanisms, including the variety of stages involved and the necessity for formal state-to-state accusations, had, however, limited their effectiveness in improving specific situations of minority related tensions. Unfortunately, neither of these mechanisms played any significant role in preventing bloodshed in the former Yugoslavia.

Beyond these processes, the OSCE instrument that has assumed the most significance in implementing the OSCE policies on minority issues in practice is the High Commissioner on National Minorities (HCNM), further elaborated upon below. The HCNM represents the most direct response created to fill the dual function of (indirectly) protecting human rights including the rights of persons belonging to minorities and providing an effective tool of conflict prevention. In terms of standard-setting, the HCNM has contributed to country-specific recommendations, but also an important series of five sets of thematic recommendations, with a view to assist and provide guidance to states. These authoritative sets of recommendations include the Hague Recommendations Regarding the Education Rights of National Minorities (October, 1996), the Oslo Recommendations Regarding the Linguistic Rights of National Minorities (February, 1998), the Lund Recommendations on the Effective Participation of national Minorities in Public Life (June, 1999), the Guidelines on the Use of Minority Languages in the Broadcast Media (October, 2003) and Recommendations on Policing in Multi-Ethnic Societies

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Those Recommendations, elaborated upon the various existing legal and other documents, provide clear guidance to states on how to implement OSCE commitments on minority protection.

2.2.2. The OSCE’s Primary Institution for the Protection of National Minorities: the HCNM

The OSCE High Commissioner on National Minorities (HCNM) was created at the 1992 Helsinki Meeting in response to the emergence of ethnic tensions and conflict in Europe, and in particular the break-up of Yugoslavia. The HCNM is tasked to serve as an “instrument of conflict prevention at the earliest possible stage.” The HCNM’s main function is to identify and seek early resolution of tensions involving national minority issues that in his judgment might endanger peace, stability or friendly relations between OSCE member states.

The HCNM was established as an instrument of conflict prevention under the politico-military dimension, and therefore does not form part of the human rights pillar of the OSCE which made the consensus in the negotiations on its establishment possible and created the High Commissioner on National Minorities, not for minorities. Therefore, his function is rather to operate from the security approach in the interest of the OSCE member states, and in the interest of minority and majority groups alike. By this method of work, the HCNM has been able to significantly contribute to minority protection within the OSCE area.

In the mandate it is stated that the post of the HCNM should be taken by an eminent person with long-standing international experience. The first High Commissioner, Mr. Max van der Stoel, former Minister of Foreign Affairs of the Netherlands, was appointed on 15 December 1992 and served until 1 July 2001. The current HCNM is Swedish diplomat Rolf Ekéus who was re-appointed for a second period, i.e. until 1 July 2007.

From the beginning of his mandate, the work of the HCNM has involved hundreds of visits throughout Eastern and South Eastern Europe and the former Soviet Union, and thousands of pages of written communications with

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72 The HCNM has still benefited from referring to the standards in the OSCE ‘human dimension’ commitments involving minority protection. The HCNM also regularly participates at the annual Human Dimension Intergovernmental Meetings.
73 Helsinki Decisions para. II.8.
Governments, non-state actors, and international organizations—with impact and effectiveness sometimes very hard to measure.\textsuperscript{74}

\textit{An Overview of the HCNM’s Mandate and Function}

The HCNM’s overall function is conflict prevention, the prevention of the acute escalation of inter-communal tensions, and, looking to the longer term, helping to set in motion a process of dialogue between the government and minority that will address the long term relationship between them and deal with the root causes of the tensions.\textsuperscript{75} The HCNM also keeps a watch on those states within Europe where the problem of minorities could interact and lead to inter-state tensions.\textsuperscript{76}

With regard to the working procedures of the HCNM, the mandate states that first, the HCNM collects information regarding national minority issues, by “obtaining first-hand information from all parties directly involved”.\textsuperscript{77} Reports from those concerned to the HCNM should be in a written format, including the name and address of the sender and should include a factual description of the situation and draw on events that have taken place in the twelve months preceding the report.\textsuperscript{78}

Concerned parties include Governments and their subordinate departments, as well as representatives of associations and non-governmental organizations of national minorities.\textsuperscript{79} Based upon the information obtained, the HCNM should, as early as possible, assess the situation by visiting any participating State in order to gather information and the participating State must ensure “free travel and communication”. In the case that permission to enter the country has been denied, the HCNM is to inform the Committee of Senior Officials (CSO; presently the Permanent Council (PC) handles this task). If the HCNM comes to the conclusion that there exists a “prima facie risk of potential conflict […] he/she may issue an early warning,” which is then dealt with by the CSO (at present the PC). After the CSO has given its attention to a conflict, the mandate states that further intervention by the HCNM depends on the findings, as well as a specific mandate from the CSO.\textsuperscript{80} In the countries where he is involved, the HCNM may discuss the questions with the parties and then, where appropriate “promote dialogue, confidence and co-operation between them”.\textsuperscript{81} According to the


\textsuperscript{76} Max van der Stoel, The Role of the OSCE in Conflict prevention, (focus on areas where kin state has interest in minorities in another state), See: http://www.osce.org/inst/hcnm/index.html.


mandate, the CSO can formally empower the HCNM to take “early action”. However, under the first High Commissioner, only one formal warning was issued and these mandated procedures were largely by-passed due to creative and pro-active engagement of the High Commissioner.

The work of the HCNM is mainly conducted through quiet diplomacy. Certain parts of his work have been published, but beyond these published materials, the HCNM works in many other aspects. The work includes on-going personal dialogues with various interlocutors at seminars and round tables conducted behind closed doors, through confidential exchanges of correspondence, in his periodic reports to the Chairperson-in-Office and the Permanent Council of the OSCE, and in exchanges with inter-governmental organizations and in consultations with independent experts (linguists, jurists, pedagogues, political scientists, philosophers, sociologists, etc.). Formal exchanges of letters with governments and General Recommendations have been the most efficient way of dealing with a minority tension. This technique of formal written dialogue has become a principal element of the HCNM’s method. The exchanges of letters, many of which have been made public, is normally followed by direct personal contact in the form of visits, telephone conversations etc. They explain the detailed analysis, generally legal in nature, which the HCNM applies to situations, and the possible political solutions, guided by applicable international norms and that fall within parameters of specific standards. The HCNM’s function is not being an advocate for either minorities or for the state. In reality his role is to act as mediator between the government and minority group.

The areas of tension in which the HCNM might be involved vary, and have often included citizenship, the use of language, and education. In practice, when dealing with ‘tensions’ the HCNM first assesses whether he can play some sort of useful role. When this is the case, the HCNM gradually seeks to increase his involvement, including through regular visits to the country. He contacts Government leaders in the executive and legislative branches, representatives of minorities and others involved in the issue. The HCNM also consults with other organizations or states that may be following the situation, including the kin state of the relevant minority. The HCNM then takes a more active role by proposing

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86 Some situations, for instance, prove ill-suited for his intervention because other actors are concurrently investing efforts in the conflict as in Cyprus, for instance, where the United Nations has the leading role in peacemaking process. Involvement may also be inappropriate if the dispute may have reached a point where his sorts of tools are not likely to make a difference, as the conflicts in Bosnia-Herzegovina and Kosovo. His mandate also prohibits him from intervening in “situations involving organized acts of terrorism,” language added at the behest of the United Kingdom and Turkey to keep the office out of the affairs of Northern Ireland and Kurdistan, respectively. See also the Mandate of the OSCE High Commissioner on National Minorities: http://www.osce.org/documents/mcs/1992/07/4046_en.pdf.
concrete steps that might help the government and the minority group find agreement on the issues. This involves working with legislators (to draft statutes) and with the administrators (to prepare and implement regulations), in coordination with the minority group whose concerns are at stake.\footnote{See Rianne Letschert, \textit{The Impact of minority Rights Mechanisms}, (T.M.C. Asser Press, The Hague, 2005), 87. See also the Mandate of the OSCE High Commissioner on National Minorities: http://www.osce.org/documents/mcs/1992/07/4046_en.pdf.}

The High Commissioner engages in this conflict prevention role within an institutional framework. He serves as a permanent mechanism of the OSCE, with a staff of some 25 international civil servants. His ability to work with governments and minorities may be influenced by their views of the OSCE, and he often needs the OSCE to support his actions. The OSCE as an organization can support him through diplomacy by its Chairman-in-Office, statements of support by the Permanent Council or members of it, information-gathering and follow-up work by OSCE Missions in various states, and projects by other OSCE institutions. Nonetheless, the High Commissioner remains, in many ways, a free agent in terms of the issues he wishes to pursue. He need only report his activities to the Chairman-in-Office of the OSCE, rather than to the entire Permanent Council.\footnote{See The Mandate of the OSCE High Commissioner on National Minorities:, http://www.osce.org/documents/mcs/1992/07/4046_en.pdf}

Concerning international norms and the HCNM’s mandate, the OSCE states did not create his position in order to implement international norms concerning minorities. At the 1992 Helsinki Meeting, the mandate made it clear that the High Commissioner served, first and foremost, as a mechanism for conflict prevention, rather than as part of the OSCE’s “human dimension.”\footnote{Idem. Para. 2.} Nevertheless, from the beginning of his term of office, the first High Commissioner has made the international norms a central part of his strategy to resolve early conflicts.\footnote{Other human dimension commitments, such as those concerning the building of democratic institutions—in the area of elections and the rule of law—became the responsibility of the Warsaw-based Office for Democratic Institutions and Human Rights. See also Rianne Letschert, \textit{The Impact of minority Rights Mechanisms}, (T.M.C. Asser Press, The Hague, 2005), 87-88.}

The norms of the OSCE, the Council of Europe, and the United Nations have provided both a starting point for many of his interventions and a continued reference point during the discussions. Furthermore, all OSCE participating States have bound themselves to respect not only express OSCE commitments, but all relevant international law irrespective of its source.\footnote{John Packer, “The protection of Minority Language Rights through the Work of OSCE Institutions”, in Snezana Trifunovska (Ed.), \textit{Minority Rights in Europe: European Minorities and Languages}, (The Hague, T.M.C. Asser Press, 2000), 255: Helsinki Final Act, signed 1975 by the Heads of State or Government of the then 35 participating states, there all those have committed to “fulfil in good faith their obligations under international law, both those obligations arising from the generally recognized principles and rules of international law and those obligations arising from treaties or other agreements, in conformity with international law, to which they are parties”.} In short, the HCNM uses norms to achieve solutions, and seeks solutions consistent with norms. Of course, securing implementation of international law forms only part of the task of the HCNM. And implementation of those standards is hardly enough to prevent a conflict. One side in a conflict may, for instance, ask for more than the norms require, even if those norms do not prohibit what they are seeking, or a tense situation may not really concern norms at all, but dialogue or political cooperation between different groups.\footnote{See Steven Ratner, “Does International Law Matter in Preventing Ethnic Conflict“, 32(3) New York University Journal of International Law and Politics (2000): 591-698, See also:} The process by which the HCNM has employed norms to
get parties to reach agreements by respecting those norms reveals potential causal paths by which norms can affect the behaviour of relevant actors. In this context, Steven Ratner presents five principal methods that the HCNM has employed for integrating norms into conflict resolution—(1) translation of norms; (2) elevation of norms; (3) mobilization of support for outcomes consistent with norms; (4) development of norms; and (5) dissemination of norms. The process of implementing the norms has been one of the HCNM’s major strategies in dealing with inter-ethnic tensions, resulting in Ratner labelling the HCNM’s engagement as that of a ‘normative intermediary’, assisting to translate standards into concrete policy options.

2.3. The Council of Europe

The Council of Europe (hereinafter CoE) is a regional intergovernmental organization created in 1950 to promote democracy and human rights, and is based in Strasbourg, France. In the early 1990s, the CoE also welcomed as members most of the states of the former East Bloc, and currently has 46 members. At the basis of the Council’s raison d’être is the creation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), to which all the Member States of the CoE must be a party. The Convention includes provisions for the binding resolution of individual complaints by the European Court of Human Rights, which has repeatedly and successfully through judicial proceedings influenced states to rectify various human rights violations, including those faced by minorities. Similar to the UN, the CoE preferred a human rights based approach, elaborating rights pertaining to all without particular attention to minorities, with determinations through formal bodies basing their decisions on the ECHR. In 1991-1992, following the issuance of the OSCE’s Copenhagen Document, one of the CoE’s organs, the Parliamentary Assembly (PACE), pressured the CoE’s governing body, the Committee of Ministers, to authorize the preparation of a new treaty on minorities. The result was the 1995 CoE Framework Convention for the Protection of National Minorities. This legally binding treaty builds upon the politically binding Copenhagen Document by containing important innovations regarding substantive protection of minorities, including the use of names, education, and public media. As for monitoring the implementation of these commitments, the CoE Committee of Ministers is assisted by an Advisory Committee consisting of independent experts.

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94 States Parties to the European Convention on Human Rights are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine, the United Kingdom of Great Britain and Northern Ireland.
who consider cycles of State reports and undertake country visits in this process. Other relevant CoE bodies adopting a formal treaty-centred or State reporting approach include the European Charter on Regional and Minority Languages (ECRML) and the European Commission against Racism and Intolerance (ECRI). While not specifically discussed, the CoE Commissioner for Human Rights is also increasingly addressing issues relevant to minority protection in his country visits and thematic reporting.95

2.3.1. Minority Rights under the European Convention on Human Rights and Fundamental Freedoms and European Court on Human Rights

The European Convention on Human Rights and Fundamental Freedoms (hereinafter, ECHR) entered into force in 1953, marking the first regional human rights system. The ECHR as an international treaty sets out rights for the benefit of persons within the CoE region, and has been updated several times through a series of protocols. Persons claiming to be the victim of a violation of these rights by a state party to the treaty may submit a complaint for redress to the European Court of Human Rights (hereinafter, ECtHR). The ECHR does not contain any specific provisions on minority protection and consequently, there is no direct way for members of minority groups to claim minority rights before the ECtHR. Nevertheless, the rights to equal treatment and non-discrimination reflect many minority concerns and a number of rights guaranteed by the ECHR are relevant to minorities. Applications for redress under the ECHR have resulted in significant legally binding judgments and precedents with regard to minority protection.96 While the ECtHR has thus contributed to minority protection in CoE States, presently the only specific reference to minorities in ECHR is in Article 14:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Even though there is no definition of “national minority”, it is contrary to the ECHR to treat “any person, non-governmental organization or group of individuals” in a discriminatory fashion with respect to one of the listed grounds without reasonable and objective justification. Article 14 is not a free-standing right to non-discrimination, and it may be raised only in connection with the alleged violation of another right of ECHR. However, the new Protocol 12 to the ECHR, which was opened for ratification in November 2000 and entered into force in 2005, created a general prohibition against discrimination in the application of any rights guaranteed by law or by any public authority.97 Discrimination is not limited only to those cases in which a person or group is treated worse than another similar group. It may also be discrimination to treat different groups alike: in the case of Thlimennos against Greece, it was clear that

95 For information on the Commissioner on Human Rights, see http://www.coe.int/t/commissioner/default_EN.
96 For a compilation of ECtHR jurisprudence relevant to minority protection, see Marc Weller and Alcidia Moucheboeuf (eds.), Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies, ECMI and University of Cambridge (forthcoming, draft on hold with author).
treating a minority and a majority alike may amount to discrimination against the minority.\textsuperscript{98} Also, the ECtHR has held that if a state takes positive measures to enhance the status of a minority group (for example, with respect to their participation in the democratic process), the majority can not claim discrimination based on such measures. In general, “a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position”.\textsuperscript{99}

A large number of cases under the ECHR have dealt with linguistic rights, but the Strasbourg institutions have consistently held that there is no right to use a particular language in contacts with government authorities. In the context of judicial proceedings, however, everyone has the right to be informed promptly, in a language he/she understands, of the reasons for arrest (Article 5.2) and the nature of any criminal charges (Article 6.3.a). There is also a right to a free interpreter if a defendant cannot speak or understand the language used in court (Article 6.3.e). The use of a minority language in private or among members of a minority group is, however, protected by the right to freedom of expression guaranteed under Article 10. Thus, minorities have a right to publish their own newspapers or use other media, without interference by the state or others. The state must allow the minority group free expression, even if this calls into question the political structure of the state.

Another means of protecting the minority’s identity is through the education of children (Article 2, Protocol 1) belonging to the group. However, there is no right to mother-tongue education under the ECHR, unless it previously existed and the state then tries to withdraw it. Refusing to approve schoolbooks written in the minority’s kin-state might be a breach of the right to freedom of expression. Even when the books might give the kin-state’s view of history and culture, the government must “show that the undisputed censorship or blocking of the books was done in accordance with law and pursued a legitimate aim, such as the prevention of disorder. It would then be for the respondent government to show that the censorship measures were necessary in a democratic society”.\textsuperscript{100}

The individual right to freedom of religion (Article 9) includes the right to manifest that religion, which allows a minority the necessary degree of control over community religious matters. The ECtHR has held that the state must not interfere in the internal affairs of the church: “freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it”.\textsuperscript{101} The state may limit manifestation of a minority’s religion only for reasonable and objective reasons. Furthermore: “where the organization of the religious community is at issue, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in this perspective, the believer’s right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary state intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection, which Article 9 affords. It directly concerns not only the organization of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members.”\textsuperscript{102}

\textsuperscript{98} ECtHR, Thlimmenos v. Greece, judgment of 6 March 2000.
\textsuperscript{100} Ibid.
\textsuperscript{101} Ibid.
\textsuperscript{102} Ibid.
Minority groups need to be able to participate effectively in cultural, religious, social, economic and public life (Article 11 and Protocol 1, Article 3). Formal or de facto exclusion from participation in the political processes of the State is contrary to the democratic principles that the CoE espouses. It is the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way a state is organized, provided that they do not undermine democracy or human rights.

According to the ECtHR, “a minority group is in principle entitled to claim the right to respect for the particular lifestyle it may lead as being ‘private life’, ‘family life’ or ‘home’” under Article 8 of the Convention. Several cases involving the Roma and the indigenous peoples of northern Europe have sought to raise such a claim, although no such application has yet succeeded.

The European Court on Human Rights Mechanism

While previously functioning as a Commission meeting in periodic sessions, in 1998 the European Court of Human Rights became the first permanent regional human rights court in the world. The right of individual petition has been inherent to the Convention system since 1998, and all of the Court’s judgments are legally binding on state parties. This section provides an overview of the complaints procedure and process.

The Court is divided into five sections; two of the sections are presided over by the Vice-Presidents of the Court and the three others are presided over by the Section President. Each section contains chambers of seven judges. The Grand Chamber of the Court is composed of 17 judges, who include, as ex officio members, the President, Vice-Presidents and Section Presidents. The judges of the Court are elected by the Parliamentary Assembly of the Council of Europe for renewable six-year terms. The execution of the Court’s judgments is overseen by the Committee of Ministers, which has the authority to suspend or expel a state from the Council of Europe if the state does not comply with a Court judgment.

Admissibility Requirements

The ECtHR can receive complaints from persons (or organizations) claiming that their rights under the Convention and its protocols have been violated. If a group or organization lodges a complaint, it must still fulfill the “victim” requirement. Trade unions, companies, religious bodies, political parties, and the inhabitants of a town have been found to fulfill the “victim” requirement in cases brought to Strasbourg. When members of a group or association are the victims, it may be advisable to lodge both an individual and a group complaint. Should the group complaint fail the admissibility test, the case may succeed on the individual complaint. A group need not be formally registered or recognized by the state in order to bring a claim to Strasbourg. Moreover, when lack of recognition results in

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103 Texts of the ECtHR’s jurisprudence and additional information about the Court may be found on its website: http://www.echr.coe.int. See also “Notes for the guidance of persons wishing to apply to the European Court of Human Rights” at: http://www.echr.coe.int/NoticesForApplicants/Noticeeeng.htm.
104 The primary publication containing the ECHR, Rules of Procedure of the ECtHR and other information is European Convention on Human Rights: Collected Texts, published by the Council of Europe. Individual decisions and judgements of the ECtHR are collected in Reports of Judgements and Decisions, available from the CoE. The CoE also publishes an annual Yearbook of the European Convention on Human Rights, which contains a selection of the most important cases and information on the ECHR’s application in domestic law.
a denial of access to domestic courts and prevents a minority group acting to defend its rights, it may amount to a denial of fair trial or an effective remedy (Articles 6 and 13, respectively) that could be challenged under the Convention.\textsuperscript{106}

The Court can deal with complaints relating to the rights listed in the ECHR and protocols. It is not a court of appeal from national courts and can not annual or modify their decisions.\textsuperscript{107}

The Court can only receive complaints involving states that have ratified the ECHR, and it can only deal with complaints about events which have occurred since the ratification. It can only hear complaints about matters which are the responsibility of a public authority (legislature, administration, armed forces, police forces, courts of law, etc.). It can not deal with complaints against private individuals or private organizations.\textsuperscript{108} The ECHR protects everyone and the nationality of the applicant is not important. An application and claims may also be made by stateless persons, which is significant given that this condition is disproportionately experienced by minorities. An application may be brought if action by one state may result in a violation of rights in another state, even if the latter is not a party to the ECHR. The most common example of this situation is when a person seeks to prevent deportation or extradition to a state in which there is a danger of torture or death.

Other procedural provisions include that before an individual can submit a compliant, she or he must have exhausted all domestic (legal or administrative) remedies of the state that is claimed to be in breach of the ECHR, before addressing a compliant to the ECtHR. After decision of the highest competent national court or authority has been given, there is a six month period within which an application may be made by the ECtHR. If the compliant relates to a court conviction or sentence, this period runs from the final court decision in the ordinary appeal process and not from the date of any other later refusal to re-open the case. If the details of the compliant are not submitted within six months, the ECtHR will not examine the case.\textsuperscript{109}

\textit{Filing an Application}

To lodge a case successfully with the ECtHR, an applicant has to fulfill certain admissibility criteria. Most complaints are dismissed at the admissibility stage. Since a complaint cannot be lodged twice on the same facts, it is necessary that the complaint meets the criteria on the first application. When an applicant is

\textsuperscript{106} To file a case under the ECHR, the complainant must have suffered personally from the alleged violation. This might be as a direct result of State action, for example, if the applicant personally suffered treatment amounting to torture or an interference with his/her right to religious freedom. Violations may also cause personal harm to the relatives of those whose rights have been directly violated. The relatives need not be the direct victims of the abuse, but can still qualify as indirect victims of a violation. For example, parents can claim if their child has been tortured. Potential victims also may file a case in some circumstances. The ECtHR has accepted the argument that an applicant is a “victim” if there is a risk of being directly affected by a State action. However, the applicant must show that there is real personal risk of being a victim in the future, not just a theoretical possibility. The ECtHR may grant priority to urgent cases, but this is very rare. The ECtHR also may propose interim measures when there is an imminent, real, and serious risk to the life of the applicant. The ECtHR can request that the State either refrain from the potentially harmful actions or undertake other actions to protect the applicant. States are not obliged to comply, but they generally do. The measures sought and the reasons for seeking them must be indicated on the application form.

\textsuperscript{107} Fernand de Varennes, “Using the European Court of Human Rights to Protect the Rights of Minorities”, 85.

\textsuperscript{108} Ibid.

\textsuperscript{109} Ibid.
ready to proceed with a complainant, the ECtHR’s own application form must be completed and returned to the ECtHR. Besides the personal details of the applicant and his or her legal representative, the ECtHR requires: (i) a detailed account of the facts, (ii) detailed submissions on the ECHR rights allegedly violated, (iii) evidence of the remedies already sought at the national level, including dates and details of judgments and, (iv) the remedy sought from the ECtHR. Copies of all supporting documents must be included with the application. The ECtHR cannot accept anonymous complaints; the name of the applicant cannot be kept from the state. The proceedings of the ECtHR are public, although confidentiality may be maintained in appropriate cases by referring to an applicant only by initials. States have an obligation not to obstruct the application and to cooperate with the ECtHR in its investigation.

There will be a reply from the Register, who may ask for more information or documents or for further explanation of the complaint. There may be an indication of how the ECHR has previously been interpreted in similar cases. If it seems that there is an obvious obstacle to the complaint, the complainant may be advised of this. If a complaint can be registered as an application and the complainant accepts that this can be done, the Registrar will send the necessary document on which to submit the formal application. After this has been completed, it will be brought to the ECtHR. Complainants will be informed by the Registrar of the progress of the case. The proceedings are in writing at the initial stage. A lawyer can be instructed by the complainant to present the case. At a later stage in the proceedings, if a complainant has insufficient means to pay a lawyer’s fees, she or he may be eligible for free legal aid.

Investigation and Decision

Not every application will necessarily make it to the ECtHR. Each application is subjected to a preliminary examination of the case, and a rapporteur decides whether it should be dealt with by a three-member committee or by a chamber of the ECtHR. A committee may decide for example, by unanimous vote, that the application does not involve any right or freedom contained in the ECHR, or that it does not comply with the time requirements, and declare it inadmissible.

If admissible, the matter will then proceed to one of the chambers. Their decisions, which are made public, may conclude by majority vote that the application is inadmissible, or rule on the merits. Once a chamber has decided to admit an application, parties can be invited to present further evidence and written observations. There may be an exchange of written pleas on both admissibility issues and on the substantive merits of an application. Each party can comment on the submissions made by the other party. The ECtHR examines the merits of the case through these written arguments, although the ECtHR may hold an oral hearing on admissibility or the merits or both (again, each side is represented at any hearings, and the entire procedure is based on equality between the applicant and the government involved). The ECtHR may also hear witnesses or even travel to the country concerned if it is deemed necessary. In that case, NGOs may be asked to provide expert evidence or to appear as witnesses, and minority-rights advocates have the possibility of submitting an amicus curiae brief to the ECtHR if a case is of particular concern. This procedure is called a “third-party intervention” and may be sought once a case has been declared admissible. It offers the possibility of providing useful information to the Court on

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110 All communication with the ECtHR should be sent to: The Registrar, European Court on Human Rights, Council of Europe, F-67075 Strasbourg CEDEX France. Information on the procedures and its decisions can be found at http://www.ECHR.coe.int/.

111 Fernand de Varennes, “Using the European Court of Human Rights to Protect the Rights of Minorities”, 86.
an issue that may have a direct impact on minority rights beyond the scope of the particular case at hand. An NGO interested in intervening can write to the President of the ECtHR for permission to intervene in a case. It is also possible for a chamber to hold a hearing on the merits of the case, though it is not obliged to do so, if none has been held at the admissibility stage.

The ECtHR does not reverse any decisions made by national courts. It can however indicate if there is a violation of the law, what this solution is, and even describe what should be done to correct that specific violation from continuing. It can also order a government to pay compensation to individuals whose rights have not been respected. However, the responsibility for supervising the execution of judgments of the ECtHR is under the Committee of Ministers of the CoE. The Committee of Ministers will check whether governments have taken the measures set forth in the Court’s judgments.

The ECtHR has considered over 40,000 individual cases and approximately 20 interstate cases, and its jurisprudence is large. The number of cases the ECtHR hears has greatly increased in the last 10 years. The ECtHR receives approximately 200 international phone calls and almost 1000 letters a day, and has a busy workload. All this means that the cases submitted to the ECtHR can take a long time before a final judgment is handed down. It should be pointed out that most of the complaints it receives are rejected because they do not deal with rights guaranteed under the ECHR and are therefore declared inadmissible, or because there was a friendly settlement of the dispute.

The chamber decides by a majority vote. There is no right of appeal after a judgment is handed down. These judgments can be appealed (with three months of delivery) to the Grand chamber of 17 judges only when the case involves a serious issue of general importance or a question affecting the interpretation or application of the ECHR. The request is examined by a panel of the grand Chamber made up of five judges: The President of the ECtHR, the Section Presidents (excluding the Section President of the original chamber that gave judgment) and another judge who was not a member of the original chamber. If the panel accepts the request, the Grand Chamber will issue a final judgment by a majority vote.\textsuperscript{112}

The ECtHR deliberates in private, but its judgment is public and is communicated immediately to both parties. The ECtHR has limited its judgments to determining whether or not there has been a violation of the ECHR and awarding monetary damages and costs when a violation is found. The Court does not issue orders to governments, e.g., to release a prisoner, change its laws, or institute criminal proceedings against those guilty of violating a person’s rights. As noted above, the Court’s judgment is legally binding on states. Ensuring compliance with a decision of the Court is a matter for the Committee of Ministers under Article 46.2 of the ECHR, although the great majority of states readily comply with the ECtHR’s judgments.

\textit{Conclusion}

The above summary suggests ways in which the ECHR can protect minority rights, but it should be kept in mind that this is not the primary task of the Convention. In many respects, the ECHR addresses a fairly narrow range of rights. There is a risk that, if a minority group tries to assert “minority rights” \textit{per se}, the claim might be dismissed as beyond the scope of the ECHR and may therefore be considered “manifestly ill-founded” and thus declared inadmissible. Furthermore, even when a violation is found, it is still up to the state involved to provide remedies beyond damages, such as amending an offending piece of legislation. The ECtHR does not act as an appellate court from domestic decisions. It will only consider whether or

\textsuperscript{112} Ibid.
not a state has fulfilled its obligations under the ECHR, not whether it might have adopted different or even better policies. At the same time, however, the Strasbourg system is perhaps the most legally powerful mechanism for protecting human rights in the world. It resembles a domestic court proceeding in both its sophistication and in the equality it maintains between the parties involved.\textsuperscript{113} It is unlikely to be the first forum to which a minority group may turn, and it cannot consider the general situation of minority rights within a country. Nevertheless, it should be considered a potentially useful tool under the right circumstances.\textsuperscript{114}

2.3.2. Minority Rights under the Framework Convention for the Protection of National Minorities

The Council of Europe’s (CoE) Framework Convention for the Protection of National Minorities, (hereinafter, the Framework Convention), is the first legally binding, multilateral instrument devoted to the protection of minorities within CoE Member States, and is regarded as providing the most comprehensive international standards in the field of minority rights to date. Parties to the Framework Convention undertake to promote the full and effective equality of persons belonging to minorities in all areas of economic, social, political and cultural life together with the conditions that will allow them to express, preserve and develop their culture and to retain their identity.\textsuperscript{115} The Framework Convention builds upon the 1990 Copenhagen Document of the OSCE by containing important innovations regarding substantive provisions for minorities, including the rights to self-identification, religious belief and practice, access to media, use of minority languages, use of minority names, learning of and in the mother tongue, effective participation in cultural, social and economic life and in public affairs. To a large extent, the Framework Convention transformed the political commitments of the OSCE Copenhagen Document into legal obligations. The Framework Convention was adopted by the Committee of Ministers of the Council of Europe in 1994 and entered into force in 1998. The Committee of Ministers is tasked to monitor the implementation of the Framework Convention, with the assistance of the Advisory Committee composed of independent expert members.\textsuperscript{116}


\textsuperscript{114} See Pamphlet no. 7 of the UN Guide for Minorities: “Minority rights under the European convention on human rights”. The Pamphlet is referring to the primary publication containing the European Convention, Rules of Procedure of the Court and other information is European Convention on Human Rights: Collected Texts, published by the Council of Europe. Individual decisions and judgements of the Court are issued in soft-cover format when they appear and are collected in Reports of Judgements and Decisions, both of which are available from the Council of Europe. The Council of Europe also publishes an annual Yearbook of the European Convention on Human Rights, which contains a selection of the most important cases and information on the Convention’s application in domestic law. A great number of books have been written on the Strasbourg system concerning both specific rights and the system as a whole.

\textsuperscript{115} Articles 4 and 5 of the Framework Convention. The text of the Framework Convention is published on the CoE website: www.coe.int.

\textsuperscript{116} See Resolution 97/10 of the Committee of Ministers of the Council of Europe, Rules Adopted by the Committee of Ministers on the Monitoring Arrangements Under Articles 24 to 26 of the Framework Convention (Sept. 17, 1997), http://www.coe.fr/cm/ta/res/1997/97x10.html.
As of December 2006, the Framework Convention has been ratified by 39 states. The Framework Convention may be ratified by Member States of the Council of Europe, and non-Member States may join at the invitation of the Committee of Ministers. Accession to the Convention is obligatory, at least politically, for states that apply for membership in the Council of Europe. The word “framework” in the instrument highlights a quite wide margin of appreciation for states to translate this convention’s provisions to their contextual situation in a specific country. Programmatic provisions often contain qualifying phrases such as “substantial numbers”, “a real need”, “where appropriate”, and “as far as possible,” giving the state parties certain flexibility when they implement the Framework Convention through national legislation and appropriate governmental policies. The Framework Convention is thus largely created as a series of state obligations rather than as a detailed list of rights of persons belonging to national minorities. However, this state flexibility does not release states from their legal obligation to implement the Convention's provisions over time.

Two of the key principles contained in the Convention are Article 1, which states that the protection of national minorities is an integral part of the protection of human rights, and Article 22, which specifies that the Convention may not be used to reduce other existing standards of protection. Since the Convention was intended as an addition to existing human and minority rights protections, it must be read to complement other human rights instruments, including the CoE European Convention on Human Rights.

(a) The Normative Provisions of the Framework Convention

The substantive provisions of the Convention cover a wide range of issues, and many of these provisions may require that States adopt special measures, which explicitly should not be regarded as discrimination. The critical issue of the scope of application of the Convention is addressed in Article, and is elaborated upon later in this sub-chapter. The main substantive provisions include legal binding agreements of States to:

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117 As of December 2006, the Framework Convention had been ratified by 39 states: Albania, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Georgia, Germany, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Ukraine, the United Kingdom of Great Britain and Northern Ireland and Montenegro. The four states that have signed but not ratified the Framework Convention are Belgium, Greece, Iceland, and Luxembourg.


119 Article 4.1 of the Convention proclaims the fundamental principles of non-discrimination and equality. Article 4.2 makes it clear that a State’s obligations may also require affirmative action on the part of the government and not merely abstention from discrimination. States are to adopt, “where necessary”, measures to promote “full and effective equality between persons belonging to a national minority and those belonging to the majority” taking “due account of the specific conditions” of national minorities. Article 4.2 is a key provision, since it provides the basis for the succeeding provisions that spell out in greater detail the measures that States should take in specific areas. Article 4.3 clarifies that any measures taken to promote effective equality are not to be considered as discrimination themselves.
• promote the conditions necessary for minorities to maintain and develop their culture and identity (Article 5);
• encourage tolerance, mutual respect, and understanding among all persons living on their territory (Article 6);
• protect the rights to freedom of assembly, association, expression, thought, conscience, and religion (Articles 7, 8, and 9);
• facilitate access to mainstream media and promote the creation and use of minority media (Article 9);
• recognize the right to use a minority language in private and in public and display information in the minority language (Articles 10 and 11);
• officially recognize surnames and first names in the minority language (Article 11);
• “endeavour to ensure” the right to use the minority language before administrative authorities and to display bilingual topographical indications in the minority language in areas inhabited by national minorities “traditionally” or “in substantial numbers” (Articles 10 and 11);
• foster knowledge of the culture, history, language, and religion of both the majority and minorities (Article 12);
• recognize the rights of minorities to set up and manage their own educational establishments and to learn their own language (Articles 13 and 14);
• “endeavour to ensure” that there are adequate opportunities to be taught in the minority language, in areas traditionally inhabited by national minorities or where they live in “substantial numbers” (Article 14);
• “create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life, and in public affairs, in particular those affecting them” (Article 15);
• refrain from measures that alter the proportions of the population in areas inhabited by minorities (Article 16);
• not interfere with the right to maintain contacts across frontiers and to participate in the activities of national and international NGOs (Article 17).

(b) Monitoring System under the Framework Convention

According to Articles 24 and 26 of the Framework Convention, the Committee of Ministers, assisted by the Advisory Committee, is entrusted with evaluating the implementation of the Framework Convention. The monitoring is based on the obligation that state parties, as required in Article 25 of the Framework Convention, submit a report giving full information on legislative and other measures taken to give effect to the instruments’ provisions, within one year of its entry into force for the respective state party. Further reports are due in cycles of five year intervals, and in addition, whenever the Committee of Ministers requests them. Article 26 of the Framework Convention mandates that the Committee of Ministers determine the rules concerning the composition of the Advisory Committee and its procedure. To this end, the Committee of Ministers adopted Resolution (97)10, the Rules on the Monitoring Arrangements under Articles 24 to 120

26 of the Framework Convention for the Protection of National Minorities on 17 September 1997.\textsuperscript{121}

The Advisory Committee of the Framework Convention is an independent expert body, composed of up to 18 members elected by the Committee of Ministers, nominated by state parties. They serve in their individual capacities and are independent and impartial. The same requirements apply to the so-called ‘additional members’, who can be called upon to assist the ordinary members in evaluating reports from state parties. Not all countries can have one of their nominees serve on the Committee, so those candidates who are not elected are placed on a reserve list of such ‘additional members’. According to Resolution (97)10, the composition of the Advisory Committee will change over time on the basis of a rotation system. The fact that the members of the Advisory Committee are independent and do not represent their governments is important, since the Committee of Ministers is a political body of government representatives. The involvement of an impartial expert body in assessing minority issues facilitates the task of the Committee of Ministers (which is the highest decision making body in the Council of Europe).

The main task of this impartial Advisory Committee is to examine the periodically submitted state reports and evaluate the adequacy of measures taken by states and to prepare an opinion on these measures.\textsuperscript{122} The Committee of Ministers then considers the state reports and the opinions of the Advisory Committee before adopting its own conclusions on the Convention’s implementation. According to Resolution (97)10, in its monitoring activities the Advisory Committee may: request additional information from a state party;\textsuperscript{123} receive information from other sources such as individuals and nongovernmental organizations, take this information into account when establishing its opinions;\textsuperscript{124} actively seek information from other sources;\textsuperscript{125} and hold meetings with government representatives and other persons.\textsuperscript{126} The drafting of state reports often involves a process of consultation with the minority itself and with nongovernmental organizations, which are also encouraged to submit shadow or alternative reports and information. The Advisory Committee’s responsibilities also extend to monitoring and following up on the Conclusions and Recommendations of the Committee of Ministers,\textsuperscript{127} which then assesses the adequacy of the measures taken by the state party concerned, resulting in conclusions. Where appropriate, it may also adopt recommendations on further steps to be taken by the respective state parties.\textsuperscript{128} The conclusions and recommendations of the Committee of Ministers are made public upon their adoption,\textsuperscript{129} together with any comments the state party may have submitted regarding the opinion delivered by the Advisory

\textsuperscript{121} CoE Resolution on the Rules Adopted by the Committee of Ministers on the Monitoring Arrangements under Articles 24 to 26 of the Framework Convention for the Protection of National Minorities, 97(10), 601st meeting (1997). Hereinafter this decision will be referred to as Resolution (97)10. On this document, see Matthias Weckering, ‘Der Durchführungsmechanismus des Rahmenübereinkommens des Europarates zum Schutz nationaler Minderheiten’, No. 24, Europäische Grundrechte Zeitschrift, (1997), 605.

\textsuperscript{122} The state reports are made public by the Council of Europe upon receipt from the state party. Resolution 97(10), 601st meeting (1997), Rule 20. See also Rule 23. All state reports are available at http://www.coe.int/minorities/.

\textsuperscript{123} Above, n. 9, Rule 29.

\textsuperscript{124} Above, n. 9, Rule 30.

\textsuperscript{125} Above, n. 9, Rule 31.

\textsuperscript{126} Above, n. 9, Rule 32.

\textsuperscript{127} Above, n. 16, Rule 36.

\textsuperscript{128} Resolution 97(10), 601st meeting (1997), Rule 24.

\textsuperscript{129} Above, n. 16, Rule 25.
Committee.\textsuperscript{130} These opinions shall, as a rule, be made public together with the conclusions of the Committee of Ministers.\textsuperscript{131} Moreover, the Advisory Committee’s responsibilities also extend to monitoring and following up on the conclusions and recommendations of the Committee of Ministers.\textsuperscript{132} Countries have the possibility to make the Opinion public at an earlier stage.

(c) Practice of the Advisory Committee

The Advisory Committee and the Committee of Ministers developed their respective monitoring practices on this legal basis during the first cycle of monitoring, and are now involved in monitoring on the basis of a second cycle of state reporting.

Immediately after the Secretariat of the Council of Europe receives a state report,\textsuperscript{133} it is transmitted to all members of the Advisory Committee, which then forms different working groups to divide its monitoring work. In addition to a copy of the state report, members of the respective working group receive all pertinent information available at the Secretariat,\textsuperscript{134} including reports of other UN, CoE and OSCE organs, including UN human rights treaty-monitoring bodies, and the European Commission against Racism and Intolerance (ECRI). Also of particular relevance are NGO reports by organizations such as Minority Rights Group (MRG), the International Helsinki Federation, and other organizations representing national minorities in the country under consideration.

When considering a report, the Advisory Committee working group identifies issues for which they consider they are in need of additional factual information in order to adequately assess the implementation of the Framework Convention. On this basis, a questionnaire is drafted and, once adopted by the Advisory Committee plenary, sent to the competent authorities of the state in question. In most cases, the questionnaire replies prove to be sources of valuable information.

One of the most important procedural aspects leading to the drafting of an opinion, proved to be the country visits by the respective working groups, upon invitation from the government concerned. From the very beginning, the working groups established the practice of meeting not only with representatives of government and other state organs such as members of parliament, ombudspersons, and judges, but also with representatives of national minorities

\textsuperscript{130} Above, n. 16, Rule 27.
\textsuperscript{131} Above, n. 16, Rule 26
\textsuperscript{132} Above, n. 16, Rule 36.
\textsuperscript{133} In this context, it must be stressed that the Advisory Committee has faced the problem of delayed state reports (for an overview of the reporting, see www.coe.int/T/E/human_rights/minorities). In this case, the President of the Advisory Committee informs the Permanent Representative of the respective state at the Council of Europe of this situation. If the state report is delayed by more than one year, the President of the Advisory Committee informs the Chairman of the Committee of Ministers who then decides upon the action to be taken. Pursuant to an initiative by the Advisory Committee, on 19 March 2003 the Committee of Ministers decided that based upon a specific mandate by the Committee of Ministers, the Advisory Committee may commence its monitoring activities in the absence of a state report. The first decision of this kind was taken on 3 September 2003 with respect to Bosnia-Herzegovina; the state report of which had been more than two years overdue.
\textsuperscript{134} Early on, the Advisory Committee decided to set up country-specific working groups, which are primarily responsible for establishing the necessary contacts with governments and other actors in a given country. These contacts are meant to facilitate the conduct of country visits, when appropriate, and for drafting the text of the opinion to be submitted to the plenary, which alone is entitled to adopt (with the majority of its ordinary members) an opinion and transmit it to the Committee of Ministers.
and knowledgeable members of civil society. In addition to these consultations, such country visits regularly included visits to regions where persons belonging to national minorities reside. This was done to obtain a better understanding of concerns in situ, and to add to the visibility of the Framework Convention and its monitoring system.\footnote{During the first cycle of monitoring, such visits have been conducted to the (thirty) following States Parties (in chronological order): in 1999, to Finland and Hungary; in 2000, to Slovakia, Denmark, Romania, the Czech Republic, Croatia, Cyprus, and Italy; in 2001, to Estonia, the United Kingdom, Germany, Moldova, Ukraine, Armenia and Austria; in 2002, to Slovenia, the Russian Federation, Norway, Albania, Switzerland, Lithuania and Sweden; in 2003, to Ireland, Azerbaijan, Poland, Serbia and Montenegro, the Former Yugoslav Republic of Macedonia, and Bulgaria; the visit to Bosnia-Herzegovina took place in 2004. Only the government of Spain regretfully did not invite the relevant working group to conduct a visit. In view of the specific situation in Liechtenstein, Malta and San Marino and the information available, the relevant working groups felt that their work on the state reports could be completed without country visits. Moreover, in September 2005, the Advisory Committee visited Kosovo under the specific Agreement concluded between UNMIK and the Council of Europe. As concerns the second cycle of monitoring which started for some countries in spring 2004, country visits to the following States Parties had been conducted as of 1 December 2006: Croatia, Hungary, Moldova, the Czech Republic and Estonia in 2004; Italy, Slovenia, Finland and Romania in 2005; Germany, Norway, Armenia, the Russian Federation, Ireland, Spain and the former Yugoslav Republic of Macedonia in 2006.} All such country visits proved to be informative, and were characterized by the determination of all parties to assist the working group in open, frank, and cooperative discussions to understand the extent to which the provisions of the Framework Convention had been implemented. In addition, these discussions regularly addressed shortcomings in domestic application and the ways and means to reduce them. Following a final meeting of the Advisory Committee working group to identify essential aspects of its draft opinion, this draft opinion is then transmitted to the plenary for a first reading and, once the amendments are agreed upon, put to a vote for adoption. The ordinary or additional member nominated by the state party concerned is always invited to comment upon the draft opinion, but not entitled to participate in the vote on the adoption of the opinion. Notably, the vast majority of opinions were adopted with overwhelming majorities, and quite often unanimously.\footnote{As of 31 December 2006, the Advisory Committee had adopted 35 Opinions during the first cycle of monitoring; all opinions are available at http://www.coe.int/minorities. As of 31 December 2006, the Advisory Committee had adopted 19 Opinions under the second cycle.} The opinions adopted were then transmitted to the governments concerned and to the Committee of Ministers, meaning to the Ministries of Foreign Affairs of all Member States of the Council of Europe.

On 30 November 2001, the Advisory Committee decided to introduce changes to the structure of its opinions. In particular, it discontinued the practice of submitting a ‘Proposal for conclusions and recommendations by the Committee of Ministers’ (Section V of the earlier opinions). In its place, a new Section IV, entitled ‘Main findings and comments of the Advisory Committee’ was introduced. It also decided to submit ‘Concluding Remarks’ in Section V instead of Section IV. Made in light of the first country-specific decisions on the implementation of FCNM taken by the Committee of Ministers in October 2001, these changes were effective immediately and applied to all subsequent opinions adopted in the first cycle of monitoring.

In a further evolution of its work methods, in its second monitoring cycle of the Framework Convention the Advisory Committee initiated a practice of using country-specific questionnaires to seek detailed and specific information from
various sources on new developments pertaining to the protection of national minorities.

(d) Practice of the Committee of Ministers with regard to FCNM monitoring

Actual discussion of the opinions of the Advisory Committee, as well as of the comments submitted by both the government of the respective state and other governments, takes place in the Rapporteur Group on Human Rights (GR-H), a sub-body of the Committee of Ministers. Representatives of the Advisory Committee introduce the opinions and present their views. This practice has strengthened the constructive dialogue between the two monitoring bodies under the Framework Convention and their mutual understanding, which is reflected in the comments by the governments concerned.\(^\text{137}\) In most instances, they consisted largely of information on developments that had taken place after the adoption of the opinion, and could frequently be seen as reactions to concerns raised in the opinion or during the meetings held in the context of visits to the countries in question. In addition, governments were given an opportunity to express their views if they disagreed with the findings of the Advisory Committee.

Significantly, the conclusions and recommendations of the Committee of Ministers have been guided by the Advisory Committee opinions. This is reflected in the conclusions that both commend the good practices established by the state party concerned, and indicate the shortcomings in its implementation of obligations flowing from the Framework Convention. Furthermore, the Committee of Ministers has always recommended that the state party take these conclusions into account together with the various findings of the Advisory Committee. The Committee of Ministers is consistently inviting the state parties to continue dialogue in progress with the Advisory Committee, and to keep it regularly informed of measures taken in response to the conclusions and recommendations set out in the resolutions.

So far the Committee of Ministers has adopted 47 country-specific resolutions\(^\text{138}\) which reflect the relevant findings of the Advisory Committee. All relevant issues which the Advisory Committee has identified in the concluding remarks of its opinions were also addressed in the conclusions of the Committee of Ministers. In addition, the Committee of Ministers consistently encourages dialogue between the states and the Advisory Committee, to keep the Advisory Committee regularly informed of new developments and of measures taken to implement the conclusions and recommendations. All this indicates the value that the Committee of Ministers attaches to the Advisory Committee’s role in monitoring. Furthermore, this shows a strong determination of both monitoring bodies to further strengthen the established, continuous, and constructive dialogue between themselves, state governments, and the national minorities concerned, as the best means to monitor and improve the domestic implementation of the provisions of the Framework Convention.

\(^{137}\) These comments are available under www.coe.int/T/E/human_rights/minorities 17 August 2004.

\(^{138}\) As of 31 December 2006, the Committee of Ministers had adopted resolutions with respect to the following states parties: Denmark, Finland, Hungary, Slovakia, Liechtenstein, Malta, San Marino and Cyprus, Croatia, Czech Republic, Romania, Estonia, the United Kingdom and Italy; Armenia, Germany, Moldova, Ukraine, Norway, the Russian Federation, Lithuania, Sweden, and Switzerland, Austria, Ireland and Azerbaijan. Indeed, it might also be useful to differentiate between the 34 resolutions adopted under the first cycle and the 13 resolutions adopted under the second cycle of monitoring. All Resolutions are available at http://www.coe.int/minorities.
(e) The Follow-Up Procedure

In this context, mention should be made of another feature of the monitoring process under the FCNM: the so-called follow-up procedure, which has developed over time and consists of follow-up seminars organized by the Council of Europe and the state party concerned some time after the adoption of the pertinent Resolution by the Committee of Ministers. This procedure consists of a continuous dialogue between the governments concerned and the Advisory Committee, serving as a forum to discuss the measures that state parties have taken, or should take, and to implement the findings of the Advisory Committee and the conclusions and recommendations of the Committee of Ministers. In contrast to many other international human rights treaties monitoring systems, state parties are not only obliged to report periodically, but also have a legal duty to maintain a continuous dialogue with the Advisory Committee. The comments of the governments concerned on the respective opinions of the Advisory Committee must be seen as an essential part of that dialogue, since they largely contain information on recent developments, often directly relating to concerns raised and comments made by the Advisory Committee. Importantly, governments are expected not only to regularly submit information concerning the measures taken in response to the specific conclusions of the Committee of Ministers, but also to report on initiatives taken based on the Advisory Committee’s detailed and specific comments. Thus, the resolutions of the Committee of Ministers have entrusted the Advisory Committee with a vital role in the follow-up procedure. They reflect its confidence in the capacity of the Advisory Committee to perform its tasks responsibly within the monitoring mechanism, based upon a legally sound interpretation of the provisions of the Framework Convention.

An important consequence of the follow-up procedure is its potential to increase public awareness and knowledge of the Advisory Committee’s opinions and to encourage a constructive dialogue at the domestic level. To this end, it is essential that the opinions be made easily accessible to the public and be translated not only in the official language(s) of the state party concerned, but also into relevant minority languages. Follow-up seminars in a country in question constitute the most important aspect of the follow-up procedure. As of 1 November 2006, the following follow-up seminars had taken place (in chronological order): in 2002, in Finland, Croatia, Estonia, Romania and Hungary; in 2003, in Armenia, Germany, Slovakia, Ukraine, Moldova and the Czech Republic; in 2004, in Cyprus, Italy, the Russian Federation, Norway and Lithuania; in 2005, in Ireland, Sweden, Croatia, Albania, Poland, the Former Yugoslav Republic of Macedonia, Serbia and Montenegro, Bosnia and Herzegovina and Azerbaijan; and in 2006, in Moldova, Estonia and Hungary. While only some of these were open to the general public, all were attended by competent government officials, representatives of national minorities, members of civil society, and representatives of the Advisory Committee. They offered ideal opportunities to engage in a fruitful exchange of views on measures to be taken by the respective governments in order to comply with the recommendations of the monitoring bodies. Follow-up seminars also offer the useful opportunity to react immediately to ongoing developments, and to engage in discussions with governments concerned before submission of the next state report.

To provide an example, one of the major subjects discussed during the follow-up seminar held in Bratislava on 8 July 2003 concerned allegations that, in some hospitals in Eastern Slovakia, young Roma women had been sterilized without their prior and informed consent. This discussion related to the establishment of a

139 The programmes of these follow-up seminars are available at: http://www.coe.int/T/E/human_rights/minorities.
group of experts to investigate these allegations. Regrettably, the Slovak authorities did not endorse the proposal of the representative of the Advisory Committee to include non-Slovak experts in the group. The Advisory Committee noted that the Government has identified shortcomings in the health care legislation and concluded that administrative irregularities in the way in which consent to sterilization was being obtained from patients had been committed by certain doctors and medical establishments. In this regard, the Advisory Committee welcomed legislative and regulatory measures initiated by the Government, including the adoption by the Parliament, on 21 October 2004, of several key changes aimed at responding to the shortcomings identified in the health care legislation concerning informed consent for sterilization. However, the Advisory Committee also noted that improved access to medical records had allegedly been occasionally refused in the hospital of Krompahy, and that authorities were informed that a number of alleged forced sterilizations were still pending before various district and regional courts. By undertaking such a follow-up visit and continuing its dialogue with the authorities, the Advisory Committee was able to highlight and welcome positive developments, as well as register and seek further information from authorities to counter continued shortcomings and recommend further measures.  

(f) National Minorities as ‘Co-owners’ of the Framework Convention Process

A further point that is important to stress is the constant - and considered to be successful - endeavour of the Advisory Committee to enhance representatives of national minorities’ access to the monitoring process, with the ultimate aim of ensuring their “co-ownership” of the process. This approach has been fully and consistently supported by the Committee of Ministers, and by practically all state parties. From a legal point of view, it is founded on the character of the monitoring system as one based on, and seeking to establish, a constructive dialogue between governments, representatives of national minorities, and domestic civil societies, on the one hand, and the Advisory Committee, on the other. In order to achieve such a dialogue and, thus, to include representatives of national minorities in the monitoring process, the Advisory Committee has consistently called upon state parties to integrate the position of representatives of national minorities into their respective state parties, and has strongly commended state parties that have done so. It has also greatly benefited from the decision of the Committee of Ministers enabling the Advisory Committee, in drafting its Opinions, to consider not only the information supplied in the respective state reports and contained in generally accessible documents, but also to actively seek and receive additional information “from other sources.” In many instances, the pertinent “alternative reports”

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140 Advisory Committee on the Framework Convention, Outline for State Reports to be Submitted under the Second Monitoring Circle, in Conformity with Article 25 Paragraph 1 of the Framework Convention for the Protection of National Minorities, ACFC/INF (2003) 001, 2003. This general outline was approved by the Committee of Ministers on 15 January 2003. In view of the advent of the second cycle, which began in February 2004, when several states parties were due to submit their second state reports, the Advisory Committee decided on two steps to streamline procedures and, in particular, to shorten the period between the submission of the state report and the adoption of the opinion of the Advisory Committee. First, it adopted a general “Outline for State Reports for the Second Cycle of Monitoring” in which states parties were strongly encouraged to report on all those measures they have taken in response to the conclusions and recommendations of the Committee of Ministers and on any other steps made to further improve the implementation of the state obligations flowing from the Framework Convention. For the Advisory Committee’s Opinion on Slovakia under the second cycle of monitoring under the Framework Convention, see CoE doc ACFC/OP/II(2005)004, paras. 51-57.
authored by civil society activities or representatives of persons belonging to national minorities have been - and continue to be - of considerable relevance for the final drafting of the Opinions of the Advisory Committee. This inclusive approach is also reflected in conducting country-visits, including to areas where national minorities reside, which not only consist of meetings with representatives of the executive, legislative and judicial powers, but also provide for the opportunity to exchange views with members of civil society and, in particular, representatives of national minorities. State parties have been, and continue to be, invited to contact representatives of national minorities in the preparation of their comments on Opinions of the Advisory Committee, and to reflect their position in such comments. Most governments have agreed to do so, and some have even attached the pertinent statements of organizations representing national minorities to their comments.

(g) The Personal Scope of Application of the Framework Convention

The drafters of the FCNM have never agreed on a definition of the term ‘national minority’ and, thus, have failed to provide the monitoring bodies with a clear indication as to the Framework Convention’s scope of application. This has prompted several states to add declarations to their instruments of ratification, usually limiting the breadth of their Framework Convention obligations to groups commonly referred to as ‘old’ or ‘traditional’ minorities, that is, those having long-lasting ties with the territory on which they reside and being nationals of the state of which that territory is a part. These states wish to exclude ‘new’ minorities from the personal scope of application of the Framework Convention. Some states took a similar approach indicating in their state reports that the Framework Convention covered only ‘old’ minorities, whereas other states opted for broader and more inclusive approaches, making the Framework Convention applicable also to ‘new’ minorities. In view of the intricate legal problems raised by such declarations, and after considerable internal deliberations, the Advisory Committee decided to make use of the flexibility inherent in the wording of the Framework Convention, and adopted a pragmatic and flexible approach, at least with respect for the first cycle of monitoring. It began by underlining that, in the absence of a definition of ‘national minority’ in the Framework Convention, the state parties had to examine the personal scope of application to be granted to the Framework Convention within their respective countries. The position of each government was, therefore, deemed to be the outcome of this examination. The Advisory Committee continued by noting that, on the one hand, state parties have a margin of appreciation in this respect in order to take into due account the specific circumstances prevailing in their countries, and that, on the other hand, this margin of appreciation must be exercised in accordance with general principles of international law and the fundamental principles set out in Article 3 of the Framework Convention. The Advisory Committee stressed, in particular, that the implementation of Convention should not be a source of arbitrary or unjustified distinctions. For this reason, the

141 Several of the Framework Convention parties have, upon ratification, decided to have their own definition of “national minority” and submitted reservations or declarations in this regard. This includes Austria, Denmark, Estonia, Germany, Poland, Slovenia, Sweden, Switzerland, and The Former Yugoslav Republic of Macedonia (see http://conventions.coe.int/Treaty/EN/v3MenuDecl.asp). Liechtenstein, Luxembourg, and Malta are parties to the Convention, but each declared that there are no national minorities within their respective territories. France has not ratified the Convention and declared, with respect to Article 27 of the ICCPR, its understanding that there are no national minorities in France.

142 For the text of these declarations, see www.coe.int/T/E/human_rights/minorities.
Advisory Committee considered that examining the scope of application given to the implementation of the Framework Convention by each state party was part of its duty, in order to verify that no such arbitrary or unjustified distinctions were being made by the states parties. Furthermore, it considered that it had to verify the proper application of the fundamental principles set out in Article 3 Convention.\textsuperscript{143} The Advisory Committee approach on this matter reflects its general tendency to avoid unnecessary confrontation with governments. Instead, it seeks to engage in constructive dialogue with a view to settling any disagreements over the interpretation of the Framework Convention. Finally, it should be mentioned that the Advisory Committee expressly stated that it agreed with, and welcomed, the approach of the Austrian and German authorities to consider that members of a national minority living outside the minority’s traditional settlement area, in principle, are also entitled to protection under the Framework Convention.\textsuperscript{144} As regards the issue of the potential applicability of the Framework Convention to persons belonging to ‘new’ minorities, the Advisory Committee maintained that some of its provisions, such as Article 11(3), with its explicit reference to areas traditionally inhabited by persons belonging to a national minority, would only be applicable to ‘old’ minorities. In contrast, it is clear that Article 6(1) of the Framework Convention applies to ‘all persons living on the territory’ of a given state party, including persons belonging to ‘new’ minorities.\textsuperscript{145} Furthermore, it seems possible to argue that other provisions, such as Articles 3, 5, 7, and 8 could also be applicable to persons belonging to ‘new’ minorities, at least in certain circumstances. Based upon this analysis, the Advisory Committee opted again for a flexible approach, making it possible to consider the inclusion of persons belonging to such groups in the application of the Framework Convention on an article-by-article basis. As a result, the Advisory Committee expressed its opinion that competent state authorities should consider the issue in consultation with those concerned.\textsuperscript{146} In the international discussion of the term ‘national minority’, there is no consensus as to whether persons differing from the majority population with respect to religion only might be considered a national minority, thus falling under the personal scope of application of international instruments aimed at the protection and promotion of the distinct identity of national minorities. As regards the FCNM, this issue has been resolved through Advisory Committee practice. In its opinion on Cyprus, it dealt extensively with the situation of the Maronites and, to a lesser extent, with other religious groups such as the Latin and Armenian communities.\textsuperscript{147} This position was later shared by the Committee of Ministers.

\textsuperscript{143} See, for example, Advisory Committee on the Framework Convention, Opinion on Albania, ACFC/INF/OP/I (2003) 004, 2002, paras. 17-22, where the Advisory Committee held that the a priori exclusion of the Egyptians, as a group having resided for centuries in Albania, from the personal scope of application of the Framework Convention was incompatible with Art. 3 Framework Convention. Advisory Committee Opinion on Denmark, ACFC/INF/OP/I (2001) 005, 2000, paras. 13-25 reached the same conclusion with respect to, \textit{inter alia}, the Roma, a finding which was confirmed in the pertinent conclusions of the Committee of Ministers.


\textsuperscript{147} See Advisory Committee Opinion on Armenia, ACFC/INF/OP/I (2003) 001, 2002, para. 19 with respect to the Yezidis.
Another highly controversial issue is the question of whether persons belonging to an indigenous people can be considered a national minority in a legal sense. In this context, the Advisory Committee held the opinion that recognizing a group of persons as an indigenous people does not exclude persons belonging to that group from the protection afforded by the FCNM, since the fact that a group of persons may be entitled to a different form of protection cannot by itself justify their exclusion from other forms of protection.\textsuperscript{148}

2.3.3. Charter of Regional and Minority Languages of the Council of Europe

The Charter for Regional or Minority Languages (hereinafter the Language Charter or Charter) is the first treaty issued by the Council of Europe in the field of minorities. The initial idea of creating a European treaty for regional or minority languages dates back to 1981, when the Parliamentary Assembly of the Council of Europe approved Recommendation 928 on educational and cultural problems of minority languages and dialects in Europe. The Standing Conference of Local and Regional Authorities of Europe (CLRAE) decided to draft a text, which was finally presented in 1988. This draft, supported by the Parliamentary Assembly, was the basis for the work of an ad hoc intergovernmental committee established by the Committee of Ministers with a mandate to prepare a definitive version. Finally, the Committee of Ministers adopted the charter as a convention, with five countries abstaining (Cyprus, France, Greece, Turkey and the United Kingdom), at its meeting on 25 June 1992. The Charter was opened for signature in November 1992, and entered into force in March 1998, after having been ratified by five countries (Norway, Finland, Hungary, Netherlands and Croatia). Today the Charter has been ratified by 22 states\textsuperscript{149}

Even though the Charter has ‘minority’ in the title and operative articles, it is not per se an instrument on minority rights, but rather focuses on protecting and promoting regional and minority languages that are traditionally used and are considered to be threatened elements of Europe’s cultural heritage that must be protected through international legal commitments. The general approach reflected in the charter is different from other international legal instruments in this field. The charter does not establish individual or collective rights for the speakers of regional or minority languages, but sets out obligations for states and their respective legal systems with regard to the use of these languages. The charter seeks, in effect, to promote regional and minority languages, and can thus only in an indirect way be considered as a legal instrument to protect linguistic minorities as such.

The very word “rights” hardly appears in the text of the charter. All the provisions of the charter concern practical measures for the protection and promotion of languages, with a view to ensuring that they remain living parts of Europe’s linguistic heritage. Instead of formulating general principles, the charter contains a list of practical measures in specific domains of language use: education, the judiciary, administrative authorities, the media, culture, economic and social life, and trans-frontier exchanges. This offers a basic structure for solid intervention in language policy in order to ensure that these languages not only benefit from legal protection, but can also be used in practice in public and private


\textsuperscript{149} The Charter entered into force of after having been ratified by five countries (Norway, Finland, Hungary, Netherlands and Croatia). For information on CRML see: http://www.coe.int/T/E/Legal_Affairs/Local_and_regional_Democracy/Regional_or_Minority_languages.
life. Even though the Charter does not establish any individual or collective rights for the speakers, the obligations of the parties with regard to the status of these languages and the domestic legislation that must be introduced in compliance with the Charter will have an obvious effect on the situation of the communities concerned.

The Charter has two operative parts: Part II and Part III. Part II contains a ‘minimum code’ of elementary standards and principles that must be observed, whereas Part III provides a ‘menu’ of 100 concrete options, out of which 35 must be selected as a minimum.\(^{150}\) While the Charter’s “à la carte” approach to protection has garnered critics because of its selectivity, the accommodation of the disparate situations of the states and facilitation of a high level of pragmatism has contributed to the effectiveness of the instrument. Even though this menu can be seen as giving the state too much possibility, the limitation is the perceptible strength of state obligations through the range of options offered to states. However, the Charter should not therefore be understood as proposing a complete alternative to standard minority rights, but as a project to foster the creation of detailed national regimes for the support of minority languages with points of guidance to states that concentrate on and highlight essential areas of action.\(^{151}\)

The major normative limitation of the Language Charter is that its definition of regional or minority languages does not include dialects of the official language(s) of the state, the languages of immigrants, or recently invented languages, but rather only the ‘traditional’ languages of Europe. In this regard it is worth mentioning that in contrast to the broader approach concerning the personal scope of application under the Framework Convention, where the Advisory Committee favours an article-by-article approach that opens the door to applying some provisions also to “new” minorities, the beneficiaries under the Language Charter are exclusively “traditional” or “historical” minorities.\(^{152}\) Even though migrants are a part of European society, the Charter’s focus on languages traditionally used may alienate them. However, conceptions of which languages of European ‘tradition’ are to be safeguarded are subject to change; further exploration of this point by the Committee of Experts over the life of the instrument will be welcome. However, de minimis, the Romany language is covered by key provisions. The stance of the Charter is broadly comparable with that of minority rights texts, in that it seeks an improving relationship between the ‘public’ and ‘official’ languages, and the living languages of European minorities. While some states remain resolutely opposed to minority rights, ratification of the Charter may represent an avenue to realize some minority rights objectives. From its own perspective, the Charter goes beyond other instruments in interlacing the ‘public’ space with a complex of language requirements. Its flexibility is capable of

\(^{150}\) For an overview of the principles in Part II and options of Part III, see Stefan Oeter, „The European Charter for Regional and Minority Languages, in ECMI/Council of Europe Mechanisms for the implementation of minority rights, Council of Europe Publishing (2004).


meeting the resource constraints on human rights programmes, though it is important that the application of the Charter should not be unduly ‘minimalist’.  

(a) Monitoring Mechanism

The monitoring mechanism provided for in the charter is based on information analysis and consultation. The central element in the monitoring system is the examination of state reports. The Parties must present periodic public reports to the Secretary General of the Council of Europe every three years on the policy and measures adopted to implement Part II and the paragraphs and subparagraphs chosen for each language under Part III. The first state report must be presented within one year from the date on which the charter enters into force in the state concerned. State reports must be made public by the government concerned.

(b) Committee of Experts

A committee of independent experts, composed of individuals of recognized competence in the matters covered by the Charter, examines these reports in order to draft its own report to be addressed to the Committee of Ministers. After its initial examination of the state report, the committee of experts can decide to address a questionnaire to the state in cases in which it considers the information in the report to be incomplete. The committee of experts can consult and give a hearing to any person or organization that it considers to be in a position to assist it in the performance of its functions. The committee of experts may also cooperate and exchange information with the Advisory Committee of the Framework Convention for the Protection of National Minorities, where appropriate, as well as with other bodies of the Council of Europe with relevant expertise, such as the European Commission against Racism and Intolerance (ECRI).

An essential element in the monitoring procedure of the Committee of Experts is the “on-the-spot visits” when a delegation of three experts, accompanied by a member of the secretariat, visits the country concerned. These visits allow the committee to consult representatives of regional or minority languages (NGOs), mayors, judges, teachers, local, regional and central authorities, and government officials (i.e. all those responsible for giving effect to state policy and legislation). On the basis of this information gathered in the country, the Committee of Experts draws up its own report, which contains detailed observations on the application of individual provisions of the charter in a state party. On this basis, the committee drafts its suggestions for recommendations to be addressed to the party by the Committee of Ministers. Prior to the report’s presentation to the Committee of Ministers, the state party has the possibility of making comments on the report and the draft recommendations. These comments are appended to the report and submitted to the Committee of Ministers. The Committee of Ministers addresses recommendations to the state party, and can decide to publish the report of the committee of experts. The report is automatically made public after the Committee of Ministers has adopted its recommendations.

154 The State Reports are available on the website of the Charter, at <http://www.coe.int/minlang>.
Finally, the Secretary General of the Council of Europe presents a two yearly detailed report to the Parliamentary Assembly on the application of the Charter. The charter is the only treaty that requires the Secretary General to report on its application. Consequently, the Parliamentary Assembly plays a very important role within the framework of the charter that sets it apart from other conventions, as it is considered essential that European parliamentarians be aware of how the regional or minority languages in Europe are protected. The reports of the Secretary General to the Assembly can be consulted on the respective websites of the charter and the Parliamentary Assembly.

(d) Machinery for Monitoring Compliance with Obligations Entered into by the Parties

The implementation monitoring mechanism of the Language Charter is in many aspects similar to the one of the Framework Convention. The different nature of the two instruments - juridico-political in the case of the Framework Convention, and juridico-cultural in that of the Language Charter - results in different types of monitoring machinery. An initial difference concerns the body responsible for monitoring implementation. In the case of the Framework Convention, that body is the Committee of Ministers, a quintessentially political organ that is, however, assisted by an advisory committee of independent experts. In the case of the Charter, Article 17 provides for a committee of experts, a technical body composed of “individuals of the highest integrity and recognized competence in the matters dealt with in the charter”.

A second difference lies in the kind of monitoring undertaken by the two organs. Under Article 26 of the Framework Convention, the Committee of Ministers “evaluate[s] the adequacy of the measures taken by the parties to give effect to the principles set out” in the convention. Given that the Framework Convention does not contain protection standards but “programmatic provisions” and that monitoring consists of evaluating the “adequacy” of measures taken by states to implement the principles set out in the convention, it may be expected that the Committee of Ministers will have to make value judgments about the capacity of a given measure to achieve an aim whose nature as a “principle,” and “programme” implies that it may be spread out over a period of time as part of a legislative trend. The machinery of the convention is thus a framework within which the contracting parties have agreed to discuss their policies on minorities together, a procedure that is clearly political in nature. For its part, the Charter does not specify the kind of steps the committee of experts has to take.

Article 15 of the Language Charter provides that the party shall present “a report on their policy pursued in accordance with Part II” of the charter “and on the measures taken in application of those provisions of Part III which they have accepted”. This wording implies that the steps taken by the committee of experts in order to monitor the implementation of Part II of the charter are similar to those carried out by the Committee of Ministers in connection with the Framework Convention. With regard to Part III, the precise, detailed nature of the measures stipulated implies that consideration will be given to whether measures taken under states’ domestic law comply with the letter and spirit of the relevant charter provisions. Such a procedure is clearly juridical in nature. Moreover, since most of the articles in Part III provide that practical measures must be selected “according to the situation” of each language, it seems likely that the committee of experts will have to judge whether measures adopted by a state are appropriate to the circumstances of a given language. If, for example, a language were spoken by a very large number of people and the protection and promotion measures were
systematically selected from among the minimal solutions, the committee of experts would have to give an opinion as to the capacity of those measures to achieve the objectives of the charter. It follows that the committee of experts, even though not a legal body (though it may formulate opinions and propose recommendations), will be called upon however to carry out, in the most part, work of an essentially legal nature.

(e) Conclusions

Although all the Charter’s articles deal with the protection and promotion of regional or minority languages, whereas only three articles of the Framework Convention address the linguistic aspect of the protection of national minorities, it is clear that both monitoring organs will have to consider the same subject-matter, with potential for interference, inconsistency and conflicting interpretations. In point of fact, the question of coordination of legal rules does not arise where states have ratified only one of the two instruments. In the case of states that have ratified both of them, coordination gives rise to some delicate issues, although all those who have studied the matter agree that, in principle, there is no danger of conflict, since measures taken in pursuance of Part III of the charter are likely also to enable states to achieve the objectives of the Framework Convention in the linguistic sphere. The two instruments are therefore complementary. Such a conclusion must be supported and endorsed, provided that the Committee of Ministers, in its role as part of the monitoring machinery for the Framework Convention, confines itself to taking note of measures implemented by parties in pursuance of the Charter. If it were to review the adequacy of such measures in relation to the programme-type provisions of the convention, there would unfortunately be potential for interference between the two instruments. It must be hoped that the Committee of Ministers will ensure the harmonious application of the two texts. Consequently it would be opportune if a genuine collaboration were to be set up between the advisory committee and the committee of experts or, at least, between their chairs.

2.3.4. The European Commission against Racism and Intolerance (ECRI)

The European Commission against Racism and Intolerance (ECRI) is a mechanism established in 1993 by the first Summit of Heads of State and Government of the Council of Europe Member States.\textsuperscript{155} The European Conference against Racism, held in Strasbourg in October 2000, called for the strengthening of ECRI’s action. On 13 June 2002, the Committee of Ministers adopted a new Statute for ECRI, consolidating its role as an independent human rights monitoring body on racism and racial discrimination.\textsuperscript{156} The third Summit of Heads of State and Government of the Member States of the Council of Europe, held on 16 and 17 May 2005 in Warsaw, decided to further intensify the fight against racism, discrimination and every form of intolerance by giving ECRI the means to carry out its work, in close cooperation with national authorities and institutions, as well as with civil society.

ECRI works at both international and national level, cooperating with other international organizations active in the field and undertaking activities in respect

\textsuperscript{155} The decision to establish ECRI is contained in the Vienna Declaration adopted by the first Summit of Heads of State and Government of the member States of the Council of Europe on 9 October 1993.

of each of the 45 Member States of the Council of Europe.\textsuperscript{157} Within the CoE, ECRI works to combat racism, xenophobia, anti-Semitism and intolerance at all levels throughout Europe. It takes a “rights-based” approach to its work, and undertakes activities aimed at ensuring that the right to freedom from discrimination is enjoyed by all persons present on the territory of Council of Europe Member States. ECRI’s actions covers measures to prevent violence and to combat discrimination and prejudice faced by persons or groups of persons notably on such grounds as race, colour, language, religion, and nationality, national or ethnic origin.

(a) ECRI’s Mandate

ECRI is (currently) composed of 44 independent members from the Member States of the Council of Europe, and serviced by its Secretariat based in Strasbourg.\textsuperscript{158} In accordance with the Statute of ECRI, the members serve in their individual capacity and must act independently and impartially in exercising their mandate. The members are appointed by their governments on the basis of their high moral authority and recognized expertise in dealing with racism, racial discrimination, xenophobia, anti-Semitism and intolerance.\textsuperscript{159}

ECRI exercises its mandate through its programme of activities, which consists of three main strands: (i) country-by-country work, (ii) work on general themes and (iii) relations with civil society.\textsuperscript{160} These three strands of ECRI’s work are closely linked and are intended to be mutually reinforcing. In the context of its country-by-country work, ECRI visits all Member States of the Council of Europe and prepares country-specific reports on matters falling within its competence. ECRI’s work on general themes includes developing General Policy Recommendations, the collection and publication of examples of “good practices” in the field of combating racism, action aimed at broadening the scope of the non-discrimination provisions of the European Convention on Human Rights, and active participation in the European and World Conferences against Racism.

(b) Country-by-Country Work

It is essential not to consider ECRI’s country-by-country work in isolation, but rather in the context of its other activities. Country-by-country work involves ECRI’s scrutiny of the situation in each and every member state of the Council of Europe on an “equal footing”.\textsuperscript{161} ECRI’s reports on its “second round” of country-

\begin{itemize}
  \item As of 31 December 2006, there were 46 member States of the Council of Europe. For an up-to-date list of CoE’s member States, consult the website of the Council of Europe: http://www.coe.int.
  \item As of 31 December 2006, there were 44 members of ECRI (with two posts being vacant). For an up-to-date list of members, consult the website of the ECRI: http://www.coe.int/ECRI.
  \item See Article 2, Statute of ECRI, Resolution Res (2002) 8 of the Committee of Ministers on the Statute of the European Commission against Racism and Intolerance.
  \item The principle of the independence and impartiality of the members of ECRI is guaranteed in Article 2 of the Statute and terms of reference for ECRI’s country-by-country monitoring work. ECRI’s work on general themes and relations with civil society are set out in Articles 11 to 13. See also Mark Kelly, \textit{ECRI 10 years of combating racism in Europe: A review of the work of the European Commission against Racism and Intolerance}, (Council of Europe, Strasbourg, 2004), 13. See also <http://www.coe.int/t/E/human_rights/ecri>.
  \item “this is a method whereby ECRI closely examines the situation in each of the member States of the Council of Europe and draws up, following this analysis, suggestions and proposals as to how the problems of racism and intolerance identified in each country might be overcome. The aim of this exercise is to formulate helpful and well-founded
\end{itemize}
by-country work were compiled after “contact visits” to 43 Council of Europe Member States. ECRI has specified that:

“[T]he aim of the contact visits is to obtain as detailed and complete a picture as possible of the situation regarding racism and intolerance in the countries being examined. The visits provide an opportunity for the rapporteurs and co-rapporteurs to meet officials from the various ministries and national public authorities dealing with issues within ECRI’s remit. They also allow the rapporteurs and co-rapporteurs to meet representatives of NGOs working in the field, as well as some of ECRI’s other partners and other parties concerned with matters within ECRI’s remit”. 162

Following the “contact visits”, a draft report prepared by ECRI is sent to the national authorities of the Member States for a brief process of confidential dialogue. The report is reviewed in the light of that dialogue and then adopted by ECRI in its final form. The report is then formally transmitted to the member state and made public two months after transmission unless the government in question expressly opposes its publication. 163

(c) Thematic Work

ECRI’s work on general themes comprises four principal areas; (i) producing General Policy Recommendations, (ii) collecting and disseminating of examples of “good practices”, (iii) working to broaden the scope of the non-discrimination provisions of the European Convention on Human Rights (ECHR), and (iv) providing follow-up to the European and World Conferences against Racism.

To date, ECRI has produced nine General Policy Recommendations (GPRs) regarding: Combating racism, xenophobia, anti-Semitism and intolerance (GPR 1), Specialized bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level (GPR 2), Combating racism and intolerance against Roma/Gypsies (GPR 3), National surveys on the experience and perception of discrimination and racism from the point of view of potential victims (GPR 4), Combating intolerance and discrimination against Muslims (GPR 5), Combating the dissemination of racist, xenophobic and anti-Semitic material via the Internet (GPR 6), National legislation to combat racism and racial discrimination (GPR 7), Combating racism while fighting terrorism (GPR 8) and The fight against anti-Semitism (GPR 9). 164

ECRI has also produced four publications identifying “good practices.” Of these, three recent publications have focused on examples of good practice in the areas of: the fight against racism and intolerance in the European media, specialized bodies, and combating racism and intolerance against Roma/Gypsies. An earlier publication, produced in 1996, provided a “basket” of examples of “good practice” across a number of thematic areas. For its series of publications on “good practices,” ECRI has selected examples which could, potentially, be replicated proposals which may assist governments in taking practical and precise steps to counter racism and intolerance”. ECRI, Annual Report on ECRI’s activities covering the period from 1 January to 31 December 2002, CRI (2003) 23, at page 13. See also Annual report on ECRI’S activities covering the period from 1 January to 31 December 2005. 162


See: Mark Kelly, ECRI 10 years of combating racism in Europe: A review of the work of the European Commission against Racism and Intolerance, (Council of Europe, Strasbourg Cedex, February 2004), 19.

ECRI General Policy Recommendations are available at: http://www.coe.int/t/e/human_rights/ecri/1-ecri/3-general_themes/1-policy_recommendations.
elsewhere, particularly in other Member States. In order to enhance this potential, ECRI has made efforts to disseminate this series of publications as widely as possible.

The ECHR is one of the principal human rights instruments upon which ECRI bases its ‘rights-based’ approach to combating racism and intolerance. In its Article 14, the Convention prohibits discrimination in relation to the enjoyment of the rights set out in the Convention. ECRI proposed that the scope of this protection should be broadened to include a more general prohibition of discrimination encompassing additional rights not listed in the ECHR (for example: economic, social and cultural rights). Following ECRI’s proposal, and after four years of deliberations, Protocol No. 12 to the ECHR, which broadened the protection afforded under Article 14 of the Convention, was opened for signature on 4 November 2000 and entered into force on 1 April 2005, once ten Council of Europe Member States had ratified it. ECRI has actively pursued the ratification of the Protocol by Member States in the context of its country-by-country work - in particular in its reports on Member States - and its work on relations with civil society.

Following a decision of the United Nations General Assembly, the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance was held in Durban, South Africa in September 2001. It represented an opportunity for the international community to reaffirm its commitment to the elimination of racism and to focus on those areas in which action had been insufficient and more concerted efforts were required. In preparation for the World Conference, regional meetings took place in Santiago, Chile; Strasbourg, France; Tehran, Iran; and Dakar, Senegal, with preceding NGO fora, all of which received funding from the European Union. ECRI prepared a position paper for the European Conference, and its secretariat was responsible for organizing the Conference and coordinating the General Conclusions and the Political Declaration of the Conference, which formed the European contribution to the World Conference.

Enhancing its relations with relevant sectors of civil society is an important element of ECRI’s strategy to combat racism and intolerance. ECRI recognizes that non-governmental and other civil society organizations have a crucial role in transmitting awareness of its work to all parts of their constituencies, especially to marginalized groups.

(d) Recent Themes Addressed by ECRI Relevant to Minorities

Throughout its more then ten years of existence and activities, ECRI has considerably contributed combating discrimination based on, inter alia, ethnic grounds and, thus, to safeguarding the distinct identity of persons belonging to national minorities.

The events of 11 September 2001 had a significant impact on the consideration of issues related to international terrorism and the international human rights framework. In December 2001, ECRI adopted a Declaration in relation to these events in which it recognized the need for effective measures to be taken to combat terrorism and stated its view that such measures should not become a

165 The current state of ratifications of Protocol No. 12 can be found at: http://www.humanrights.coe.int/Prot12/Protocol%2012%20and%20Exp%20Rep.htm.
166 See: Mark Kelly, ECRI 10 years of combating racism in Europe: A review of the work of the European Commission against Racism and Intolerance, (Council of Europe, Strasbourg Cedex, February 2004), 82.
167 Ibid. 134.
pretext under which discrimination and intolerance could be allowed to flourish.\textsuperscript{168} The Declaration called on Member States to remain vigilant regarding hostile reactions towards particular groups of the population.\textsuperscript{169} In its Annual Report for 2002, ECRI noted an escalation of the problem of Islamophobia following 11 September 2001.\textsuperscript{170} In its Annual Report for 2005, ECRI was concerned by the increase in the climate of hostility towards persons who are Muslim, or who are believed to be Muslim. It deplored the fact that Islamophobia continues to manifest itself in different guises within European societies. Manifestations of this problem include an increase in prejudice against Muslim communities involving acts of violence, harassment, discrimination, negative attitudes and stereotypes. ECRI strongly regrets that Islam is often portrayed inaccurately on the basis of hostile stereotyping, the effect of which is to make this religion seem like a threat. ECRI firmly recalls the fact that Islam is a peaceful religion which represents no threat to our democratic societies, and that quite to the contrary, racism and discrimination represent deadly dangers for these same societies.\textsuperscript{171} In response to this escalation, ECRI noted the need for enhanced vigilance towards possible discrimination against Muslims, and called on Member States to implement its General Policy Recommendation No. 5 on combating intolerance and discrimination against Muslims.\textsuperscript{172}

Another theme with relevance to minority protection involves General Policy Recommendation No. 8 on combating racism while fighting terrorism. A fundamental problem facing ECRI is that of incorporating its action of combating racism into a world which is increasingly influenced by the fight against terrorism. After the events of 11 September 2001, ECRI underlined the risk of the fight against terrorism generating racism and racial discrimination. Today, ECRI notes with concern that certain groups of persons, notably Arabs, Jews, Muslims, certain asylum seekers, refugees and immigrants, and certain visible minorities have become particularly vulnerable to racism and racial discrimination across many fields of public life as a result of the fight against terrorism waged since the events of 11 September 2001.\textsuperscript{173}

\textsuperscript{168} ECRI, Annual Report on ECRI’s activities covering the period from 1 January to 31 December 2001, CRI (2002) 19.
\textsuperscript{169} See: Mark Kelly, \textit{ECRI 10 years of combating racism in Europe: A review of the work of the European Commission against Racism and Intolerance}, (Council of Europe, Strasbourg Cedex, February 2004), 16.
\textsuperscript{170} ECRI, Annual Report on ECRI’s activities covering the period from 1 January to 31 December 2002, CRI (2003) 23, at paragraph 7.
\textsuperscript{172} See: Mark Kelly, \textit{ECRI 10 years of combating racism in Europe: A review of the work of the European Commission against Racism and Intolerance}, (Council of Europe, Strasbourg Cedex, February 2004), 16.
2.4. The European Union (EU)

The protection of persons belonging to minorities has a chequered record in regards to the prospect of becoming part of EU internal and external policies on human rights. To date, the attention to minority protection has been primarily directed in the external dimension, within the context of the EU enlargement process to countries of Central and Eastern Europe. The Copenhagen criteria designed in 1993 for countries seeking to join the EU specifically highlight the protection of minorities. The Copenhagen criteria state that ‘membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and the respect for and protection of minorities’. Candidate countries’ records regarding minorities are assessed on a yearly basis in reports presented by the European Commission to the European Parliament and to the Council. Particular attention has been paid to the situation of the Roma communities, as these populations account for around 6 million people in the candidate countries of Central and Eastern Europe.

The Stability Pact for Europe, which was launched at the initiative of the EU, was signed on 10 June 1999, and which aims to anchor peace and democracy in South East Europe, also pays a great attention to the respect for minorities. Minority issues have been included among the thematic priorities in calls for proposals launched under the European Initiative for Democracy and Human Rights (EIDHR). Combating racism, xenophobia, and discrimination against minorities has also been identified as a thematic funding priority for the EIDHR in the years 2002/2004, as outlined in the May 2001 Commission Communication on the EU’s Role in Promoting Human Rights and Democratization in Third Countries.

Nevertheless, while an explicit and comprehensive intra-EU policy on minorities, which would also cover current EU Member States, remains lacking, recent normative developments and monitoring capacities provide new potentials to this end. While the compromise version of the draft EU Constitution contained a reference to minority protection among its fundamental principles, the adoption of this document appears to be stalled. The other EU instruments adopted and described below, do not provide a solid legislative foundation for EU minority protection. Similar to other international instruments, there are no definitions of ‘national minorities’ or ‘minorities’ provided in the Union Law, and no EU recognition of national minorities in any country. In 2005, the European Parliament observed/complained that ‘there is no standard for minority rights in Community policy nor is there a Community understanding of who can be considered a member of a minority’.

In its Thematic Comment on the rights of minorities in the EU, the EU Network of Independent Experts on Fundamental Rights noted that the different EU Member States had different understandings of the notion of ‘minority’ or ‘national minority’.

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2.4.1. EU Standards on Minority Issues

(a) European Union treaties and Charter on Fundamental Freedoms

Article 6 of the Treaty on European Union provides that the EU institutions and Member States implementing Union law are bound to respect the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law on which the Union is founded. In the opinion of the European Commission, this includes respect for the rights of minorities, which would also correspond to minority rights forming part of the body of international human rights law.\textsuperscript{176} While there is no explicit EU provision confirming this understanding, support can be found in the non-binding EU Charter of Fundamental Rights, proclaimed by the Council/Commission/European Parliament in December 2000. Although the EU Charter of Fundamental Rights does not provide for rights of minorities as such, it prohibits any discrimination based on, \textit{inter alia}, membership of a national minority (Article 21); it states that the Union shall respect cultural, religious and linguistic diversity (Article 22); and it protects the right to several specific rights that may serve to protect certain dimensions of the rights of persons belonging to minorities.\textsuperscript{177} A promising political sign is indicated in Article 7 of the Treaty of the European Union, which concerns “serious and persistent” violations of human rights, which could foresee Member States running the risk of having some of their rights within the Union suspended.\textsuperscript{178}

Since the entry into force of the Treaty of Amsterdam on 1 May 1999, Article 13 of the EC Treaty allows the Community to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age of sexual orientation.” This enables the Council of the Union, acting unanimously, to protect ethnic and religious minorities from discrimination.\textsuperscript{179} Two important directives have been adopted based on Article 13 of the Amsterdam Treaty, and will be briefly outlined below: the “Racial Equality Directive” and the “Employment Equality Directive,” which outlaw both direct and indirect discrimination in these fields.

(b) The Racial Equality Directive

The Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereinafter referred to as the “Racial Equality Directive”) was adopted on 29 June 2000.\textsuperscript{180} A related development was the Council Decision of 27 November 2000 establishing a Community action programme to combat discrimination from 2001-2006.\textsuperscript{181} These acts essentially aim to provide a comprehensive framework for fighting discrimination in a number of areas, such as in access to employment, working conditions, health care and social security, and education, in both the public and private sectors. The Racial Equality Directive obliges the Member States to protect all persons from direct and indirect discrimination on the grounds of race or ethnic


\textsuperscript{177} For example, the EU Charter of Fundamental Rights includes the right to respect for private life (Article 7), freedom of religion (Article 10), freedom of expression (Article 11), and freedom of association (Article 12).


\textsuperscript{179} Ibid.


origin in employment and occupation (including conditions for access to employment, to self-employment and to occupation, access to vocational guidance, vocational training, advanced vocational training and retraining, employment and working conditions, and membership and involvement in an organization of workers or employers), social protection (including social security and healthcare), social advantages, education, and access to and supply of goods and services that are available to the public, including housing.

While the Racial Equality Directive has been largely hailed as a positive step, critics have pointed out the omission of references to religious discrimination, and that incitement to racial hatred or violence are not included in its provisions.182

(c) The Employment Equality Directive

Another important and relevant act is Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation183 (hereinafter referred to as the “Employment Equality Directive”), which was also based on Article 13 of the Amsterdam Treaty. The Employment Equality Directive obliges the Member States to protect all persons from discrimination, inter alia, on grounds of religion or belief, and in employment and occupation, similar to Article 9 of the European Convention on Human Rights.

Article 12 of this directive states:

“To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation.”

In Article 31 it is written that:

“The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.”

Other Minority Protection Related Provisions

In addition to Article 13 EC, other provisions of the treaties for the adoption of measures aiming, at least indirectly, at the protection of minorities in EU Law can also be mentioned.184 The Community may encourage cooperation between Member States and supplement their action, “while fully respecting the responsibility of the Member States for the content of teaching and the organization of education

182 Boris Tsilevich, “EU Enlargement and the Protection of National Minorities: Opportunities, Myths and Prospects”, (EUMAP, 2001), available at http://www.eumap.org.org/articles/content/10/101/index. This would contrast to the position of the FCNM Advisory Committee, which in practice implies that the FCNM can also apply to religious groups. See AC Opinion on Cyprus, paras. 18-21.
systems and their cultural and linguistic diversity” (Article 149 EC). Under Article 151 EC, the Community may encourage cooperation between Member States and, if necessary, support and supplement their action in the field of culture. It may legislate in order to promote the freedom to provide services, including audio-visual services, throughout the Union (Article 49 EC). It may adopt measures establishing the internal market, including by harmonizing national rules (Article 94 and 95 EC). Still other provisions of the EC or the EU Treaty could be listed, insofar as they allocate to the Community or the Union certain powers which may be used in order to implement minority protection principles.\(^{185}\)

Certain soft law mechanisms of coordination in the employment or social inclusion fields have been relied upon in order to encourage the EU Member States to improve the integration of minorities. In particular, since the European Employment Strategy was launched in 1997, it includes the specific concern of tackling discrimination in employment in particular, in order to improve access to employment by visible minorities. The revised Employment Guidelines, based on Article 128 of the EC Treaty, provide that the Member States should seek to make their employment markets more inclusive, and that “Combating discrimination, promoting access to employment for disabled people and integrating migrants and minorities are particularly essential” in this regard.\(^{186}\)

In addition, the rules pertaining to the free movement of persons within the Union may mandate that Member States that they abandon certain linguistic requirements that might appear indirectly discriminatory against the nationals from other Member States, who seek to exercise their right to free movement in the Union, or that they revise rules, relating for instance to the attribution or the spelling of surnames, which might have such discriminatory effect.

De Schutter argues that apart from the limited, but nevertheless significant, competencies attributed to the Community or the Union to protect and promote minority rights in the Union (which he calls the positive dimension of an EU minority policy), the institutions of the Union, in the exercise of their competencies, and the Member States, when they act in the field of applying Union Law, in particular in order to implement EU legislation, are obliged to respect both the general principle of equal treatment and certain specific minority rights. This may be called the negative dimension of the EU minority rights policy, aimed at not violating those rights rather than at affirmatively contributing to their full realization.\(^{187}\)

2.4.2. The EC/EU’s Monitoring Mechanisms

Each organ in the EU has contributed, at various levels, to the emergence of human rights in the legal and political landscape of the European Union. The European Parliament has been the institutional organ to place particular attention on minority protection over time, having adopted acts and reports on cultural diversity, including the Ebner report in 2003, and through its support of the NGO Bureau for Lesser Used Languages (until 2000). While the EU Council has been less


active, it did task the European Commission with presenting proposals on what would become the Race Directive and Equal Employment Directive. In 1999, the EU Council required that “attention should be paid to the improvement of the situation of those groups which do not form a majority in any state, including the Roma/Gypsies”.

Nevertheless, unlike the other major international organizations in Europe, the European Union does not dispose of a separate implementation body on minority rights. It has only recently started developing anti-discrimination legislation, and this has not been fully implemented yet in the Member States. There has nevertheless been a steady evolution reflected in the work of the European Court of Justice (ECJ), the European Commission/Council, the European Monitoring Centre on Racism and Xenophobia (EUMC), and the EU Network of Independent Experts, as is further outlined below. While these developments indicate a tendency towards more comprehensive legislative, policy and monitoring on minority issues, it is too early to provide an assessment of the contribution of the two latter mechanisms. The chapter ends with a note on EU-CoE interaction on minority protection.

(a) The Court of Justice of the European Communities (European Court of Justice)

It is the responsibility of the European Court of Justice, seated in Luxembourg, to ensure that the law is observed in the interpretation and application of the treaties establishing the European Community and the provisions laid down by the competent Community institutions. Preliminary rulings are designed to guarantee a uniform interpretation of Community legislation between various national courts of Member States. More specifically, if national courts are in doubt about the interpretation or the validity of Community law, they may, under particular conditions, ask the European Court of Justice for advice. Other types of actions include proceedings for failure of a Member State to fulfill an obligation, proceedings to annul a Community provision, which private individuals may also request, provided that they can demonstrate that they are affected directly and individually, and finally provisions for the European Parliament, the Council, or the Commission’s failure to act.

In its early case-law, the European Court of Justice had the position that human rights were not included in the treaty as such, and that it could only apply and interpret Community Law. The Court did not deal with the interpretation and application of national law, and therefore individuals could not challenge any violation of their rights before this Court. Later on, the European Court of Justice began referring to international human rights treaties to which member states were signatories and to make specific reference to articles of the CoE’s ECHR as a source of human rights protection. However, the court did not state that these provisions formed part of Community Law. The European Court of Justice has also recognized rights driving from the International Labour Organization treaties, the CoE’s Social Charter, as well as the ICCPR and ICESCR.

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Today in its work the European Court of Justice applies a ‘case-by-case’ recognition of fundamental rights. However, there are two kinds of limitations. First, the degree of protection afforded is limited to cases in which a particular right is relevant to the proceedings and does not harm an important Community goal with respect to the Single Market. In such cases the European Court of Justice tends to recommend a limited interpretation of the right in question so as to protect the functioning of the EU.\textsuperscript{191}

The second limitation occurs within the context of the effect of EU law on Member States. Again, while there is no direct reference to minority rights, the European Court of Justice initially chose to refuse to examine conformity of national legislation with human rights principles, when the legislation in question was within the jurisdiction of national authorities. Yet, some years later, the European Court of Justice stated that national authorities, when implementing Community rules are bound by human rights as by general principles of Community Law. This indicated that minority rights have a long way to go before being formally and directly recognized before the European Court of Justice.\textsuperscript{192}

Nonetheless, there are increasingly strong arguments favouring the recognition of an EU-wide common general principle of law in the area of minority protection; it could be reminded that discrepancies also existed between EU Member States when human rights developed into a general principle of EC law. There have been ECJ judgments that have contributed to the EU’s stance on minority protection, including \textit{Roman Angonese v. Cassa di Risparmio di Bolzano} in 2000, and \textit{Horst Bickel and Franz} in 1998. In the former, the ECJ recognized explicitly that the protection of an ‘ethno-cultural minority’ constitutes a ‘legitimate aim’ of domestic legislation as concerns the proportionality test under European Community Law.\textsuperscript{193} In this case, the ECJ held that the principle of non-discrimination precluded any requirement that linguistic knowledge required for an employment position must have been acquired within the national territory. In \textit{Bickel and Franz}, the Court provided that Article 12 EC (then Article 6 of the EC Treaty) ‘precludes national rules which, in respect of a particular language other than the principal language and who are resident in a defined area, the right to require that criminal proceedings be conducted in that language, without conferring the same rights on national of other Member States travelling or staying in that area, whose language is the same.’\textsuperscript{194} Nonetheless, it has been argued that minority rights have a long way to go before being formally and directly recognized before the ECJ.\textsuperscript{195}

\textbf{(b) European Commission and Council}

The pre-screening of European Union legislation in order to verify that it complies with the Charter of Fundamental Rights has been recently enhanced, and would have bearing also on minority issues. In April 2005, the Commission adopted a

\textsuperscript{191} Ibid.

\textsuperscript{192} Ibid.


Communication seeking to improve the compliance of its legislative proposals with the requirements of the Charter. In June 2005, it adopted a new set of guidelines for the preparation of extended impact assessments accompanying the legislative proposals of its annual work programme.

In addition, a major contribution of the European Commission to minority issues has been its annual Regular Reports, which serve as the EU’s key instrument to monitor and evaluate the EU Candidate States’ progress towards accession. The reports indicate the main trends and results in the field of minority protection within the candidate countries. They have a formulaic structure that broadly follows the Copenhagen criteria, and thereby permits cross-country comparisons. It is difficult to measure the relative weight of these imputes and to assess the process by which they were filtered and evaluated, but it is clear that in the area of minority issues, the CoE and the OSCE were major sources of information. During the drafting stage, the European Commission scheduled regular annual briefing sessions in Brussels with the CoE and the OSCE. While the EU delegations in the candidate countries provided the basis for the reports, the country desk in DG Enlargement wrote up the drafts. The whole process, including cooperation with the relevant DGs, was overseen by a Horizontal Coordination Unit with DG Enlargement. This unit produced a manual outlining issues to be addressed each year, and streamlined the final version of the Regular Reports in terms of substance and language to ensure consistency and comparability within and cross the reports. However, throughout the accession process the Commission’s emphasis has shifted gradually from the adoption of the acquis towards issues of “capacity” and implementation. However, the Regular Reports demonstrate that the Commission is less equipped to monitor and follow-up on implementation issues. Problems in the implementation of minority policy are dealt with in general terms, and list the lack of funding, weak administrative capacity, understaffing, and the low levels of public awareness in the candidate countries as the main shortcomings.

With its over 100 field presences/delegations around the world, the European Commission also has the potential to influence minority policies through country engagement and conflict prevention activities. In the headquarters in Brussels, the Conflict Prevention and Crisis Management Unit in Directorate A (CFSP) of DG RELEX (External Relations and European Neighbourhood Policy) is responsible for coordinating Commission conflict prevention activities. The unit was launched in 2001, and provides expertise to headquarters and field staff, and promotes conflict assessment methodologies within the Commission, with sections dedicated to, inter alia, Country Conflict Assessments and a Rapid Reaction Mechanism. In close cooperation with the Council Secretariat and the Joint Situation Centre, the unit provides the Council with a watch-list of potential crisis states on which the EU should focus. The Unit contributes to Common Foreign Security Policy debates within the Council and

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200 Ibid. Page 70.
maintains contacts with other organizations active in conflict prevention (incl. UN, Council of Europe and OSCE).201

Also highly relevant in this regard is the Secretariat of the Council of the EU, which is headed by the Secretary General/High Representative (SG/HR), currently Mr. Javier Solana. The Secretariat is divided into nine Directorates-General, one of which deals with External Relations. The Policy Planning and Early Warning Unit has a staff drawn from the member states, the Secretariat and the Commission, and provides the High Representative with daily policy guidance. The unit is also responsible for coordinating and managing actions under the Rapid Reaction Mechanism (RRM), created in 2001 to allow DG RELEX to disburse aid rapidly in potential conflict situations. Desiring to reinforce the civilian aspects of EU conflict management, in November 2003 Member States decided to put in place a Planning and Mission Support Capability within the Secretariat. To date, the EU has provided missions with different mandates in Bosnia and Herzegovina, Macedonia, but also outside of the European context, as experienced in the Democratic Republic of Congo (DRC) and Aceh, Indonesia.202

(c) The European Monitoring Centre on Racism and Xenophobia (EUMC)

The EUMC was established by Council Regulation in 1997, and is based in Vienna. The primary task of the EUMC is to provide the Community and its member States with objective, reliable and comparable information and data on racism and xenophobia. This primarily research-based function includes a European Information Network on Racism and Xenophobia (RAXEN), which is accomplished via National Focal Points (NFPs). The EUMC also initiates and finances a limited number of projects that study and analyze the phenomenon of racism and discrimination, with calls for tender published in the Official Journal of the European Communities. However, it has been argued that restrictions in its powers that prevent EUMC from proposing legislation makes it less dynamic than it could be.

On 1 March 2007, EUMC will be transformed into the European Union Agency for Fundamental Rights (FRA).203 FRA was established to provide assistance and expertise to the European Union and its Member States, when they are implementing Community law, on fundamental rights matters. FRA’s aim is to support them to fully respect fundamental rights when they take measures or formulate courses of action.

(d) The EU Network of Independent Experts on Fundamental Rights Mechanism

The EU Network of Independent Experts on Fundamental Rights was set up in September 2002 by the European Commission at the request of the European Parliament. The network consists of one expert per Member State and is headed by a coordinator. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. Each year the network issues a report on the situation of fundamental rights in the Member States and in the Union. It may also give opinions on specific issues related to the protection of fundamental rights in the Union at the request of the European

203 FRA was established through Council Regulation (EC) No 168/2007 of 15 February 2007. FRA is expected to be fully operational in 2008, when a Multi-annual Framework is in place and its governing structures have been set-up. For more information, see http://eumc.europa.eu/eumc/index.php.
Commission. It also contributes by assisting the Commission and the Parliament in developing EU policy on fundamental rights.\(^\text{204}\)

The annual report assesses the situation of fundamental rights on the basis of an analysis of the legislation, the case-law and the administrative practice of the national authorities of the Member States and the institutions of the Union. The objectives of the report are: (i) to inform the institutions of the state of fundamental rights in all the Member States; (ii) to make recommendations to the institutions based on the information gathered in order to promote the safeguarding of fundamental rights; and (iii) to add to the pool of experience by producing a list of measures to be presented as good practice. Annual reports have also comprised a Thematic Comment that examines one or more areas selected by the Commission and the European Parliament in greater depth. Significant in this regard was the 2005 Thematic Comment no 3 on the rights of minorities in the Union.\(^\text{205}\)

Concerning Country reports, the synthesis report prepared on an annual basis by the Network is based on 25 country reports prepared by the individual members of the Network, as well as on the report on the situation of fundamental rights in the practices of the institutions of the Union, prepared by the coordinator.\(^\text{206}\)

Also, the network of independent fundamental rights experts may be called on to deliver an opinion on specific questions raised by the Commission. These opinions may be consulted on their website.\(^\text{207}\)

(e) Cooperation between the EU and the CoE on Standards and Monitoring Mechanisms?

Finally, a note on the relation between the EU and the CoE in the area of minority protection seems to be called for. The EU Charter on Fundamental Freedoms refers to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which has been ratified by all EU Member States. However, neither the CoE Framework Convention for the Protection of National Minorities (FCNM), nor the full set of rights listed in the FCNM, has been considered as part of the fundamental rights acquis of Union Law. The FCNM has to date never been invoked by the European Court of Justice, which in contrast, has recognized a ‘special significance’ of the European Convention on Human Rights (and also occasionally referred to the UN International Covenant on Civil and Political Rights). While a potential ratification of EC to CoE Conventions has largely centred on a prospective accession to the European Convention, there is in fact nothing preventing the EC/EU from acceding also to the FCNM as a supervision system based on an international treaty. Short of this, it is reasonable to expect that there are also numerous influences and flows between Strasbourg and Brussels/Luxembourg.\(^\text{208}\)

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\(^{206}\) The national reports drafted by each network expert are available either in English or in French on the website of the Interdisciplinary Research Cell in Human Rights (CRIDHO).


\(^{208}\) For an overview of the questions arisen in the transfer of standards and cooperation between CoE and EU in minority protection, see Rainer Hofmann and Erik Friberg, “The
discrimination, for example, the Community has entered into an agreement with the Council of Europe on behalf of the centre in order to establish close cooperation between the two organizations in an attempt to make their respective activities complementary.²⁰⁹
3. Part Three - Minority Protection along the Conflict Continuum; Before, During and after Conflict

3.1. Comparative Advantages of International Mechanisms in Minority Protection

3.1.1. Introduction of the ‘Conflict Continuum’ and Conflict Phases

Since the failure of the international community to prevent the events in Rwanda and Southeast Europe in the 1990s, both practitioners and scholars have paid extensive and increasing attention to conflict prevention. Preventive actions are designed to resolve, manage, or contain disputes before they become violent. Conflict management, in turn, means the limitation, mitigation and containment of conflict. The notion of conflict prevention includes numerous activities such as conflict avoidance and conflict resolution, with techniques such as mediation, peace-keeping, peace making, confidence building measures, and track-two diplomacy. However, despite all developments, a major source of frustration for the international community is the inability to credibly and accurately predict and rapidly respond to conflicts that threaten to turn violent. This is due both to the complex dynamics of internal, ethnic and communal conflicts and to the reluctance of many states to take steps that involve risks and costs. Nevertheless, the increasing presence of international organizations and state and non-state entities in conflict-prone areas raises the hope that a multi-lateralization of conflict prevention could reduce the number of missed opportunities in the future.

Minority rights and human rights conventions in general do not specifically address conflict stages, although they provide some special measures for derogation from some rights in a situation of public emergency or conflict. They provide for basic civil, cultural, economic, political and social rights, most of which are routinely violated in conflict situations. States must decide how they will deliver these rights. Read in conjunction with human rights conventions, a series of soft law standards - on independence of the judiciary, on law enforcement officials and prosecutors, and on national human rights institutions - set out good practice in relation to the institutions that need to deliver these rights. However, while human rights do not prohibit war, they do continue to apply during all conflicts and all conflict stages, whether international or non-international. Human rights law does not distinguish between armed conflict and lesser forms of conflict such as terrorist attacks or guerrilla activities.

This chapter briefly indicates the rights that may be particularly relevant in the various phases of the conflict continuum, illustrated in Box 1 below, and outlines the comparative advantages and the relevance of existing mechanisms described in part II of this paper. ‘Structural prevention’ and ‘operational prevention’ occur in the “pre-conflict phase,” whereas ‘intervention’ signifies actions taken “during conflict phase” while activities in the “post-conflict” phase take place once hostilities have ceased. Obviously, the boundaries of these distinctions are fluid, as a conflict can evolve and move along the “continuum,” different organizations, and parts of organizations, are involved throughout the different phases, and their techniques may also be adjusted to reflect changing realities. ‘Structural prevention’ comprises strategies to address the root causes of violent conflict whereas ‘operational prevention’ is defined as strategies and tactics aimed at stopping violence when it appears imminent. This classification was developed in the Report of the Carnegie Commission on Preventing Deadly Conflict in 1997 and subsequently adopted in the Report of the UN Secretary-
General on the Prevention of Armed Conflict in 2001. Intervention, often coercive in terms of economic sanctions, preventive deployment of troops, or full-scale military intervention, occurs during a violent conflict, whereas post-conflict activities address the “4 R’s”: reconciliation, rehabilitation, reconstruction and restitution. As noted, unresolved root and proximate causes in the post-conflict phase can contribute to grievances that ignite renewed violence if left unresolved, and merit new attention to operational prevention activities.

Box 1. The ‘conflict continuum’ indicating root and proximate causes, and the relative significance of diplomacy.

Box 1 manifests one estimation of how the effectiveness of quiet diplomacy as an approach differs along the conflict continuum. While this paper does not forward a theory to adequately measure the effectiveness of different approaches, it is submitted that different approaches and mechanisms may hold comparative advantages in particular phases of conflict. A traditional ‘name and shame’ human rights approach, using public statements and drawing international attention to a situation or discriminatory practice, may be complemented by more diplomatic approaches to provide technical assistance and constructive engagement with a view to influence state practice and policies.


3.1.2. Structural Prevention Stage; State Reporting Mechanisms

Much remains to be done and many minorities are subject to serious and persistent violations of their basic rights. Long experience has shown that neither oppression, applied in defiance of international law, nor neglect of minority problems provides a sound basis for relations between groups. Enforced or involuntary assimilation has sometimes been attempted, but it has often failed. Although minority problems may change over time, there is no reason to believe that the groups concerned, or their claims, will disappear, unless positive action is taken. Unresolved situations and conflicts involving minorities indicate that further measures to address minority issues need to be adopted and new avenues of conflict resolution need to be sought. The effective implementation of the non-discrimination provisions and special rights, as well as of the resolutions and recommendations of the various organs and bodies of the United Nations, can contribute to meeting the aspirations of minorities and to the peaceful accommodation of different groups within a state. Tolerance, mutual understanding and pluralism should be nurtured and fostered through human rights education, confidence-building measures, and dialogue. Persons belonging to minorities, rather than being considered adversaries, should be allowed to contribute to the multi-cultural enrichment of our societies, and be involved as partners in development. This is an essential condition for greater stability and peace within and across State borders.

The lack of rights that may be particularly relevant in a pre-conflict setting include structural and systematic discrimination, access to social services or absence of equal enjoyment of political rights. The participation in public life and associated rights, including the right to register associations and freedom of expression may lead to a sense of exclusion. When minorities are not able to enjoy and exercise their cultural, religious and linguistic rights, this can constitute grievances which, over time, undermine their loyalty to the state they find themselves in, if they do not, or even merely perceive that they do not, have a stake in it.

Mechanisms to address these root causes of conflict should therefore address issues such as social and economic insecurity, inequality, exclusion and discrimination through poverty reduction strategies, institutional development and good governance. This would typically point towards comprehensive assessments of a state’s legislation and practice, such as those undertaken by treaty-monitoring bodies based on state reporting, whether of the UN or CoE instruments. These reports are reviewed, if submitted in a timely fashion, every 4 to 5 years. In the next paragraphs, some developments of (i) CERD, (ii) the monitoring of the FCNM, and (iii) the role of UN Special Rapporteurs will exemplify this conflict stage and approach.

(i) The Committee on the Elimination of Racial Discrimination (CERD), in addition to their regular monitoring based on state reports, has established an ‘early-warning mechanism’ drawing the attention of the members of the Committee to situations that have reached alarming levels of racial discrimination. The Committee has adopted both early-warning measures and urgent procedures to prevent, as well as to respond more effectively to violations of the Convention. Criteria for early warning measures could, for example, include the following situations: the lack of an adequate legislative basis for defining and prohibiting all forms of racial discrimination; inadequate implementation of enforcement mechanisms; the presence of a pattern of escalating racial hatred and violence or appeals to racial intolerance by persons, groups or organizations, and significant
flows of refugees or displaced persons resulting from a pattern of racial
discrimination or encroachment on the lands of minority communities.

(ii) The Advisory Committee of the FCNM addresses substantive issues that
have a potential risk of causing a minority related conflict. They concern the
preservation and development of minority cultures; freedoms of assembly,
association and religion; media; the use of minority languages in public; education
in, and of, minority languages; effective participation in public, social, and
economic life. Violations of one or several of these rights are usually the root
causes of any conflict in a country. An example was the demand of ethnic
Albanians to establish separate educational institutions, which was one of the
major reasons for conflict in Macedonia. For instance with respect to political
rights, freedoms of assembly and association, the Advisory Committee has followed
the same approach as the ECtHR in its judgments in the United Communist Party,
Sidiropoulos and Ilinden cases. The activities of political organizations aimed at
the promotion of the distinct identity of national minorities do not per se
constitute a threat to national security and must, therefore, not be prohibited
unless there are additional reasons, such as indications that such aims shall be
achieved by non-democratic means. Of particular relevance is the view that
domestic legislation prohibiting the establishment of political parties of national
minorities as such raises considerable problems as to its compatibility with Article 7
FCNM. As regards freedom of religion, the Advisory Committee has mainly
commented on very specific issues often connected with disputes concerning
property rights of churches and other religious monuments. It has held that the
absence of comprehensive legislation to protect individuals from religious
discrimination or religious hatred has an adverse effect on persons belonging to
national minorities, in particular if blasphemy laws are restricted solely to one
religion.

Media rights of national minorities have so far not been of any major
relevance for the jurisprudence of the European Court of Human Rights under
Article 10 ECHR. As regards the practice of the Advisory Committee, it is important
to note that the bulk of its concerns relate to situations of insufficient access of
national minorities to public radio and television broadcasting programmes and the
unequal allocation to different national minorities of financial and other resources
relating to private radio and television programmes. Since most national minorities
in Europe are characterized by their language, linguistic rights are of essential
relevance to the protection and promotion of their distinct identity. Such linguistic
rights include the right to use one’s own language in the private and public spheres
and, to some extent, in contacts with administrative and judicial bodies; the right
to use one’s own name in the minority language and the right to official

212 Rainer Hofmann: The impact of international norms on the protection of national
minorities in Europe and the added value and essential role of the Framework Convention
for the Protection of National Minorities”, on 4th meeting of the Committee of Experts on
Issues Relating to the Protection of National Minorities, (DH-MIN, Strasbourg, 19-20 October
2006).
213 ECtHR, United Communist Party v Turkey, Judgment of 30 January 1998, RJD 1998-I;
ECtHR, Sidiropoulos v Greece, Judgment of 10 July 1998, RJD 1998-IV; ECtHR, Stankov and
the United Macedonian organisation Ilinden v Bulgaria, Judgment of 2 October 2001, RJD
2001-IX.
214 See, e.g., paras. 43-45 of the Opinion on Azerbaijan; and para. 49 of the (first) opinion
on Moldova.
215 See paras. 68-70 of the (first) Opinion on the Russian Federation; on this issue see also
paras. 61-63 of the Opinion on Bulgaria.
216 See paras. 57-61 of the Opinion on the United Kingdom.
recognition thereof; and the right to display, in a minority language, signs of a private nature and display topographical signs in a minority language. With respect to several states, the Advisory Committee concluded that there were considerable problems concerning the practical implementation of domestic legislation providing for the use of minority languages in official dealings with administrative authorities. It has, for instance, welcomed legislation in Austria, the Czech Republic, Romania, Slovakia and the Former Yugoslav Republic of Macedonia that allowed for such use of minority languages in areas in which the minority population represented 10% (Austria) or 20% (Romania, Slovakia and the Former Yugoslav Republic of Macedonia) of the overall population while, in contrast, it declared a quota of 50% to be too high.217

As to the right to use one’s own name in the form of the minority language, the Advisory Committee strongly welcomed pertinent legislative reforms and criticized cases in which persons were forced to use versions of their names in the state language. With respect to the right to display “signs and other information of a private nature to the public” and topographical signs in a minority language, the Advisory Committee has, for instance, welcomed a judgment of the Austrian Verfassungsgerichtshof (Constitutional Court) in which it ruled that, if a national minority formed more than 10% of the total population in an area over a long period of time, this was sufficient to entitle the inhabitants to the display of bilingual topographical indications.218

Education is considered to be the key for the successful protection and promotion of any cultural identity, in particular that of national minorities. Since national minorities in Europe are usually defined by their distinct language and culture, the right to learn one’s mother tongue is an absolute conditio sine qua non for the survival of any national minority. Therefore, educational rights are indeed of central relevance for the international protection of national minorities. But for a state policy aimed at the preservation and promotion of the distinct identity of a national minority, it is not enough for pupils belonging to a minority to learn – and be taught - their minority language. It is equally important that they are familiarized with their history and culture – as well as with the language, history and culture of the majority population. Finally, it is also necessary to acquaint pupils and the general public belonging to the majority population with the history and culture of the national minorities residing in their country and to enable them, if they so wish, to learn minority languages. Thus, it is clear that the issue of educational rights of persons belonging to national minorities ranks highly among the issues dealt with in the field of minority rights protection. Whereas such rights have, as yet, not been of particular significance for the jurisprudence of the European Court of Human Rights,219 this is, of course, different as regards the practice of the Advisory Committee. The Advisory Committee has, for instance, expressed its deep concern about an apparently widespread practice of placing

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217 See paras. 79-81 of the Opinion on Bosnia and Herzegovina; paras. 43-45 of the (first) Opinion on Croatia, but see paras. 111-113 of the (second) opinion on Croatia where the Advisory Committee explicitly welcomed the lowering of the applicable threshold to one third of the population of the administrative unit concerned; paras. 39-41 of the (first) Opinion on Estonia, but see paras. 95-98 of the (second) Opinion on Estonia where the Advisory Committee explicitly welcomed pertinent improvements; para. 62 of the (first) opinion on Moldova; and paras. 49-53 of the Opinion on Ukraine.

218 See para. 50 of the Opinion on Austria.

219 The noteworthy exception was the judgment in the Case relating to certain Aspects of the Laws on the Use of Languages in Education in Belgium of 23 July 1968, ECHR Series A Vol. 6 where the Court held that States have a right to determine the official languages of instruction on public schools and denied that there was a right to instruction in the language of one’s choice.
Roma children in special educational groups or even schools designed for mentally disabled children, due to either real or perceived linguistic and cultural differences between the Roma and the majority. It also noted that shortages of available textbooks in minority languages and of qualified teachers still persist in some countries.

In all, the monitoring system as now established under the FCNM offers an ideal possibility for the Advisory Committee, with the continuous support of the Committee of Ministers, to act as a catalyst, as a facilitator for a constructive dialogue between majority and minority populations. This is pursued with a view to identify situations with a considerable potential for inter-ethnic conflict early, and/or to successfully address systemic shortcomings that constitute violations of the rights of persons belonging to national minorities. Such an effect cannot be easily achieved through individual applications which, by their very nature, can only result in findings on individual cases. The follow-up procedure of FCNM monitoring strongly enhances the likelihood of continuous engagement and, thus, adds to the possibilities of effective pre-conflict monitoring and dialogue facilitated by competent external actors.

(iii) How relevant, then, are the UN Special Rapporteurs in structural prevention? The Special Rapporteur on the right to education of the United Nations Commission on Human Rights subsequently adopted by the United Nations Committee on Economic, Social and Cultural Rights, in General Comment N° 13 has stated that the right to education comprises four elements: availability, accessibility, acceptability and adaptability. Through country visits and communications, this Special Rapporteur has been involved in addressing issues of concern to minorities in a variety of countries. Given the often ad hoc involvement of UN Special Rapporteurs, their engagement is probably most effective in drawing attention somewhere between that of treaty-monitoring bodies and that of other mechanisms more directly addressing conflict situations. Indicative of this is the approach of the UN Independent Expert on minority issues, Ms. Gay McDougall. The Independent Expert has indicated her intention to “collaborate closely with the Special Advisor to the Secretary-General on the Prevention of Genocide and with United Nations bodies such as CERD, to discuss strategies for effective early warning and conflict prevention, including through the development and implementation of social indicators that could highlight patterns of extreme violence or social exclusion aimed at or affecting minority communities”. The Independent Expert appears to identify her mandate as an “early, early warning” mechanism, and considering that her initial country visit in 2005 took place in Hungary, this would indicate that her approach is rather to identify successful practices, in line with the mandate, than to seek a mediation or conflict resolution function. However, as the Independent Expert has also demonstrated involvement in situations including Myanmar, Iraq and the Dominican Republic, this indicates a willingness to engage also in situations further ahead along the ‘conflict continuum’. In terms of which phase of a conflict her role would be particularly relevant, this author would place the comparative advantage of the function of the UN Independent Expert on minority issues, together with other UN special rapporteurs, somewhere between CERD and the Special Advisor on the Prevention of Genocide. While more able to respond to an evolving situation, the Independent

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Expert can issue a press release or undertake a country visit, which is a more timely form of engagement than CERD can provide. However, the Independent Expert does not have the mandate or means to attempt to influence the Secretary-General and Security Council, a function more attributed to the mandate of the Special Advisor.

3.1.3. Operational Prevention Stage; Early Warning/Action and Continuous Engagement

This phase addresses root causes and proximate causes, such as aggressive rhetoric, tensions, institutional weakness and violent incidents through diplomacy, dialogue, governance and preventive deployment. The same rights are commonly involved as under the structural prevention stage. The right not to be discriminated against, to be equal before the law, to fair the distribution of resources, and to enjoy freedom of expression, association, and assembly are particularly important for minorities. Governments must respect and support the right of minorities to use their own language, enjoy their cultures, profess and practice their religions, and participate effectively in public life.222

Three mechanisms will be mentioned in this regard: (i) the UN High Commissioner for Human Rights, (ii) the Special Advisor to the Secretary-General on the Prevention of Genocide, and (iii) the OSCE High Commissioner on National Minorities. The section on the HCNM will also include a case study on Macedonia to exemplify this engagement in a situation of high tensions, and the HCNM’s role as ‘normative intermediary’ during the implementation process.

(i) The UN High Commissioner for Human Rights (UNHCHR) has been entrusted with the specific task of preventing the continuation of human rights violations throughout the world. To this end, the High Commissioner plays a mediating role in situations which may escalate into conflicts by acting at the diplomatic level to obtain substantive results with individual Governments and by encouraging dialogue among the parties concerned. General Assembly Resolution 48/141 requested the Office of the UN High Commissioner for Human Rights to play an active role in preventing human rights abuses. In addition, numerous technical cooperation projects have been implemented in response to help governments, national institutions, and NGOs enhance the situation of human rights.

(ii) The UN has one mechanism dedicated to the prevention of genocide: the Special Advisor to the Secretary-General on the Prevention of Genocide (SAPG). The Special Advisor is located in the Department of Political Affairs (DPA) in New York, and reports to the Security Council through the Secretary-General. The Special Advisor, Mr. Juan Mendez (Argentina), has accompanied the High Commissioner for Human Rights, Ms. Arbour, on two visits to Sudan/Darfur, made one visit to Cote d’Ivoire, and has accompanied the High Commissioner when reporting to the Security Council. However, the Special Advisor has not been invited to report directly to the Security Council in his own right; a limitation which could hopefully be readdressed if the mandate were amended in 2007 by the incoming UN Secretary-General.

(iii) The overall function of the OSCE High Commissioner on National Minorities, as summarized by Diana Chigas, is not to “resolve” complex ethno-national disputes. Instead, he has seen his main task to be in the realm of short-

term conflict prevention, to prevent the acute escalation of tensions, and, looking to the longer term, to help set in motion a process of dialogue between the government and minority that will address the long-term relationship between them and deal with the root causes of tension. To accomplish this, the High Commissioner and his staff closely monitor those states within Europe where tensions involving minorities could lead to violence and armed conflict. An ‘instrument of conflict prevention at the earliest possible stage,’ the mandate provides accessibility to any member state and, importantly, ensures contacts with civil society, balanced by confidentiality. Thus, the HCNM meets with representatives from all sides, including senior government officials as well as representatives from minority groups, and often engages them in a cooperative problem-solving process. According to the first OSCE HCNM, Mr. Max van der Stoel, ‘if minorities have input into discussion and decision-making bodies, if they have avenues of appeal, and if they feel that their identities are being protected and promoted, the chances of inter-ethnic tensions arising will be significantly decreased’. The HCNM also benefits from OSCE field presences, which contribute to even closer engagement and more opportunities to play such a facilitating role both formally and informally. For example, some OSCE country missions have established an open-door policy for members of minority (or other) communities who wish to complain about government discrimination. Although the OSCE created the position of the High Commissioner as part of its mission to prevent conflict, rather than explicitly as a mechanism to implement OSCE norms on minorities or human rights, his work in practice has shown the inseparability of norm implementation and conflict prevention. The work of the OSCE’s High Commissioner on National Minorities offer the most useful recourse for empirical research on appraising the role of international law in preventing ethnic conflict, due to his role in and reliance upon international norms whether legal or non-legal, and simply on standards.

It has been pointed out that in other regional intergovernmental organizations, if equipped with dedicated units of professional staff working every day to collect and analyze information, the appropriate actor of inter-governmental preventive diplomacy in any given context may also be a Secretary-General, an Eminent Person (or group), a Special Envoy or a High Commissioner, who can benefit from systematic expert analysis and advice, and then use their judgment and diplomatic skills to maximum effect. However, it

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224 The OSCE has its own missions deployed in post conflict regions and countries, with different mandates depending on the stage of a post conflict situation a country is; usually the missions have human rights department with rule of law unit, property implementation unit, assisting in establishment of human rights institutions and at later stage providing political support to existing human rights institutions (such as Ombudsman institutions, Human rights commissions and etc.). Democratisation department usually focuses on support to democratic institutions and civil society.


may also be critical to consider the balance between domestic and external incentives for policymaking in the field of minority protection, and it can also be considered that the success of the HCNM is in part attributed to EU leverage.

Case study: The HCNM’s Involvement in Macedonia on Separate Higher Education

This section offers a brief analysis of the implementation of the HCNM’s recommendations regarding the question of ethnic Albanians’ separate higher education institution in Macedonia. Building on the prior part of this report, this provides an example of how an institutional actor can engage in the nexus of minority rights protection in an early stage of a conflict. The HCNM has, from the beginning of his mandate and the start of inter-ethnic tensions in Macedonia, mediated extensively on the question of higher education for minorities. One colleague to the former HCNM said that “Mr. Max van der Stoel has been involved in the Macedonian conflict since 1993. During all those years I attended more than 200 meetings with him. His mandate was to alleviate inter-ethnic tensions here in Macedonia, and he succeeded!”

In 1994 when tensions, between the ethnic Albanians and the Macedonian Government in Tetovo were very high, particularly after the incident in Mala Recica, the HCNM started working to try to find a solution so that ethnic Albanians could receive higher education in their own language. The first question for the HCNM was to see which international norms were required, and to what extent, for the government to recognize ethnic Albanians’ separate higher education institutions. The HCNM’s translation function involved two processes. First, he needed to make the ethnic Albanian and ethnic Macedonian sides aware of the requirements—and the limitations of the requirements—of the international norms. The HCNM conveyed to both sides, publicly and privately, that the ICCPR, the ICESCR, and the Framework Convention ensure the right for minorities to establish educational institutions in their own language, but made clear that they do not have a right to either public funding or automatic recognition of diplomas. The second step was to find a solution for how to translate those norms into practice.

“I should also like to refer to Article 13(4) of the International Covenant on Economic, Social and Cultural Rights which states i.a. that the States should not ‘interfere with the liberty of individuals and bodies to establish and direct educational institutions’ (meaning private institutions’). Article 2(2) of this covenant prescribes ‘that the rights enunciated in the present covenant will be exercised without discrimination of any kind as to ... language’.”

At the same time, he told the government that these norms do not allow a government to deny recognition to an institution based solely on the language used; rather, its decision to recognize or not recognize must turn on objective

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228 Interview with Bear Grazhdani, National Political Liaison Officer, OSCE Mission to Skopje, July 2004.

229 Here the HCNM interpret “private educational institutions” as mentioned in International Law include also “higher educational establishments”.

230 See, Letter from the OSCE High Commissioner on National Minorities to Blagoj Handziski, Minister of Foreign Affairs of the former Yugoslav Republic of Macedonia (Mar. 30, 1998).
However, the issues were still not resolved, since the main issues pertaining to the rights of national minorities were regulated by Articles 45 and 48 of the Constitution. None of those articles made any reference to higher education institutions. Since Article 45 did not say anything about private higher education institutions, the HCNM came to the conclusion that, in accordance with the Constitution, a solution that would give ethnic Albanians the possibility to open a private higher education institution should be found and in his letter to the government stated:

“As regards the legal basis of the private higher education institution I am proposing, it has to be kept in mind that Article 45 of the Constitution explicitly provides for the establishment of “private schools at all levels of education”. As for the languages of instruction, I note that no language of instruction for higher education in private establishments is either specifically prescribed or specifically prohibited in the Constitution and, therefore, following from the normal principles of law in a democratic society it is to be presumed that it is permissible to have instruction in the language chosen by those establishing such an institution”.

This clarification to both sides became a constructive solution to the problem, and the two sides could now shift from clashes to the consideration of practical possibilities. After numerous meetings with political parties and education experts, the HCNM offered a public proposal in November 1998. In it, he suggested the creation of an “Albanian Language State University College” for teacher training, presumably located in Tetovo, which would be funded by the state with foreign assistance:

“Taking into account the vital importance for the Albanian community of adequate teacher training system for the higher grades of primary education and for secondary education, I would recommend the creation of a special Albanian Language State University College for teacher training, which will be linked with the University of Skopje through an agreement of co-operation.”

This proposal would allow ethnic Albanians to have something called a “University” in Tetovo, although one limited to their main needs, i.e., teacher training. In addition, the HCNM proposed a new “Private Higher Education Centre for Public Administration and Business,” funded by a consortium of outside states. It would offer courses in English, Macedonian, and Albanian, with the goal of training...

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233 For other examples, see OSCE High Commissioner on National Minorities, Statement on Greece (Aug. 23, 1999) <http: //www.osce.org/inst/hcnm/news/23aug99.htm> (in discussing the Greek opposition to legal recognition of the Turkish minority in Greece, the HCNM clarifies that the Copenhagen Document does not justify secession or even require territorial autonomy, but also notes that it prohibits discrimination based on nationality in registering organizations).
primarily ethnic Albanians for positions of public administration and business, another pressing concern of the ethnic Albanian community. Although private, the quality of the instruction would, under his proposal, merit recognition of its diplomas.\textsuperscript{234} In proposing this option, the HCNM again reminded the Macedonian authorities of their obligation to allow private institutions, and not to base any decisions to recognize these institutions on the language of instruction.\textsuperscript{235} However, the establishment of a private institution instead of recognition of Tetovo University was something that none of ethnic Albanians’ leading parties (DPA and PDP) could accept. Tetovo University has been seen as a symbol for the ethnic Albanians’ fight for broader rights and therefore they found it very difficult to support the government’s plan to close Tetovo University for a new private school, located away from the centre of Albanian-dominated intellectual life and politics. An additional restraint was the reliance upon foreign donors to fund such an institution, and it has since been an uphill struggle to argue that the long-term funding of the university should be provided by the Macedonian Government.

In May of 2000, after several years of lengthy discussions, Max van der Stoel succeeded in persuading the DPA to accept his proposal by suggesting to the Macedonian Government, as a compromise, a New Law on Higher Education. Following the agreements in May, the Macedonian Parliament adopted the Law on Higher Education and approved an OSCE-sponsored measure to legalize an accredited private institution - the Southeast European (SEE) University. The law entered into force on 11 August 2000 and introduced recognition procedures for private higher education institutions and qualifications. It also qualified private institutions for public funding under certain conditions.\textsuperscript{236} Since one of the main ideas behind the SEE University was to increase inter-ethnic communication, the academic curriculum includes mandatory studies of the Albanian language for ethnic Macedonian students, as well as for other nationalities. The proposal of the HCNM proved to have several advantages: it established an Albanian language university and satisfied one of the key requirements of the ethnic Albanian community, and in the same time allowed the Macedonian Government to ‘save face’ by not recognizing Tetovo University in its current form, which was perceived to be lead by the radical Albanians. The unique function of the high-level, non-confrontational mandate of the HCNM enabled Max van der Stoel to become a respected friendly advisor to both ethnic groups, which yielded results and gave both groups the confidence to go ahead with the plans he suggested.

Conclusions

By being able to find a solution which appealed to both the Macedonian and the ethnic Albanian side, through an appeal to each side’s vital interests, the HCNM van der Stoel did play a prominent role in preventing the further escalation of tensions at two critical points - during the drafting of the new Law on Higher Education, and when persuading the ethnic Albanian party to cooperate and to start building the SEE University. Regardless of these challenges, which remain


\textsuperscript{235} See idim.

\textsuperscript{236} The SEE University includes five faculties and two high schools; Faculty of Law, Business Administration, Public Administration, Teacher Training, Communications Sciences and Technology. In the Legal Framework of the SEE University is stated that the University has been established by an international foundation, namely, the SEE University Foundation Zurich. The SEE University Foundation was created on 1st February 2001, by public deed. Foundation carries the responsibility for donor funding and for international expert and executive support to the University.\textsuperscript{236} The SEE University opened on 1st October 2001. See: http://www.see-university.com/macedonian/index.asp.
partly outstanding, it has been demonstrated that the HCNM played a major role in effectively dealing with the question of providing higher education in Macedonia for the ethnic Albanian population. The HCNM’s involvement shows that, in times of inter-communal tension, the existence of international institutions that can provide guidance for states to ensure their compliance with international norms and standards concerning minority protection, can be extremely effective. As reflected in the majority of my interviews with domestic officials, both Macedonian and ethnic Albanian sides alike, one official stated that: “Mr. Max van der Stoel’s efforts succeeded to alleviate inter-ethnic tensions to the point that the new law was accepted”. \[237\] Thanks to the involvement of the HCNM, the issue of a separate ethnic Albanian higher education institution is now a much less sensitive issue, particularly considering the recognition of Tetovo University in January, 2004. After one decade of struggle, today in this small city Tetovo, there exist two universities: one the product of the HCNM’s involvement - the SEE University - and the second, Tetovo University. The SEE University will play a more integrative role, while Tetovo University will provide persons belonging to the ethnic Albanian minority with the possibility to study in their own language, and to have their diploma officially recognized. Tetovo University gained official recognition, and the SEE University exists as a multicultural, international institution, where students from both ethnic groups can study together and interact.

3.1.4. Violent Conflict Stage; Coercive Action and Peace Negotiations

As the situations in numerous ‘hot spots’ around the world demonstrate, once violence breaks out, a conflict develops its own dynamics, substantially reducing the chances for successful diplomatic engagement and leaving the international community with uncertain outcomes of coercive forms of intervention. At this point, the rights affected include those related to “ethnic cleansing” such as freedom from torture, right to life, and right to physical integrity.

The approaches to be employed include coercive action, including sanctions and the use of force. Peace negotiations take place in order to bring a cessation of hostilities with a view to find acceptable arrangements to turn from bullets to ballots and embark on a peaceful future. The relevant existing mechanisms established in order to stop an armed conflict are imposing either economic sanctions and embargoes, or military intervention.

The relevant mechanism for intervention in an armed conflict in the attempt to stop it is mainly the UN Security Council. Short of Security Council measures, Chapter VI of the UN Charter requires the exhaustion of attempts to resolve conflicts through pacific settlements. Here the role of the UN, EU and other mediators is relevant, which raises the question of which human rights are essential in interest-based mediation and peace negotiations, i.e. seeking to make interests of the conflicted parties coincide. As to preventive deployment, an effective and ground-breaking action was carried out in 1992 when the UN Security Council, fearing “that an outbreak of violence in Kosovo might draw in Macedonia, Albania, Bulgaria, Greece and even Turkey, either directly or indirectly [...] sent] some 1,200 peacekeeping troops to monitor Macedonia’s borders -- the United Nations Preventive Deployment Force (UNPREDEP) mission”. \[238\]

\[237\] Interview with Bear Grazhdani, National Political Liaison Officer, OSCE Mission to Skopje, July 2004.
Chapter VII of the UN Charter allows the Security Council to use enforcement measures, including military force, to restore peace and security in the world. Orders issued under this chapter are legally binding on all member states of the United Nations. While the experiences of comprehensive sanctions have not been encouraging, the search for targeted and “smart sanctions” targeting significant national decision-makers and resources that are essential for their rule, continues. According to its provisions, the Security Council, after having determined that a threat to peace, a breach of the peace, or an act of aggression has occurred, may, if necessary, take military enforcement action involving the armed forces of the Member States. While UN action under Chapter VII was limited until the end of the Cold War, the Security Council has deployed forces in an increasing number of situations since 1990, including in operations in ex-Yugoslavia (UNPROFOR) and in Somalia (UNOSOM II). In UN practice, it has become common for such enforcement action to be carried out on the basis of a mandate to, or more frequently an authorization of, states that are willing to participate, either individually, in ad hoc coalitions, or acting through regional or other international organizations, among them prominently NATO.

Concerning the peace-negotiation process, a framework/ interim agreement begins to set out a framework for resolving the substantive issues of the dispute: they put in place a constitutional setup/repair. They map out the basic institutions of government, and set in place processes of drafting blueprints for a new legal and human rights institutions. The detail of these institutions may be left to later agreement or legislation. These arguments tend to be more inclusive of the main groups involved in waging the war by military means, and usually are public. Human Rights measures here often form part of a broader constitutional framework, aimed at ensuring fair governance and addressing the self-determination or democratization demands of the peace processes. A relevant actor for this stage of conflict within the UN structures is the UN Department of Political Affairs (DPA). There has been some initial attempt by the United Nations to provide guidance on how human rights standards should guide peace negotiations. In 1999 the United Nations Secretary General issued some guidelines to his Special Representatives. These have not been published, but they apparently dealt with “the tensions between the urgency of stopping fighting, on the one hand, and the need to address punishable human rights violations on the other”.

The Office of the UN High Commissioner for Human Rights (OHCHR) is commonly engaged in alternative and complementary ways. While sometimes contributing to DPA negotiation teams, the OHCHR has primarily been tasked with monitoring the respect for human rights at all phases of conflict and post conflict evolution, and with providing advisory service based on human rights principles, including direct engagement with state authorities and other parties with the object of ending conflict and building a new society based upon respect for human rights. The OHCHR also advises on the compatibility of proposed institutional structures, law, and policy with international human rights norms, engages directly in the transitional justice process, undertakes advocacy for victims of conflict and

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242 Press release, UN Secretary General, Secretary General Comments on Guidelines Given to Envoys, Press Release SG/SM725 (December 10, 1999).
impunity, in particular, and related human rights violations, in general, and offers sustained commitment to UN peace negotiations and presences.

One of the most problematic questions in this phase of conflict to reaching a peace agreement is the question of the “sequencing” of rights and a perceived distinction between “peace is precondition for justice” and “justice is precondition for peace.” Ms. Louise Arbour, the current UN High Commissioner on Human Rights, argues that human rights are indispensable for both peace and justice and that neither of these goals, let alone both, can be achieved in the absence of human rights approach:

“In my view, a peace agreement procured through the bargaining away of the fundamental human rights entitlements of affected persons results in an impoverished “peace” that might better be labelled an absence of raging conflict”. Such an agreement cannot provide a durable architecture for the (re-)construction of an inclusive society, based on rule of law”. 243

In consideration of the inter-relationship between human rights and security, Ms. Arbour offers two guiding principles: (i) Impunity must be replaced by accountability, and (ii) a rule of law free from discrimination, which must be respected. Concerning impunity, Ms. Arbour argues that impunity for past gross or systematic violations of international human rights and humanitarian law is antithetic to the most basic principles of human rights and to the international human rights treaties giving effect to them. This fundamental notion has been affirmed repeatedly by UN human rights treaty bodies and regional human rights courts, as well as by national courts drawing on these same standards. Impunity denies the right of victims and their families to remedy; to redress impunity denies the right of victims and their families to remedy, to redress and to truth. It is complicit in a denial of responsibility and it lays the foundation for revisionism that infects collective memories and historical truth. It follows that blanket amnesties seeking to anchor such impunity in law cannot stand. Ms. Arbour notes that in practice, the failure to combat impunity opens the door to new violations by the same perpetrators and encourages others to believe that they too will go unpunished.

The second principle Ms. Arbour outlines is that of rule of law free from discrimination - something which flows from the abhorrence of impunity. Modern conflicts usually have at their source forms of discrimination, sometimes deeply rooted in the society, at other times manufactures by those going to war against their own people, which dehumanize a part of society and expose it to the most flagrant violations of rights. Conflicts directed against particular racial or ethnic groups are but the most apparent signs of this phenomenon. Peace agreements -to have a true chance of success - must instead resist the temptations to draw any sort of distinction that has the effect, whether intended or not, of solidifying or perpetuating the fractures in societies and peoples torn by conflict. It follows that peace agreements must resist the call for favourable treatment of certain classes or groups of people, whether their claim to such entitlement is rooted in the armed conflict or elsewhere. Such distinctions are inimical to and discourage the emergence of any form of true rule of law, and of the equality of all persons before the law and the courts. However, peace agreements, she stated, may have to lay the foundations of subsequent minority rights protection provisions in constitutional reform.

Ms. Arbour recognizes that imposing these standards may complicate and delay the completion of a peace agreement, but adds that the process itself is as

important as its outcome. That is, according the OHCHR, it is better than sponsoring an agreement that cannot serve as the foundation for a just society recognized as such under international standards. Ms. Arbour concludes by underlining that human rights approaches come to bear at the pre-negotiation stage, the negotiation stage, the conclusion phase, and at the implementation point of a peace agreement.

While the examples above indicate that the ‘peace’ and ‘justice’ considerations are perhaps most clearly articulated by the OHCHR with regard to engaging during this conflict stage, the operational capacity of the EU and NATO is much more significant, as demonstrated in actions ranging from the Balkans to Aceh. As to sanctions, in December 2003 the Council of the EU adopted the “Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy”. However, a chequered record of the effects of travel and visa bans on some citizens of Côte d’Ivoire, and senior officials of the unrecognized Transdniestria government in Moldova, and strengthened measures against the military junta in Myanmar and towards Zimbabwe demonstrate the challenges of using effectively targeted sanctions.

As to peacekeeping, while EU support enhances the capabilities of the African Union and ECOWAS, the EU has yet to prove itself on a larger scale concerning its own peacekeeping capacities. However, its takeover from NATO in Bosnia at the end of 2004 was a significant step towards developing the EU’s capacities further. Currently, the tools of the EU such as the Special Representative mechanism and the Council’s policy unit, and the creation of an External Action Service, mean that the EU’s major contribution to date is as partner within internationally-led non-coercive mediation efforts or as a sole mediator and negotiator.

3.1.5. Post-Conflict Stage; Peace-Building Support

Almost half of all countries emerging from armed conflict lapse back into violence again within five years. Peace agreements must therefore be developed and implemented in a sustained manner. International organizations have a tendency to move attention to other ‘hot’ conflicts before peace is secured and sustained. This was exemplified by the situation in Timor Leste in 2006, which risked overturning the steady progress made in recent years. The challenge for many international human rights organizations has been the difficulty of establishing an effective regime of human rights protection, especially in the period immediately following a peace settlement. A state is usually destroyed economically and politically as well as in terms of human lives lost. This stage can be perceived as the most sensible period for preventing a conflict from becoming a “cycle,” i.e. from sliding back to violent conflict in the years following a peace agreement or the cessation of hostilities. An example of when such short-term efforts to temporarily end a conflict contributed to a conflict cycle is the Dayton agreement in Bosnia, which many today consider as discriminatory and not conducive to the development of an integrated and unified society. While such temporary remedies might be effective to cease violence, by not addressing root causes and accepting half-fixes, the measures taken are often difficult to revisit and change later on. In Bosnia, the conflicting parties agreed to end a conflict on rather divisive conditions and to continue to form a “life” according to the settlements agreed upon. The futile efforts to date in revisiting and revising the Dayton agreement demonstrate the difficulties involved, and at this stage are rather increasing tensions and disagreements.

244 Council Document 15579/03.
One recent institutional development at the UN level is the creation of the Peace-building Commission, established specifically to provide sustained and effective support to post-conflict countries. It is expected to provide a more long term focus in building post-conflict societies, rather than leaving this task to the national institutions too early. The initial focus of the Peace-building Commission has been Burundi and Sierra Leone, and there has passed too little time to estimate its effectiveness. It should also be noted that in 2002, the Secretary Council recommended that peace processes and the implementation of peace agreements be inclusive of women, and address their concerns.

Human rights measures at this stage are often focused on the details of institutional reform, as the institutional mechanisms for delivering the rights previously committed to are developed and implemented. The following shows the human rights issues that tend to be dealt with at the implementation stage: (i) Demilitarization, demobilization and reintegration (monitoring, peace keeping), (ii) Progress of human rights commissions (establishment of institutions engaging with society and continuing to define human rights), (iii) Increased involvement of civil society in the human rights agenda (and process generally), and (iv) More measures to deal with past human rights violations and abuses, including perhaps a unified holistic mechanism such as a Truth Commission, and provide reparations. Another typology of human/minority rights instruments/provisions in the interim/substantive agreements is elaborated in a report by the International Council on Human Rights Policy. The report outlines the following issues: (i) Arrangements for access to power and territory related to the right of self-determination (provision of a human rights agenda, bill of rights, human rights commissions, other rights-based commissions [land, equality etc.], reform of policing, reform of criminal justice and reform of judiciary); (ii) Provision of an agenda for undoing the past (return of refugees and return of land), (iii) Ad hoc measures addressing the past (prisoner release, amnesties, measures for reconciliation, measures for help ‘victims,’ embryonic and partial truth processes, or other accountability mechanisms) and (iv) Provisions for civil society to become involved in implementation.

At the substantive level, among the main and challenging issues to resolve in the post-conflict phase, are: (i) bringing war criminals to justice, and (ii) the right to return, which will be further elaborated upon below.

(i) Bringing War Criminals to Justice.

In order to reach peace, some practitioners and theoreticians are suggesting a so called “sequencing” of rights. This includes a perceived tension between peace and justice. There is usually a strong desire from the side of victims for justice, i.e. to bring all the perpetrators to justice. Usually in order to negotiate and sign a peace agreement, the rebels would not sign a peace agreement if they might face justice by means of accountability of past crimes. In 2004, the Secretary General issued a report on transitional Justice and Rule of Law, which made a series of recommendations in relation to peace processes. Furthermore, the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Updated Principles of Impunity), also specifically addresses peace processes, providing comprehensive principles relating to transitional justice and institutional reform. In 2005 the UN Commission on Human Rights passed a resolution on Human Rights and Transitional Justice. Some argue that socio-

246 Resolution 1325 of 31 October 2000.
economic rights can be more important to tackle, and that there is always the possibility to return to accountability questions, including the prosecution of war criminals. By their nature, implementing peace agreements involves new negotiations and in practice often leads to a measure of re-negotiation as parties attempt, in essence, to renege on their commitments while asserting that they are complying with the agreement.

(ii) The Right to Return

The return of refugees is an important signifier of peace at the end of a conflict. The return of refugees and displaced persons to their homes plays a key role in building confidence among communities. Repatriation can play an important part in validating the post-conflict political order, for example, by legitimizing elections. However, the return of refugees and displaced persons can also validate the post-conflict order in a more subtle way. In Bosnia and Herzegovina, the notion of a ‘right’ to return was, in effect, the international community’s price for allowing the establishment of two entities whose ethnic make-up and territorial divisions reflected the ‘gains’ of ethnic cleansing. Without a right to return aimed at undoing ethnic cleansing over time, conceding power to the entities would have looked more like victory for those involved in ethnic cleansing. Repatriation of refugees was therefore a key to the international community’s validation of the peace agreement power divisions.

The return of refugees may be a pre-condition for peace if the refugees are politically and militarily active. Equally, the return of displaced persons can make an important contribution to the economic recovery as well, and dealing with land disputes may be vital to avoiding future conflict. Conflicts can easily erupt in the places where refugees and displaced persons return, and land issues are not adequately addressed. The return of refugees and displaced persons and land justice can cause tension by beginning to rewrite the territorial compromises at the heart of the deal. The issue of forcible displacement and land ownership, while often framed in terms of individual rights, goes to the heart of conflicting communal claims to territory and power. For instance, the international community’s insistence of ‘return’ in the Bosnian conflict has to be understood in terms of an attempt to reverse ethnic cleansing. Mass return to an area can significantly affect the ethnic balance of a region, and even its sovereignty. Return can undo one side’s territorial conflict gains. If returnees are further entitled to repossess the land, their return may displace those who came to occupy the land during the conflict (who are often themselves people who have been displaced), further undermining an (ethnic) territorial gain, and laying the foundation for renewed conflict. Therefore, returning refugees and displaced persons can lead to instability. Return without the infrastructure to assist the return and to deal with matters such as land disputes between current and former owners, can destabilize cease-fires and longer term peace-building efforts. Particularly when return has a significance in terms of the ethnic control of power and territory, threatening to ‘undo’ territorial gains that a party believes itself to have achieved through conflict, return is likely to be resisted and the rhetoric of return will have to be matched by the will and the capacity to enforce it, and a willingness to deal with further implementation problems in the post-conflict environment.

251 Ibid.
252 Ibid, 59.
3.2. Conclusion

The international hard-law provision directly relevant to minority protection is Article 27 of the ICCPR, which states: “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 practice their own religion, or to use their own language”. The UN Declaration on the Rights of Minorities specifies the implications of this provision by enumerating the rights which persons belonging to minorities enjoy. At the European level, the Concluding Document of the second Meeting on the OSCE held in Copenhagen in June 1990, lists, in section IV, the rights of persons belonging to national minorities. This document inspired the drafting of the CoE’s FCNM, the first legally binding instrument specifically dedicated to minority protection. Furthermore, the CoE’s European Charter for Regional or Minority Languages was opened for signature in November 1992, and entered into force on 1 March 1998. In the implementation of Union law, the EU Member States are bound to respect the Charter of Fundamental Rights, as well as the other fundamental rights which belong to the general principles of Union law. While the EU Charter of Fundamental Rights does not provide for rights of minorities as such, it prohibits any discrimination based on, inter alia, membership of a national minority; it states that the Union shall respect cultural, religious and linguistic diversity; and it protects the right to respect for private life, freedom of religion, freedom of expression, and freedom of association, all of which may serve to protect certain dimensions of the rights of persons belonging to minorities. The Network of Independent Experts has concluded that for instance, freedom of religion or the right to privacy - which includes a right to maintain a certain traditional lifestyle - are to be attributed to all persons under the jurisdiction of the State, whatever the nationality of the beneficiaries or the links they have with the State. Other rights, such as the right to participate in public affairs, may be granted only to those whose connections to the State are stronger, or who have the nationality of the State concerned.

The meaning and scope of these ‘living’ international and regional instruments have been clarified in the course of their respective monitoring systems within different intergovernmental organizations. The UN Human Rights Committee has interpreted the meaning of Article 27 ICCPR while examining the state reports and communications of individuals claims, similar to the practice of other UN treaty-monitoring bodies including ICERD. At the Council of Europe level, the Committee of Ministers is charged with monitoring the implementation of the FCNM, with the assistance of the Advisory Committee. The Advisory Committee examines the state reports containing information on legislative and other measures taken, and adopts an opinion based on its examination, thus providing a valuable source of soft-law jurisprudence. Monitoring of the European Charter for Regional or Minority Languages is also based on a reporting procedure with a committee of independent experts.

As to existing mechanisms and their comparative advantages in different parts of the conflict phases, treaty-monitoring bodies can hardly respond in a timely manner to a developing crisis, as they only engage with states on a regular basis every 4-5 years. This characteristic makes treaty-monitoring bodies largely useful as means of structural prevention at an early stage, long before tensions turn violent. However, there have been useful initiatives to exercise continuous engagement, including follow-up seminars by the Secretariat of the FCNM, the CERD’s development of an ‘urgent action’ procedure to send communications, and a ‘review’ procedure to review countries if no state report has been submitted. As
it has, on average, taken 10 years for expressions of grievances to evolve into expressions of violence, this would indicate sufficient time for treaty-monitoring bodies to draw attention to, and to urge states to abandon discriminatory practices in time.

The activities of Special Rapporteurs of the (now) UN Human Rights Council benefit from the possibility to engage in a more timely fashion, and the Independent Expert on Minority Rights holds this potential one year into the creation of this mandate in 2005. Nevertheless, while some 50 countries have issued standing invitations to UN special procedure mandates, their engagement remains largely *ad hoc* with one-off visits and only limited dedicated follow-up. Particularly relevant in the nexus of human rights, including standards on minority protection, and conflict prevention, is the evolution of the OSCE framework, which established the Office of the High Commissioner on National Minorities (HCNM). It therefore appears that the paramount mechanism to engage in *operational conflict prevention* (in OSCE states) is the HCNM. Essential elements of the HCNM are the standing invitations and multiple visits that enable the continuous engagement necessary to develop trust among interlocutors to facilitate dialogue and other conflict resolution techniques (for instance, the HCNM undertook some 200 visits to Macedonia during the crisis). Conceived as an instrument of conflict prevention, its mission consists of identifying and seeking early resolution of ethnic tensions that might endanger peace, stability or friendly relations between OSCE participating states. Apart from country recommendations, the HCNM has formulated a series of thematic recommendations on certain issues of minority protection, which attempt to clarify and build upon the content of the relevant international standards.

At the stage of structured violence and armed conflict, there are few effective mechanisms at the international level, as the enforcement action of the Security Council or regional bodies yields costly yet uncertain outcomes. The role of the Department of Political Affairs in peace negotiations, and the possibility of the OHCHR to contribute to New York led action of the security bodies, remains to be refined for maximum effect. While critical to ensuring transitional justice by enabling both accountability for past crimes and the right to return to ensure sustainable peace, there could also be scope for a strategic sequencing of rights.

In all, while increasing attention is geared towards early conflict prevention, less attention is given to post-conflict support and peace-building mechanisms striving to establish well functioning democracies and the rule of law. It is of critical importance that the international community develop further capacities and a persistent presence in post-conflict situations to ensure a sustainable peace, and to avoid the consolidation of temporary arrangements which, if left unaddressed, constitute new root causes for resumed tensions and violence. The UN Peace-building Commission may provide one institutional vehicle to assist in this regard, though it remains too early to assess its effectiveness.

As mentioned above, all human rights are relevant and remain valid throughout all phases of conflict (unless specifically derogated from). The denial and abuse of human and minority rights are both a cause and a symptom of internal conflicts, and affect the escalation and de-escalation of these conflicts. Many ethnic conflicts that are viewed as primarily secessionist conflicts began as demands for greater equality and human rights. Thus, conflicts in Kosovo, Macedonia, Northern Ireland and Sri Lanka, had claims for equality at the centre of their origin. As these claims remained unanswered, or were actively resisted, violence resulted. Revolutionary conflicts and economic conflicts are often also generated by state repression, the lack of equal access to resources, and the
failure of the rule of law. As a conflict escalates, human rights abuses escalate and cycles of repression and violence occur, often implicating all actors. Both Bosnia and Burundi stand as examples of instances in which mutual fears of domination, coupled with claims to territory, led to human rights abuses as a tool of war. This evidences the cyclical nature of conflict, in which new abuses create new grievances in a conflict that escalates and mutates, giving rise to human rights abuses and providing a need for complex and multilayered ‘solutions’.

Effective implementation of human, including minority, rights and dedicated mechanisms provide key vehicles for moving from short-term (negative) peace to long-term (positive) peace. At the pre-negotiation stage, human and minority rights standards can provide a useful tool to set limits on a conflict, and can eventually be extended. They may operate as useful confidence building measures, as the parties slowly move towards substantive negotiations. Peace agreement drafting provides an opportunity to address the long-term values of society, and a principled basis for institutional reform, which may take debates away from a ‘them’ and ‘us’ dynamic. While a cease-fire may be the overriding goal of early peace agreements, in the longer-term a more positive peace is likely to be delivered not just through political institutions and democratic debate, but also through justice institutions such as a fair, independent and impartial judiciary and police service, as well as national human rights institutions. Human rights provisions can help with peace process sequencing. Addressing human rights abuses often involves stopping the abuse through immediate monitoring and intervention with regard to at least the most egregious abuses, followed by institutional reconstruction aimed at providing longer-term mechanisms to avoid human rights abuses, such as an independent judiciary and a fair and accountable police service.

As this report’s (overview) case study on Macedonia illustrates, human rights instruments provide standards and a framework that can serve as the basis for negotiations, which can have many possible outcomes. As the first HCNM Mr. Max van der Stoel noted, the international norms provide only minimum protection, and states are always encouraged to go beyond them by providing broader protection to ethnic groups. International law provides normative standards that should not be bartered away by state parties, whatever the motive. Equally, these standards consider national enforcement, and leave institutional design to national processes. Indeed, human rights actors can play a key role in conflict resolution by providing options and encouraging debate as to how new or reformed institutions can best ensure the protection of human rights for all individuals and ethnic groups. Human rights standards can thus provide a way of enabling parties in a conflict to move from irreconcilable positions, to address the more reconcilable interests underlying these positions, such as mutual fears of discrimination and domination. Human and minority rights standards provide impartial internationally accepted tools, independent of the parties to a conflict. These can be used to separate legitimate from illegitimate demands as a means to explore the interests underlying the positions of conflicting parties.

BIBLIOGRAPHY


Fernand De Varennes, “Using the European Court of Human Rights to Protect the Rights of Minorities”, in *Mechanisms for the implementation of minority rights, Minority Issues handbook* (Council of Europe, 2004).


Asbjørn Eide, “Possible ways and means to facilitate the peaceful and constructive solution of problems involving racial minorities”, (E/CN.4/Sub.2/1993/34 and Add.1-4).


Patrick Thornberry, The UN Minority Rights Declaration, in Alan Phillips and Allan Rosas, eds., The UN Minority Rights Declaration (Abo Akademi University Institute, 1993).


Max van der Stoel, The Role of the OSCE High Commissioner on National Minorities in the Field of Conflict Prevention, Recueil des Cours 296 (2002).


Web-pages for further information:
http://www.coe.int/minorities/
http://www.coe.int/T/E/human_rights/minorities
http://www.coe.int/T/E/Legal_Affairs/Local_and_regional_Democracy/Regional_or_Minority_languages
http://cmiskp.echr.coe.int/tkp197/default.htm
http://www.osce.org/hcnm/documents.html?lsi=true&limit=10&grp=45
Mandate of the OSCE High commissioner on National Minorities:
The network of fundamental rights experts:
http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm and
http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm#
For reports of the Independent Expert, see
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