EUROPEAN PARLIAMENT

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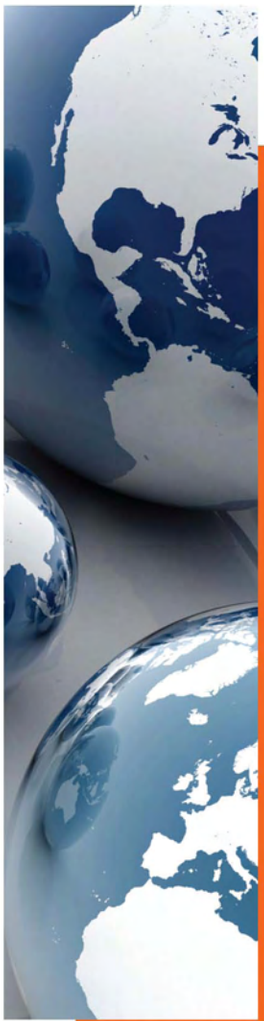
POLICY DEPARTMENT

MAINSTREAMING HUMAN AND MINORITY RIGHTS IN THE EU ENLARGEMENT WITH THE WESTERN BALKANS



MAINSTREAMING HUMAN AND MINORITY RIGHTS IN THE EU ENLARGEMENT WITH THE WESTERN BALKANS

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EUROPEAN PARLIAMENT

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

DIRECTORATE B

POLICY DEPARTMENT

STUDY

MAINSTREAMING HUMAN AND MINORITY RIGHTS IN THE EU ENLARGEMENT WITH THE WESTERN BALKANS

Abstract

With the entry into force of the Lisbon Treaty the protection of minorities became an explicit founding value of the European Union. In its external relations the EU has with the membership perspective and increased integration in the common market strong instruments at her disposal to promote and foster the protection of human and minority rights in the Western Balkan states. The question, however, arises to which extent the EU made and makes use of this leverage in its enlargement policy. The study investigates whether the EU`s own commitments with regard to the protection of minorities became an integral part of the enlargement process with the Western Balkan states. It gives an overview of the situation of minorities in the states of the Western Balkan, explores the minority rights frameworks in place and how they have been implemented so far. It reviews the EU's record of monitoring and mainstreaming rights of persons belonging to minorities in the enlargement process and examines current policy and financial instruments available in enlargement and neighbourhood policies in this regard. Since there are various actors involved in the protection of minorities at the regional level cooperation with the OSCE and the CoE will be explored and analysed how regional cooperation in the field of minority protection is already developed. In concluding, recommendations will be made on how to improve EU and European Parliament's action in the field of minority protection

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

AA	Association Agreements
AAP	Annual Action Programme
ACFC	Advisory Committee for the Framework Convention on National Minorities
AP	Action Plan
BiH	Bosnia and Herzegovina
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CFR	Charter of Fundamental Rights
CLNM	Constitutional Law on the Rights of National Minorities (Croatia)
CM	Committee of Ministers
CoE	Council of Europe
CPED	International Convention for the Protection of All Persons from Enforced Disappearance
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSO	Civil Society Organisations
CSP	Country Strategy Paper
ECHR	European Convention for Human Rights
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EEAS	European Union External Action Service
EIDHR	European Instrument for Democracy and Human Rights
ENP	European Neighbourhood Policy (ENP)
EP	European Partnership
EU	European Union
FCNM	Framework Convention for the Protection of National Minorities
FRA	Fundamental Rights Agency
HCNM	High Commissioner on National Minorities
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination

ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IDP	Internally Displaced Persons
IEMI	Independent Expert on Minority Issues
IPA	Instrument for Pre-Accession Assistance
JC	Joint Commission
JHA	Justice and Home Affairs
JOP	Joint Operational Programm
MARRI	Migration, Asylum and Refugee Regional Initiative
MIPD	Multi-annual Indicative Planning Document
MoU	Memorandum of Understanding
MP	Members of Parliament
NGO	Non-governmental Organisation
NHRI	National Human Rights Institutions
NIP	National Indicative Programme
OHCHR	Office of the High Commissioner for Human Rights
OP	Optional Protocol
OSCE	Organization for Security and Co-operation in Europe
PCA	Partnership and Cooperation Agreements
PR	Progress Reports
RAE	Roma, Ashkali and Egyptians
RCC	Regional Cooperation Council
RTK	Radio and Television Kosovo
SAP	Stabilisation and Accession Process
SEECP	Southeast European Cooperation Process
SDSS	Independent Serb Democratic Party
UDHR	Universal Declaration of Human Rights
UDNM	UN Declaration on the Rights of Minorities
UfM	Union for the Mediterranean
UN	United Nations
UNSCR	United Nation Security Council Resolution
UPR	Universal Periodic Review (UPR)

EXECUTIVE SUMMARY

This study investigates the current status of human and minority rights monitoring and mainstreaming in European Union (EU) relations with the states of the Western Balkan. It aims to identify the state of minority protection in the Western Balkans, the role minority rights play and have played in the enlargement process and how minority protection through EU engagement can be strengthened in the countries subject of the study.

In Chapter One the study takes its departure in a general survey of international and regional minority rights instruments, the relevant actors and how the Western Balkan states have transformed the international and regional minority protection standards into national legal frameworks highlighting similarities and differences. Furthermore, three case studies on Croatia, Vojvodina/Serbia, and Kosovo assess how existing legal frameworks on the protection of minorities have been implemented in practice.

This is followed in Chapter Two by a review of the relevant monitoring and mainstreaming efforts undertaken by the EU in regard to the protection of minority rights in the enlargement process. It analyses to which extent minority rights are a priority in the Stabilisation and Association Process, whether a coherent system of benchmarks has been developed and how minority rights are mainstreamed and monitored in the progress reports. The accession negotiations with Croatia, the first country of the Western Balkans to accede to the EU, will serve as a case study. Furthermore, the impact and role of the EU's financial instruments on the protection of minority rights will be examined. Lastly, this Chapter seeks to explore whether the experience gained during the enlargement process and its approach to improve minority rights compliance in the Western Balkans can be used in the European Neighbourhood Policy (ENP) and which conclusions can be drawn from the experiences made in the enlargement process in this regard.

Regional cooperation between the three major organisations in the field of minority protection in Europe – the Organization for Security and Co-operation in Europe (OSCE), the Council of Europe (CoE) and the EU – is subsequently examined in Chapter Three. The analysis of existing synergies, good practices and gaps is the basis for recommendations on how cooperation between the three organisations can be improved in order to enhance minority protection in Europe. Furthermore, the Chapter investigates whether and how minority rights have become mainstreamed in the work of the Regional Cooperation Council (RCC) aimed at increasing local ownership among Western Balkan states for regional cooperation and reforms made in various fields. Finally, the Chapter looks at bilateral cooperation in the field of minority protection and the potential hold by bilateral agreements and the respective Joint Intergovernmental Commissions regarding standard setting and conflict management.

In Chapter Four conclusions are presented on how the EU in general and the European Parliament in particular can further contribute to the protection of minority rights and their mainstreaming into the EU policies towards the Western Balkans but also in the European neighbourhood. Therefore, a series of specific recommendations is presented in the last chapter for the overall enhancement of EU minority rights monitoring and mainstreaming in the enlargement and neighbourhood policies and the pertinent financial instruments. Furthermore, the recommendations suggest how regional cooperation can contribute to improved minority protection in Europe in general and the Western Balkans in particular.

HUMAN RIGHTS, MINORITY RIGHTS AND MINORITY PROTECTION IN THE WESTERN BALKANS

Based on the examination of relevant international and regional minority rights instruments the initial chapter outlines the state of the art of minority protection in the Western Balkans. First an analysis of the legal frameworks is made, focusing on the right to self-identification, linguistic rights, the right to education, media rights, and the right to effective participation in public and economic life, which are measured against the relevant provisions of the Framework Convention for the Protection of National Minorities (FCNM) of the CoE. Secondly, the practical implementation of these standards is analysed through the examples of Croatia, Vojvodina/Serbia and Kosovo.

Main findings

- The international and regional system for minority protection is well developed. The FCNM of the CoE is, however, the only legally binding instrument specifically aimed at protecting minorities. The principles enshrined in the FCNM together with the findings of the Advisory Committee on the Framework Convention (ACFC) and the resolutions of the Committee of Ministers (CM) are of central importance in the enlargement process in terms of standard setting.
- There is still a lack of a commonly approved and legally binding definition of minorities at the international and regional level. Different approaches in this regard can lead to inconsistencies in the minority protection regime.
- The legal frameworks governing minority protection in the Western Balkan states are generally well developed in a few cases even going beyond protection provided to minorities in EU member states. Main findings are:
  - Right to self-identification:
    The reliance of states to citizenship as a criterion for their minority definition and the unavailability of reliable statistical data on minorities is a common challenge in the Western Balkans.
  - Linguistic rights and right to education:
    The legal situation in Western Balkan countries regarding the fields of linguistic rights and education mostly reflects the principles laid down in the FCNM. Problems persist regarding their implementation. Sometimes the legal regime goes even beyond European standards raising however the question whether it might be too ambitious.
  - Minority media:
    The main points of critique concern the issue of funding and equitable distribution of funds, especially for print media, the mainstreaming of minority interests and concerns in general programming, the recruiting of more minority representatives, the revision of legislative frameworks for broadcast media to ensure appropriate coverage for each minority and the allocation of sufficient broadcasting times, as well as the support for initiatives to increase mutual understanding and inter-cultural dialogue.
  - Effective participation in public and economic life:
    The legal systems of Western Balkan countries provide for a variety of means to allow for minorities' representation in elected and advisory bodies. Critique concerns the lowering of previously existing standards and the general exclusion of in particular numerically smaller minorities from the possibility of being elected, the representativeness of minority advisory councils, their independence, the funding and the lack of coordination among minority bodies.
    In terms of participation in economic life in all countries there is well-intended legislation for the proportional representation of minorities in public bodies in place; however, implementation is

unsatisfactory and authorities rely on census data often not reflecting the demographic changes occurred over the past decades.

– While legal frameworks in the Western Balkans in general and in Croatia, Vojvodina/Serbia and Kosovo in particular reflect European standards, implementation is considerably lagging behind. The main reasons for this discrepancy concern:
  - the insufficient commitment to implement the legislation by governments since laws in the field of minority rights are often the result of external pressure and intervention.
  - legislation that is difficult to implement because authorities lack capacities to fulfil the prescribed requirements.
  - insufficient monitoring of implementation at local level. Municipal authorities often lack the capacity and/or the will to act autonomously and are not sufficiently monitored or advised by central institutions (or international actors).
  - insufficient societal support for the legislation. As a result, implementation is obstructed by lack of support that expresses itself in administrative practices and discrimination.
  - small size or insufficiently organised minority community. In some cases, the minority communities are either very small in size or characterised by strong internal divisions that reduce the effectiveness of minority rights mechanisms.

MAINSTREAMING HUMAN AND MINORITY RIGHTS IN THE EU ENLARGEMENT PROCESS AND THE EUROPEAN NEIGHBOURHOOD POLICY

With the conditionality criterion of the enlargement process and to a much more limited extent of the neighbourhood policy the EU has a strong lever at her disposal to advance and enhance minority protection in potential member and neighbouring states. However, the question arises to which extent the EU made use of this leverage and how minority rights became integral part and mainstreamed throughout the enlargement and the neighbourhood policies.

Main findings

Policy Instruments

– Human and minority rights indeed have become a matter of declared priority in the EU's enlargement and neighbourhood policy. The approach chosen in both of the policy instruments appear to be comparable, however, the incentive of membership in the enlargement process provides the Commission with leverage not at her disposal under the neighbourhood framework.

– Under both policies human and minority rights became an integral part of the European and Accession Partnerships and the Association and Partnership Agreements with the corresponding national Action Plans (APs).

– The European Partnerships appear to keep repeating themselves with regard to short-term priorities concerning the protection of the rights of minorities. From this repetition one can draw several conclusions: First, that minority related short term priorities were just not realistic in terms of the timeframe; second, that they have been framed in such a broad way that the wide room of manoeuvre granted to the states impeded an effective implementation; and third that the political conditions in the countries concerned undermined the implementation of the priorities.

– The Progress Reports as instruments of monitoring the implementation of the priorities under the European and Accession Partnerships consider and address human and minority rights when assessing compliance with the political criteria (and, where relevant, under the negotiation Chapter dealing with fundamental rights). It is not always clear on which basis statements on progress or deterioration of a

situation are actually made as indicators are missing. Concrete recommendations guiding states on their way to improve a situation are missing.

– Benchmarks are developed only for the opening and closing of negotiation chapters. The benchmarks developed for Croatia are not easily accessible which impairs the transparency and inclusiveness of the monitoring exercise. Furthermore, while benchmarks are supposed to represent targets to be achieved and are thus rather general by nature, they should be more specific than simply requiring to 'strengthen [...] the protection of minorities, including the effective implementation of the Constitutional Law on National Minorities', as was the case with Croatia.

– In the European Neighbourhood Policy's (ENP) APs minority issues are also addressed under the political criteria section in a very broad way. Similar to the enlargement process, the annual progress reports assess the state of minority protection, however it remains unclear by when progress has to be made and against what this progress is actually measured and judged. Due to the lack of benchmarks the APs reiterate the same findings in regard to minority rights issues leading to the conclusion that the ENP only had marginal impact on the protection of minority rights in the EU's neighbouring countries.

– In terms of mainstreaming minority rights the enlargement and the neighbourhood policy both show the same patterns, in the sense that the EU's mainstreaming record is quite modest. Minority rights have been dealt with under the political criterion and fundamental rights section but hardly in other chapters/sections not specifically concerned with the issue. They occasionally appear in the fields of social policies or employment connected to non-discrimination, and in particular in relation to double discrimination. Still, a pro-active approach towards mainstreaming minority rights in the enlargement and the neighbourhood policy is clearly missing.

Financial Instruments

– Under the Instrument for Pre-Accession (IPA) minority concerns are integrated as cross-cutting issues in all planned activities and at the strategic planning level minority rights are indeed incorporated and connected to the political criterion related to Justice and Home Affairs (JHA), legislative matters and public administration reform. The IPA in theory is directly linked with the progress reports made by the Commission and should reflect and in particular address issues that have been highlighted in the reports. However, a comparative analysis did not reveal that the multi-annual indicative planning documents (MIPDs) and the progress reports reflect and mutually complement each other leaving considerable space for improvement. Even though a direct link between the policy and the financial instrument is missing here, various projects have been implemented that can bring considerable structural change improving the conditions of minorities in the enlargement countries.

– The European Instrument for Democracy and Human Rights (EIDHR) follows a completely different logic since it does not address states but civil society organisations (CSO) and is therefore tailor-made for practical changes and factual improvements for minorities in particular at the local level rather than for structural changes at the policy level. The protection of minorities constitutes a major objective under the EIDHR and plenty of projects have been financed in the Western Balkan states aimed at improving the situation of minorities there. The success of such CSO projects and their impact on minority communities is beyond doubt and it is desirable that funding provided under the EIDHR continues to be increased in order to allow for non-state responses to minority issues.

– The European Neighbourhood Partnership Instrument's (ENPI) national Strategy Papers do not address the issue of minority rights explicitly but include the protection of human rights as a strategic objective. It is hard to trace to which extent the ENPI actually had impact on human or minority rights since the distribution of ENPI funding by the receiving countries is unclear and information hardly accessible.

REGIONAL COOPERATION AND MINORITY RIGHTS

Cooperation between the three major European actors in the field of minority issues as well as regional and bilateral cooperation between the Western Balkan states is crucial for enhancing protection for minorities.

Main findings

- Cooperation between the OSCE, the CoE and the EU in the field of minority protection is necessary in order to reach common objectives, avoid duplication of work and diverging standards and to promote efficiency in the allocation of financial resources.
- The OSCE's High Commissioner on National Minorities (HCNM) as a conflict prevention mechanism intervenes behind the scenes; the CoE with the only legally binding minority rights protection instrument – the FCNM – at its disposal plays a crucial role in standard setting and monitoring; and the EU uses its lever of conditionality to influence and improve the minority protection record of states applying for membership.
- The three organisations already cooperate at functional (e.g. EU funded projects implemented by the OSCE) and practical (e.g. exchange of information, joint conferences, seminars) levels. The different functions and structures, however, provide room for enhanced cooperation.
- The EU – in the absence of specific internal minority standards – made use of the CoE and OSCE instruments and used these standards for measuring the progress made with regard to the protection of minorities throughout the enlargement progress.
- The Regional Cooperation Council (RCC) as successor of the Stability Pact is aimed at increasing regionally owned and led cooperation between the countries of the Western Balkan states. So far, minority rights have not been an explicit priority for the RCC and have not been addressed in a systematic way but only as side issues.
- Western Balkan states have increasingly concluded minority relevant bilateral agreements in form of agreements specifically addressing minority protection following the blueprint of the FCNM or in form of agreements concluded in the field of cultural and educational cooperation. Joint intergovernmental Commissions act as supervision bodies but do not have the power to impose sanctions and remain therefore rather ineffective. The analysis of the more recent bilateral agreements has shown that they can have a positive impact because they cover areas that are not addressed by the international or regional minority rights mechanism and Joint Intergovernmental Commissions could serve as conflict prevention mechanism.

MAINSTREAMING HUMAN RIGHTS AND MINORITY RIGHTS IN THE EU ENLARGEMENT POLICIES: CONCLUSIONS AND RECOMMENDATIONS

The last part of the study comprises a set of recommendations to the EU in general and the European Parliament in particular, firstly on how the monitoring of human and minority rights in the enlargement process can be improved by developing indicators and benchmarks. Using these tools to draft progress reports would allow for a comparative, consistent and transparent methodology for monitoring minority rights throughout the enlargement process guaranteeing a continuous pursuance of the topic. Emphasis is thereby placed on practical implementation of policy and legal commitments. The improved tools could be used in the country strategies and political dialogues. Secondly, recommendations cover the EU's financial instruments for the Western Balkan states. They provide guidance on how financial instruments in place can be made more effective concerning the concrete implementation of policy commitments addressing both the planning as well as the implementation phase. Thirdly, recommendations are made on how cooperation with other stakeholders as the CoE and the OSCE could be strengthened further. Finally, recommendations for actions by the European Parliament to foster human rights in general and minority rights in particular in the enlargement

process will be provided. The subsequent section gives only an overview, the entire recommendations with annotations can be found in Chapter Four.

Improving the methodology of annual progress reports

With the aim to improve the methodology in assessing progress (or decline) in the annual progress reports, the Commission should:

- focus on the implementation of legislation on the protection of persons belonging to national minorities by the identification and promotion of best practices.
- put more effort to mainstreaming minority issues into all policy fields and not only the ones related to the political criteria.
- align and coordinate minority rights mainstreaming with similar efforts taking place in the realms of notably gender, LGTB and children's rights.
- give special attention to the needs of the Roma community in its mainstreaming efforts.
- improve benchmarking in order to make it concrete, systematic and transparent.
- develop quantitative and/or qualitative indicators to measure minority rights in the enlargement process.
- collect data relevant to the situation of persons belonging to minorities including socio-economic data, events based data, household perceptions and expert judgments in order to substantiate indicators.
- propose to the Council to invite all countries with which an SAA has been concluded to participate in the Fundamental Rights Agency as an observer and in the meantime make use of examples of good practice and indicators developed by the FRA.
- link the various enlargement instruments, i.e. Progress Reports and European or Accession Partnerships, in a transparent manner.
- provide clearer guidance to states as to what kind of action is expected with regard to the protection of minorities.

Recommendations for EU action on human and minority rights

With the aim to improve the mainstreaming of minority rights into the enlargement and neighbourhood policy the Commission should

Policy instruments

- improve European and Accession Partnerships in terms of mainstreaming minority rights and formulation of priorities.
- make human and minority rights a priority in the APs of the ENP and mainstream them in all relevant policy areas.
- strengthen its efforts to make minority rights an integral part of the work of the RCC.

Financial instruments

- In order to improve the impact the EU's financial instruments can have on the protection of minorities the Commission should

IPA

- improve and enforce the mainstreaming of minority rights as recognised cross-cutting issues into the five components of the IPA and subsequently into the multi-annual indicative financial framework and the national MIPDs.
- ensure that projects with IPA support do not adversely affect minority groups or interethnic relations and strengthen the long term perspective of IPA projects.
- make more efforts to align and link the MIPDs with the progress reports.
- explore and enforce linkages and complementarity between the IPA and the EIDHR.

EIDHR

- ensure that in all projects funded under the EIDHR minority issues are a matter of concern.
- take into consideration that projects supported by the EIDHR can contribute to the realisation and reinforcement of the minority dimension of projects and policies implemented through other regional financial instruments and can thereby contribute to a general minority rights mainstreaming.

ENPI

- ensure that the CSPs seek to define, establish and reinforce human and minority rights-based approaches to programming.
- improve monitoring of funding provided under the ENPI.

Strengthening cooperation with the COE and the OSCE

In order to avoid duplication of work and maximise protection of minority rights the Commission should

- strengthen practical cooperation with the CoE and the OSCE through the institutionalisation of joint meetings.
- strengthen the synergies with the ACFC more systematic reference not only to FCNM in general but to ACFC country-specific findings in particular in the Progress Reports.

Recommendation for action by the European Parliament

The European Parliament as one of the driving actors for EU action on human rights at the EU level should

Action on mainstreaming human rights in general

- initiate the development of indicators and benchmarks for EU human rights and democratisation policies that can be operationalized.
- insist on a careful, systematic and balanced assessment of the degree to which individual countries meet relevant criteria with regard to the protection of minority rights.
- request the presentation of the results of these mainstreaming efforts in the Annual Report on Human Rights and Democracy in the World.

Action on strengthening of minority rights in particular

- call on the Commission and the Council to develop, in cooperation with the states concerned and relevant civil society actors, clear and transparent minority rights indicators and benchmarks and apply them consistently throughout the enlargement process and the neighbourhood policy.
- call on COHOM and the EEAS to include high standards on minority rights in the individual country strategies on human rights for Western Balkan countries.
- use its budgetary powers to ensure that the follow-up reports on the ENPI entail detailed information on the reforms and the results made through the funding and to guarantee that they include measurable outcomes.
- increase cooperation with the CoE and the OSCE through the regular exchange of information on the issue of minority protection in the context of meetings of the Subcommittee on Human Rights (DROI) and other levels.
- encourage states through available channels to establish Joint Intergovernmental Commissions as foreseen in the existing bilateral agreements on the protection of minorities.

INTRODUCTION

The new Strategy Framework and the Action Plan on Human Rights and Democracy commit the European Union (EU) to promote human rights in all areas of its external action. In particular, '[h]uman rights will remain at the heart of the EU's enlargement policy'[1]. With regard to the promotion of respect of the rights of persons belonging to minorities, the EU shall ensure the use of existing EU instruments to support efforts to protect and promote minority rights[2]. In this context the EU´s enlargement policy has been probably the most powerful tool for the promotion of human rights in Europe. To access the EU not only the *acquis communautaire* with the Fundamental Rights Charter (FRC) as integral part has to be accepted, but also the compliance with the Copenhagen criteria requiring 'stable institutions that guarantee democracy, human rights and respect for and protection of minorities' has to be ensured. Given the demographic complexity and the 'turbulent' history of ethnic relations,[3] minority protection in the Western Balkans (Albania, Bosnia and Herzegovina, Croatia, Kosovo, FYR Macedonia, Montenegro, and Serbia)[4] is of particular importance. Hence, human rights and minority rights considerations should be mainstreamed in all policy areas as part of the EU engagement with the Western Balkan states throughout all stages of the enlargement negotiations and the financial assistance provided by the EU.

The overall purpose of the study is fourfold:

As a first step, a comprehensive mapping of the situation of minority protection in the Western Balkans, identifying gaps and best practices will be made.

The second Chapter will examine to which extent minority issues are reflected and mainstreamed in the EU enlargement process in general and in the Western Balkans in particular. Special emphasis will be placed on how criteria set forth in existing enlargement policies and financial instruments with regard to human and minority rights have been implemented. Additionally, relevant policies and instruments under the European Neighbourhood Policy (ENP) will be explored to allow for a comparison between enlargement and neighbourhood strategies with regard to the protection of minorities.

The third Chapter explores existing synergies between the EU, Council of Europe (CoE) and the Organization for Security and Co-operation in Europe (OSCE) systems with regard to the protection of the rights of minorities, including an assessment of possibilities for improvement. Furthermore, the role of human and minority rights in the work of the Regional Cooperation Council (RCC) and in bilateral agreements between Western Balkan countries will be assessed.

And finally, the fourth Chapter is aimed to propose recommendations how EU human rights and minority protection policies could be improved in the Western Balkans by a better methodology of progress reports, policy options with regard to available instruments and possible action by the European Parliament to promote mainstreaming of human rights, with a special focus on minorities.

[1] Council of the European Union, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 25 June 2012, paras. 9 and 14. See also Benedek, W., 'EU Action on Human and Fundamental Rights in 2011', in: Benedek, W. et al. (eds.), *European Yearbook on Human Rights 2012*, NWV/Intersentia, Vienna/Antwerp, 2012, pp. 49-70.

[2] Council of the European Union, 'EU Strategic Framework', para. 28.

[3] E.g. Marko, J., 'Processes of Ethnic Mobilization in the Former Yugoslav Republics Reconsidered', 34(1) *Journal of South East Europe*, 2010, pp. 1-38.

[4] E.g. Marko, J., 'Die Rechtliche Stellung der Minderheiten in Slowenien, - in Kroatien, - in Serbien' (The Legal Situation of Minorities in Slovenia, - in Croatia, - in Serbia), all in: Frowein, J., Hofman, R., and Oeter, S., (eds.), *Das Minderheitenrecht Europäischer Staaten (Minority Rights in European Countries*), Part 2, Max-Planck-Institut, Beiträge zum Ausländischen Öffentlichen Recht und Völkerrecht, Vol. 109, Springer, Berlin, 1994, pp. 83-128, 286-319 and 320-351.

CHAPTER ONE – HUMAN RIGHTS, MINORITY RIGHTS AND MINORITY PROTECTION IN THE WESTERN BALKANS

1. MAPPING THE LEGAL SITUATION

1.1 International and regional framework for the protection of minorities

1.1.1 Introduction

When the United Nation (UN) General Assembly in 1992 stated that the 'promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live' the importance for the protection of the rights of minorities for the purpose of maintaining peace and stability was recognised[5]. The objectives for the establishment of an international minority rights regime can be grouped roughly around three major lines: the full enjoyment of human rights for everyone including persons belonging to groups that otherwise might face exclusion or discrimination (minority rights as extension of human rights); the preservation and evolution of cultural pluralism and diversity in society; and the maintenance of peace and security[6].

The need to strengthening minority rights in order to strengthen peace and security both at the national and the regional level became in particular apparent when in the beginning of the 1990s the conflicts in the Balkans, Ruanda and Sri Lanka involving the persecution of ethnic, racial, linguistic and religious minority groups proved that nationalism combined with the oppression of minority groups is likely to open a Pandora´s box of political conflicts and tension. This has been repeatedly been affirmed at the international and regional level[7] and in the case of the Balkan states has also found expression in the peace agreements concluded in the aftermath of the wars. Still, commitments and the general understanding on the protection of minorities at the international level were shaped by nation states' reservations towards the establishment of legally binding international norms with corresponding implementation mechanisms concerning minority rights. The arguments mainly used by states reluctant to accept the idea of special protection for minorities encompass *inter alia* that international mechanisms with regard to the protection of minorities are likely to interfere with a state's internal affairs; a uniform approach towards the protection of minorities is questionable due to the various different national contexts; the preservation and strengthening of minority identities could endanger state unity and identity; and that acknowledging special rights to a certain group within a state's territory could lead to reverse discrimination[8].

In addition to or as a consequence of general state concerns regarding an international minority rights protection regime, establishing what actually constitutes a minority and the determination of the substantive content of states' obligations towards minorities proved to be more than challenging. With regard to the former, so far no consensus on an internationally agreed definition as to which groups constitute a minority could be reached. The International Covenant on Civil and Politic Rights (ICCPR) fails to establish an acceptable definition of what constitutes a minority[9]. The most widely recognised definition in theory and practice – even

[5] UN General Assembly Resolution, *Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities*, UN Doc. A/RES/47/135, 18 December 1992, Preamble.

[6] Eide, A., and Letschert, R., 'Institutional Developments in the United Nations and at the Regional Level', 14 *International Journal on Minority and Group Rights*, 2007, p. 299. The categorisation of justification for minority rights alongside the lines of a) peace and security, b) human dignity, and c) culture has been proposed by Spiliopoulo-Akermark, A., *Justifications of Minorities in International Law*, Kluwer, London/The Hague/Boston, 1997.

[7] E.g. OSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, para. 30 'respect for the rights of persons belonging to national minorities as part of universally recognised human rights is an essential factor for peace, justice, stability and democracy in the participating States'; the CoE Framework Convention for the Protection of National Minorities (FCNM) 'Considering that the upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace in this continent', Preamble; the 2005 UN World Summit outcome 'respect for the rights of persons belonging to national minorities as part of universally recognised human rights is an essential factor for peace, justice, stability and democracy in the participating States'.

[8] Capotorti, F., *Study of the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384 and Add.1-6 (1977), republished by the UN Centre for Human Rights, New York,1991, Preface.

[9] Art. 27 ICCPR reads 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

though not being legally binding – is the one suggested by Special Rapporteur Francesco Capotorti in his study on minorities. He defined a minority as

> '[a] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from the those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.'[10]

The Framework Convention for the Protection of National Minorities (FCNM) as the only legally binding minority rights specific instrument neither entails a definition of the term minority. The Advisory Committee to the FCNM (ACFC) adopted a pragmatic approach dealing with minority issues on a case-by-case basis rather than trying to draw up general rules and principles with regard to the definition. For its observations the ACFC regularly refers to the Venice Commission's 'Report on Non-citizens and Minority Rights' and its definition attempts[11].

Besides difficulties arising out of the lack of definition further uncertainties ascend with regard to the scope of state obligations towards minorities. On the one hand, minority rights are individual rights going beyond traditional human rights protection mechanisms by addressing individual concerns of a member of a minority group. On the other hand, they have a collective purpose aimed to create conditions under which members of minorities and minorities can express, develop, maintain, and preserve their specific features and characteristics and are therefore intended to remedy eventual structural imbalances between minorities and majorities in areas that are important for the maintenance of cultural integrity. They are not privileges but they are granted to make it easier if not even possible for minorities to preserve their specific cultural characteristics. The Office of the High Commissioner for Human Rights (OHCHR) identified survival and existence, promotion and protection of the identity of minorities, equality and non-discrimination, and effective and meaningful participation as major concerns under the international minority rights regime[12]. Under international law it is established that under certain circumstances and for the purpose of achieving not only formal but also substantive equality the principles of non-discrimination does not require equal treatment under all circumstances but may justify or even demand difference in treatment if this differentiated treatment is necessary, reasonable, objective and proportionate to its aim. In this vain minority rights instruments confirm that for the purpose of minority protection states will have to adopt positive measures designed to advance the specific position of minorities.

1.1.2 International level

1.1.2.1 Instruments

The UN standards relevant for the protection of minorities are enshrined in various instruments. Whereas all core human rights treaties[13] contribute to the protection of minorities by setting forth non-discrimination rules, specific rules on minority protection can only be found in Art. 27 ICCPR and Art. 30 of the Convention on the Rights of the Child (CRC)[14]. Next to Art. 27 ICCPR, the most elaborated instrument specifically dedicated to the protection of minorities is the 1992 UN Declaration on the Rights of Minorities (UDNM) both of which will be elaborated further below.

[10] Capotorti, 'Study', p. 4.

[11] Venice Commission, *Report on Non-citizens and Minority Rights*, Strasbourg, adopted on 15-16 December 2006, (CDLAD (2007)1).

[12] OHCHR, *Minority Rights – International Standards and Guidance for Implementation*, Geneva, 2010, p.7. Available at http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf.

[13] International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CRC), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), International Convention for the Protection of All Persons from Enforced Disappearance (CPED), Convention on the Rights of Persons with Disabilities (CRPD).

[14] Art. 30 CRC reads 'In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.'

Art. 27 ICCPR

Art. 27 is the most widely accepted legally binding provision with regard to the protection of minority rights and has been inspiring the contents of the UN declaration on minorities. It provides that where ethnic, religious or linguistic minorities exist within the territory of a state party, their members shall not be denied the right to enjoy their own culture and preserve their specific characteristics. Even though the text of Art. 27 may be misleading its applicability does not depend on the official recognition of a minority by a state since parties to the Covenant are automatically obliged to ensure that all individuals under their jurisdiction enjoy the rights as provided for in the Covenant[15]. According to Art. 27 persons belonging to minorities shall not be denied certain rights deriving from their identity. From a first sight it appears that states therefore only have the obligation of non-interference in these rights, rather than having an obligation to promote the situation of minorities by taking specific affirmative actions. However, state duties in respect of the protection of minorities have been construed in terms of protection from infringements and in terms of effective preservation but also development of minority identity[16]. With regard to the content and scope of Art. 27, General Comment No 23 of the Human Rights Committee (HRC) provides the most authoritative interpretation[17]. Most importantly it recognised that Art. 27 constitutes an autonomous right within the Covenant meaning that persons belonging to a minority group are granted a right 'which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are entitled to enjoy under the Covenant.'[18]

The HRC, as the most relevant treaty body for the rights of minorities, employs various means when monitoring state compliance with the ICCPR, including a state reporting mechanism, general comments, an interstate complaint mechanism accompanied by an individual complaint mechanism under the Optional Protocol (OP) to the ICCPR[19]. It is tempting to argue that reporting mechanisms in comparison to judicial proceedings constitute rather weak monitoring instruments only having political implications. Still, judicial proceedings and legally binding judgements can neither be considered as panacea for comprehensive human rights protection. Clearly, enforceable judgements have eventually an impact in particular on the victim of the human or minority rights violation. But: First, even if a judgement is delivered it does not mean that it is executed at the national level[20]. And secondly, it can be questioned whether selective judgements will bring a policy chance for instance with regard to minority rights. Periodically reporting on the other hand will have political impacts eventually leading to policy changes. Additionally, due to the engagement of civil society actors throughout the reporting period the reporting system has a rather strong preventive dimension and the primary role of the HRC in particular in the evaluation of state reports is the one of an adviser and consensus-builder[21] The individual complaint procedure is a quasi-judicial mechanism likely to have stronger implications on the compliance of states with the human rights provisions enshrined in the ICCPR providing the HRC with the authority to examine individual communications and issue final decisions on their merits. However, the individual complaint procedure is not enshrined in the ICCPR itself, but in its OP and therefore not mandatory[22]. By ratifying it a state 'recognises the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State

[15] On the interpretation of Art. 27 ICCPR see Nowak, M., *Covenant on Civil and Political Rights (CCPR)* – Commentary (2nd rev. ed.), Engel, Kehl am Rhein, 2005.

[16] Pentassuglia, G., 'Introduction - Minority Rights, Human Rights: A Review of Basic Concepts, Entitlements and Implementation Procedures under International Law', in: Council of Europe (ed.), *Mechanisms for the Implementation of Minority Rights*, Vol. 2, Council of Europe Publishing, Strasbourg, 2005, p. 14.

[17] UN Human Rights Committee, *General Comment 23 – The Rights of Minorities (Art. 27)*, UN Doc. CCPR/C/21/Rev.1/Add.5, 8 April 1994.

[18] Ibid.

[19] For a detailed examination see Morawa, A., 'The United Nations Treaty Monitoring Bodies and Minority Rights, withParticular Emphasis on the Human Rights Committee', in: Council of Europe (ed.), 'Mechanisms for the Implementation', pp. 29-47.

[20] The ECtHR, being considered the gold standard in human rights protection is struggling considerably with the execution of its judgments. As a consequence of the often delayed or lacking execution of the judgements at the national level Protocol No 14 to the ECHR provided the Committee of Ministers with greater powers in this regard.

[21] Morawa, 'The United Nations Treaty Monitoring Bodies', p. 33.

[22] The OP to the ICCPR has 114 parties out of 167 parties to the ICCPR.

party of any of the rights set forth in the Covenant.'[23] The HRC in the individual complaint procedure acts as a tribunal, however, from a legal point of view, the 'views' of the HRC are not comparable to judgements. They are not legally binding and there is a lack of a sanction mechanism in case the respondent state does not comply with the view of the HRC hampering its enforcement[24].

The ICCPR foresees general comments as a means of interpretation and guidance for the domestic implementation of the provisions of the Covenant. Additionally, there is the theoretical possibility of inter-state complaints envisaged in the Covenant[25]. However, so far the inter-state complaint mechanism has never been used and has been qualified by scholars as meaningless tool[26].

The fundamental weakness of UN treaty based monitoring mechanism is that while they can identify minority rights violations of minority groups they cannot enforce the breached obligations being confined to giving recommendations which may attain some precedential value indeed, however do not generate any binding obligations for states.

1992 Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities

The Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (UNDM), adopted by consensus in the General Assembly in 1992, is the only universal instrument being exclusively dedicated to the protection of minorities. As has been already indicated, the UNDM has been inspired by Art. 27 ICCPR, its scope, however, is much broader. While being legally non-binding it was aimed to further expand the substance of minority rights within the UN system. Most obviously this approach is reflected by the choice of language: whereas Art. 27 ICCPR has been drafted in a negative way the UNDM applies a positive language with regard to state duties ('shall protect' or 'shall encourage')[27] and replaced the phrase 'shall not be denied' of Art. 27 by 'have the right'[28]. Art. 2 introduces most importantly the right to effective participation in cultural, religious, social, economic and public life (Art. 2.2); in decisions affecting them on the national and regional level (Art. 2.3); the right to establish and maintain their own associations (Art. 2.4); and the right to maintain and establish peaceful contact with other members of their group (Art. 2.5). Subsequently, Arts. 4 - 7 stipulate that states in order to promote and protect the rights of minorities will have to take certain positive measures. For instance Art. 4.2 calls on states to create favourable conditions for the expression and development of minority cultures 'except when specific practices are in violation of national law and contrary to international standards.' Arts. 5 -7 invite states to ensure that minority rights are duly taken into account in national planning and international cooperation. The remaining provisions embrace standards typical for minority rights instruments, for instance that the entitlements in question may not prejudice existing state obligations and commitments, that minority rights must not undermine human and fundamental rights of others, that positive actions taken by states to ensure the effective enjoyment of the rights set forth in the UNDM shall not *prima facie* be considered as contrary to the equality principle[29], and lastly, that the UNDM must not be construed as means to jeopardise sovereign equality, territorial integrity and political independence of a state[30].

The UNDM despite its flexible wording and clawback clauses ('whenever possible' or 'where appropriate' giving the respective provisions a rather negative touch) still is an important contribution to the international minority protection regime. The fact that it was adopted by a great diversity of states and that in the UN a declaration even though being not being legally binding is a formal instrument raise the hope that UN

[23] See Art. 1 OP to the ICCPR.
[24] Morawa, 'The United Nations Treaty Monitoring Bodies', p. 37.
[25] Arts. 41 and 42 ICCPR.
[26] Niewerth, J., *Der Kollektive und der Positive Schutz von Minderheiten und ihre Durchsetzung im Völkerrecht*, Duncker & Humblot, Berlin, 1996, p. 197.
[27] Art. 1 UNDM,
[28] Art. 2 para. 1 UNDM.
[29] All Art. 8 UDNM.

members will abide to the principles it contains. It does not however itself foresees specific enforcement mechanism, despite initial proposals, since no consensus could be reached[31]. Instead, in Art. 9 the UDNM, only indicates that the UN system as a whole is expected to contribute to the full realisation of its rights and principles[32].

1.1.2.2 Other enforcement and monitoring mechanisms

When it comes to enforcement at the international level, minority rights suffer the same fate as human rights in general, namely that due to the absence of a centralised power of enforcement at the international level, the implementation of the respective international standards has to be secured through national systems. However, it is well known that when the implementation of human rights in general or minority rights in particular is entirely left to states there might be a weakening of protection. To avoid that standards degenerate into insignificance because of the reluctant position of states a variety of procedures and mechanisms have been made available within the UN institutions to pursue international enforcement of minority standards[33].

Minority issues can be taken on by other UN bodies not explicitly dealing with human rights issues such as by the General Assembly or even the Security Council. Those bodies can consider minority rights violations within their broader mandate enshrined in the UN Charter even though there are no formal reporting or complaint mechanisms in place. The General Assembly can adopt politically profound resolutions and the Security Council may even authorize enforcement actions under Chapter VII of the UN Charter in case minority rights violations amount to threats or even breaches of international peace or security.

Universal Periodic Review (UPR)

All UN members have to report every four years to the Human Rights Council on the fulfilment of their human rights obligations. The Universal Periodic Review (UPR), introduced by General Assembly Resolution 60/251 2006, is comprised of three reports (one state report and two reports of the OHCHR compiled of reports by the treaty bodies, the special procedures but also of input by other stakeholders such as NGOs, National Human Rights Institutions (NHRIs), academic institutions and regional organisations) and shall thereby 'complement and not duplicate the work of the treaty bodies'[34]. Even though not being a specific instrument with regard to the protection of minority rights the UPR provides a platform to address minority rights violations and as a matter of fact minority issues and the promotion and protection of the rights of persons belonging to minorities often came up in the state reports and in the reports compiled and prepared by the OHCHR.

The Independent Expert on Minority Issues (IEMI)

Special Procedures mandates call on mandate holders to publicly report, investigate, monitor and advise on country specific human rights situations (country mandates) or on specific human rights issues (thematic mandates) worldwide[35].

In 2005 the then Commission on Human Rights requested the High Commissioner on Human Rights in its resolution 2005/79 to appoint an Independent Expert on Minority Issues (IEMI). Appointed in 2005, the IEMI's mandate has been renewed twice in 2008 and 2011 and encompasses *inter alia* the promotion of the implementation of the UDNM; the identification of best practices and opportunities for technical cooperation with the OHCHR; the engagement in consultations and dialogue with governments regarding minority issues

[30] Ibid.
[31] Gudmundur, A., Zayas, A., 'Minority Protection by the United Nations', 14(1) *Human Rights Law Journal*, 1993, p.3.
[32] Art. 9 UDNM.
[33] Pentassuglia, G., 'Introduction', p. 15.
[34] UN GA Resolution, UN Doc. A/RES/60/251, 3 April 2006.
[35] For an overview over all Special Procedures see OHCHR, http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx .

in their countries; taking into account the views of non-governmental organisations on matters pertaining to the mandate; and the submission of annual reports on his/her activities including recommendations on for effective strategies for the better implementation of the rights of persons belonging to minorities[36]. The IEMI, such as all other Special Procedure mandate holders, can react fast to alleged violations of minority rights all over the world and plays a crucial role in the promotion and protection of the rights of minorities. Since its establishment the IEMI has conducted 14 country visits, the last one taking place in Bosnia and Herzegovina in September 2012[37]. The IEMI's mandate was renewed firstly in 2008 and later in 2011 and its task broadened.

Next to its function as aimed at enhancing protection of minorities at the national level the IEMI also promotes as one of her thematic priorities the inclusion and mainstreaming of consideration of minority issues within the work of the UN and other important multilateral forums keeping thereby minority issues a priority at the international agenda[38]. Importantly, in her first report the IEMI stressed that her work will benefit and seek guidance from other existing regional instruments such as from the CoE's Framework Convention for the Protection of National Minorities (FCNM) and the Copenhagen Document of the OSCE. Furthermore, a clear intention to cooperate with the OSCE High Commissioner on National Minorities (HCNM) and the CoE's Advisory Committee (ACFC) under the FCNM was expressed[39].

The Forum on Minority Issues

In 2007 the Human Rights Council established by Resolution 6/15 the Forum of Minority Issues replacing the Working Group on Minority Issues[40] that most importantly in 2001 adopted a commentary on the UDNM providing valuable guidance on the interpretation and application of the provisions of the Declaration.

The objective of the Forum on Minority Issues is to provide thematic contributions and expertise to the work of the IEMI, to identify and analyse best practices, challenges, opportunities and initiatives for the further implementation of the UDNM[41]. So far the Forum on Minority Issues has held four sessions each with a specific focus and made recommendations for each thematic priority[42]. The Forum hereby follows the approach of the Working Group to bring together representatives of Member states, UN mechanisms, bodies and specialised agencies, intergovernmental organisations, regional organisations, national human rights institutions and, most importantly, representatives of minority groups, to exchange views and start a continuous dialogue.

[36] Human Rights Council, *Resolution on the Mandate of the Independent Expert on Minority Issues*, UN Doc. A/HRC/RES/16/6, 8 April 2011. For more information on the Expert on Minority Issues see OHCHR, http://www.ohchr.org/EN/Issues/Minorities/IExpert/Pages/IEminorityissuesIndex.aspx.

[37] For the country visits conducted by the IEMI see http://www.ohchr.org/EN/Issues/Minorities/IExpert/Pages/visits.aspx.

[38] OHCHR, http://www.ohchr.org/EN/Issues/Minorities/IExpert/Pages/Mainstreamtheconsideration.aspx.

[39] McDougall, G., *Report of the Independent Expert on Minority Issues*, UN Doc. E/CN.4/2006/74, 6 January 2006.

[40] The Working Group on Minority Issues was established in 1995 pursuant to ECOSOC Resolution 1995/31 of 25 July 1995 as a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights (previously called the Sub-Commission on Prevention of Discrimination and Protection of Minorities).

[41] OHCHR, 'Minority Rights', p.22.

[42] For a compilation of all the recommendations see UN Forum on Minority Issues, *'Compilation of Recommendations of the Four Sessions 2008 to 2011*, available at http://www2.ohchr.org/english/bodies/hrcouncil/minority/docs/Forum_On_Minority_Pub_en_low.pdf. So far recommendations have been developed on 'Minorities and Education' (1st Forum), 'Minorities and Effective Political Participation' (2nd Forum), 'Minorities and Effective Participation in Economic Life (3rd Forum), 'Guaranteeing the Rights of Minority Girls and Women' (4th Forum).

1.1.3 Regional level

With respect to Europe some comparable patterns in the development of regional migration protection regimes can be identified even though the existing mechanisms in place do considerably differ from those at the UN level.

1.1.3.1 OSCE

The Organization for Security and Co-operation in Europe (OSCE, formerly the Conference for Security and Co-operation in Europe (CSCE)) established by the Helsinki Final Act in 1975 as the first pan-European security organisation has been the result of a remarkable political and pragmatic compromise between the principal players of world politics whose ideological approaches could not be more divergent. During the Cold War the primary objectives of the CSCE were not explicitly concerned with the protection of minority rights but rather with hard security issues as for instance arms control and border assurance and economic cooperation. Even though the protection of minorities was mentioned already in the Helsinki Final Act, concrete standards had to be developed over the following decades. With the end of the Cold War and the resurgence of nationalism in wide parts of Europe the minority question was back as priority at the agenda of politicians and the protection minority rights became understood as method to avoid inter- and intrastate conflicts[43]. Consequently, different political mechanism relevant for the protection of minorities were developed and the High Commissioner on National Minorities (HCNM) established as well as long term missions active in the field. Still, it has to be kept in mind, the OSCE differently from the CoE for instance is not a human rights organisation *per se* but rather a security organisation seeing human rights and for that matter minority rights through the prism of security. In the approach of the OSCE it is therefore not the individual playing the centre role but it is rather security and conflict prevention within the OSCE territory.

The concluding instrument of the first conference, the Helsinki Final Act of 1975, laid down ten basic principles divided in four baskets governing the relations between the participating states but also between governments and citizens. Under Basket I ('Questions relating to Security in Europe') minoritiesthe protection of is mentioned as a Principle[44].

The CSCE/OSCE process evolved through a series of 'Follow up Meetings' held at regular intervals. Important for minority protection is the Vienna follow-up meeting (1986-1989) where a 'Human Dimension Conference' was established to make further progress in the field of human rights and fundamental freedoms. With regard to minority rights' standard setting, the Concluding Document of the Copenhagen Meeting of the Human Dimension of the CSCE held in November 1990 expressed a new consensus on minority issues and can be considered as the 'peak of standard setting on national minority issues both for the CSCE and more generally'[45].

A whole Chapter of the Copenhagen Document is dedicated to the protection of minority rights encompassing detailed provisions concerning the treatment of minorities. The importance of democratic structures and respect for the rule of law as well as the impact of the rights of minorities on peace and stability are explicitly highlighted[46]. Besides the general and very broad obligation that 'participating States will protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and create conditions for the promotion of that identity'[47] the document includes provisions such a minority-specific ban on discrimination (para. 31), the right of minorities to use their mother tongue (para. 32.1), the right to establish and maintain their own educational, cultural and religious institutions (para. 32.2), the right to profess and practice their religion freely (para. 32.3), the freedom of assembly including cross-border contacts (para.

[43] Wright, J., 'The OSCE and the Protection of Minority Rights', 18(1) *Human Rights Quarterly*,1996, p. 191.
[44] Principle VII para. 4 Helsinki Final Act 1975.
[45] Wright, J., 'The OSCE', p. 196.
[46] Para. 30, Copenhagen Document.
[47] Para. 33, Copenhagen Document.

32.6), and to participate effectively in public affairs (para. 35). Most importantly para. 32 states: 'To belong to a national minority is a matter of a person's individual choice and no disadvantage may arise from the exercise of such choice.'

The Copenhagen Document is not a treaty but like all OSCE documents not legally binding. Still, it has a very strong political significance; it can be considered politically binding, due to the fact that participating states adopted it by consensus.

The High Commissioner on National Minorities

In 1992 the follow-up conference in Helsinki adopted the mandate of the High Commissioner on National Minorities (HCNM). With the Helsinki Document[48] the standard-setting process with regard to the protection of minorities was basically accomplished since the following conferences did not provide new minority rights provisions. The position of the HCNM was not developed in order to implement international standards concerning minorities nor does he has the role as a minority ombudsman getting involved in individual cases. The mandate of the HCNM follows a security perspective and he only gets active when minority issues are likely to result in conflict limiting his work considerably by leaving outside those minority issues that just do not have the potential for serious tensions[49].

The mandate of the HCNM following the logics of quiet diplomacy reads:

> 'The High Commissioner will provide 'early warning' and, as appropriate, 'early action' at the earliest possible stage in regard to tensions involving national minority issues which have not yet developed beyond an early warning stage, but, in the judgement of the High Commissioner, have the potential to develop into a conflict within the CSCE area, affecting peace, stability or relations between participating States, requiring the attention of and action by the Council or the CSO.'[50]

The activities of the HCNM are based on the diplomatic principles of impartiality and confidentiality a fact that has been criticised by various commentators[51]. At a first glance the working method of the HCNM indeed appears to be designed to protect the interests of the state rather than the interests of endangered minority groups. Without doubt, when the mandate of the HCNM was negotiated, states were eager to ensure that neither their international reputation nor their territorial integrity could be jeopardised by the intervention of the HCNM (principle of confidentiality). At the same time they made sure that the HCNM in his work had to be impartial to avoid him taking a stand for national minorities eventually having separatist endeavours. These assurances in fact allowed that the HCNM is able to work on his own initiative without being dependent on a political decision of the OSCE which would have required consensus allowing states who might face themselves minority related tensions to block the deployment of an early warning mission. On the other hand it was impeded that the HCNM could have been misused and influenced by kin-states trying to further their own national interests or the interest of their kin-minorities[52].

Once the HCNM has been informed about alleged violations of minority rights, he will assess at the earliest possible stage the role of the parties directly concerned, the nature of the tensions and recent developments therein and, where possible, the potential consequences for peace and stability within the OSCE area. To this end the HCNM can collect information from any source, including NGOs[53], and pay visit to any participating

[48] OSCE, *CSCE - Helsinki Document 1992, The Challenges of Change*, July 1992, available at http://www.osce.org/mc/39530?download=true.
[49] See as well Bloed, A., and Letschert, R., 'The OSCE High Commissioner on National Minorities', in: Henrad, K., and Dunbar, R., (eds.), *Synergies in Minority Protection – European and International Law Perspectives*, Cambridge University Press, New York,2008, e-book version.
[50] Part II, para. 3 Helsinki Final Act.
[51] Neukirch, C., Simhandl, K., and Zellner, W., 'Implementing Minority Rights in the Framework of the CSCE/OSCE', in: Council of Europe (ed.), 'Mechanisms for the Implementation', p. 164.
[52] Preece, J., 'National Minority Rights Enforcement in Europe – A Difficult Balancing Act', 3(2) *International Journal of Peace* Studies, 1998, p. 5.
[53] It has been noted however that the HCNM so far have not taken real advantage of the possibility of engaging with NGOs. See Kemp, W., *Quiet Diplomacy in Action, The OSCE High Commissioner on National Minorities*, Kluwer, The Hague/London/Boston, 2001, p.100.

state and communicate in person, with parties directly concerned to obtain first-hand information about the situation of national minorities. During these visits the HCNM, when it is appropriate, discuss the questions with the parties, and promote dialogue, confidence and cooperation between them. If the HCNM after having examined and assessed the situation concludes that there is a *prima facie* risk of potential conflict he has to issue an early warning to the Senior Council. If considered necessary the HCNM may recommend that he be authorised to enter into further contact and closer consultations with the parties concerned[54]. The country visits can be considered as a far reaching instrument the HCNM has at his disposal since he can enter a state's territory even without the state's consent[55]. This practice has been considered by various participating states as interference in internal affairs. Even though there is the common understanding and consent that the protection of minorities is a common concern of all OSCE participating states[56] Russia has been increasingly opposing the involvement of the OSCE and the HCNM with regard to the Chechen crisis and Turkey with regard to the Kurdish problem. Even though this opposition violates OSCE commitments with regard to minority rights there are hardly any possibilities to address these issues effectively. The OSCE remains a political organisation and will always remain dependent on the voluntary consent of participating states due to the absence of effective enforcement mechanism[57].

The explicit mandate of the HCNM is in general rather short and not very explicit on the working instruments (i.e. collecting information, pay visit, communication with parties concerned, discussions) having a strong emphasis on 'early warning' rather than on 'early action'. However, the flexibility of the mandate allowed the HCNM to develop and introduce a series of working instruments not foreseen by the mandate.

On basis of the discussions held with parties concerned the HCNM developed the instrument of specific recommendations to governments. These specific recommendations are firstly addressed to the government concerned and then to the Permanent Council raising the authority by the mobilisation of other participating states[58].

Since international minority norms and standards are rather vague, abstract and often difficult to be applied at the national level, the HCNM in his thematic work developed recommendations and guidelines. Recommendations have so far been developed with regard to education (Hague Recommendations 1996), language (Oslo Recommendations 1998), participation (Lund Recommendations 1999), policing (Recommendations on Policing in Multi-Ethnic Societies 2006), inter-state relations (Bozen Recommendations 2008). Currently recommendations on integration are developed that are soon to be adopted (Ljubljana). Guidelines on the Use of Minority Languages in the Broadcast Media have been adopted in 2003[59].

Furthermore, the HCNM in the past issued occasionally public statements with the purpose to increase the commitments made by the parties concerned during the preceding confidential discussions by presenting them to the broader public[60].

1.1.3.2 Council of Europe

The Council of Europe (CoE), the Strasbourg based regional intergovernmental organisation founded in 1950 to promote human rights, in its beginnings similar to the UN promoted a human rights based approach towards minority rights elaborating and developing instruments pertaining to all without particular attention paid to minorities. The main instrument of the CoE, the European Convention of Human Rights (ECHR), for

[54] Part II, paras. 11-16 Helsinki Final Act.
[55] Bloed, A., and Letschert, R., 'The OSCE High Commissioner'., e-book version. However, even though the HCNM might enter the territory without the consent of a state it does not seem to be useful to do so and conduct a country visit without the involvement of the state.
[56] OSCE, Moscow Document 1991.
[57] Bloed, A., and Letschert, R., 'The OSCE High Commissioner', e-book version.
[58] Neukirch, C., Simhandl, K., and Zellner, W., 'Implementing Minority Rights ', p. 165.
[59] All the recommendations and guidelines are available at OSCE, High Commissioner National Minorities-Thematic Issues, http://www.osce.org/hcnm/43202 .
[60] Neukirch, C., Simhandl, K., and Zellner, W., 'Implementing Minority Rights', p. 166.

instance does not explicitly refer to minorities. It was only when the CSCE in 1990 adopted the Copenhagen Document that there was also the perceived need at the CoE level to further minority protection and the Parliamentary Assembly pressured the Committee of Ministers to authorise the preparation of a legally binding, minority rights specific instrument. In 1993 at the Vienna Summit, the head of governments and states of the CoE finally declared and agreed that the protection of minorities is an essential element of stability and democratic security and 'that the national minorities which the upheavals of history have established in Europe should be protected and respected so that they can contribute to stability and peace.'[61] In 1994, the Council adopted the Framework Convention for the Protection of National Minorities (FCNM) which entered into force in 1998. The FCNM is the first legally binding multilateral instrument exclusively devoted to the protection of minorities and it transforms to a large extent the political commitments made by the OSCE in the 1990 Copenhagen Document into legally binding provisions. Even though the FCNM has been criticised on various grounds, it still can be considered one of the most comprehensive treaties designed to protect minorities[62]. As of September 2012 39 states have ratified the FCNM[63].

The Framework Convention for the Protection of National Minorities

The 32 articles of the FCNM cover a wide range of issues including *inter alia* non-discrimination, the promotion of effective equality, promotion of conditions favouring the preservation and development of culture, religion, language and traditions, freedom of assembly, association, expression, thought, conscience and religion, access to and use of media; linguistic freedoms, education, participation in economic, cultural, social and public life, and the prohibition of enforced assimilation. Importantly, Art. 1 states that the protection of minority rights is an integral part of human rights and Art. 22 specifies that the Convention must not be used to reduce the protection standards already existing.

The provisions in the FCNM are programme-type provisions leaving states a rather wide margin of discretion in the implementation of declared objectives. The word 'framework' already highlights the wide margin states have to translate and contextualise the provisions into the national frameworks. The FCNM to a certain extent can be considered an action programme for states in defining their obligations not particularly setting forth subjective rights for the individuals since it remains with the states how they implement their obligations[64]. Qualifying phrases such as 'substantial numbers', 'a real need', 'where appropriate' and 'as far as possible' could be interpreted that the FCNM aims at protecting state interests rather than the rights of individuals. As the other international instruments on minorities the FCNM does not contain a definition of the concept of national minorities and each state party is left room to assess who belongs to a minority group within its territory.

As for the monitoring of the implementation of the FCNM, the CoE set up an Advisory Committee (ACFC)[65] entrusted with the task to consider successive state reports in order to enhance the protection of minorities at the domestic level within the state parties[66]. Contrarily to the OSCE HCNM the ACFC's mandate does not include any prevention competencies. Its main task is to examine the submitted state reports and evaluate the adequacy of measures taken by states in order to align domestic standards with the FCNM standards and prepare finally an opinion on these measures[67]. The mandate of the ACFC has been further defined in

[61] CoE, Vienna Declaration, 9 October 1993, available at https://wcd.coe.int/ViewDoc.jsp?id=621771 .
[62] For a comprehensive introduction into the FCNM see Phillips, A., 'The Framework Convention for the Protection of National Minorities', in: Council of Europe (ed.), 'Mechanisms for the Implementation', pp. 109-129.
[63] For the list of all state parties see http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=157&CM=&DF=&CL=ENG.
[64] Eide, A., and Letschert, R., 'Institutional Developments', p. 311.
[65] Arts. 24 and 26 FCNM.
[66] Art. 25 FCNM. For a detailed analysis of the ACFC see de Beco, G., and Lantschner, E., 'The Advisory Committee on the Framework Convention for the Protection of National Minorities (the ACFC)', in: Gauthier de Beco (ed.), *Human Rights Monitoring Mechanisms of the Council of Europe,* Routledge, New York/London, 2012, pp. 100-126.
[67] The state reports themselves and the comments are public and available at http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/Table_en.asp

Resolution (97)10[68] detailing the specific monitoring arrangements. Accordingly, the ACFC may request additional information from a state party; receive information from other sources such as individuals and non-governmental organisations and take this information into account when establishing its opinion; and hold meetings with government representatives and other persons.[69]

Even though the mandate does not foresee it, the ACFC has developed the practice to visit states upon invitation when examining state reports and collect further information at the spot and start an intensive dialogue with governments and representatives of minority groups. Additionally, the ACFC also issues thematic commentaries providing valuable guidance on how the standards of the FCNM can be interpreted and transformed into national law[70].

Based on and taking into account the opinions of the ACFC the Committee of Ministers makes finally country specific conclusions or recommendations on a state's compliance with the provisions of the FCNM[71]. The responsibilities of the ACFC further extend to the follow-up on the conclusions and recommendations made by the Committee of Ministers[72]. The follow-up procedure basically consists of follow-up seminars organised by the CoE and the state party concerned[73]. The seminars are established for the purpose to continue the dialogue between the governments concerned and the ACFC. These follow-up activities accomplish the reporting duties of states and oblige them not only to submit regularly information on the measures taken in response to the recommendations by the Committee of Ministers but also to report on new initiatives taken on the basis of the opinion of the ACFC.

European Charter for Regional and Minority Languages

Another specialised instrument at the CoE level is the European Charter for Regional and Minority Languages that entered into force in 1998. Its objectives are basically twofold: First, regional and minority languages have to be protected and promoted as threatened aspect of Europe's cultural heritage; and secondly, speakers of those languages should be enabled to use them in private but also in public life. For this purpose the Charter sets forth objectives and principles following a 'menu approach' that all states have to apply on regional and minority languages at their territory. Furthermore, the Charter, that has lesser state parties than the FCNM, foresees a series of concrete measures designed to facilitate and encourage the use of specific regional or minority languages in public life[74].

For the European Charter for Regional and Minority Languages the Committee of Experts is responsible for the monitoring of the provisions of the Charter. It examines the situation of regional or minority languages in each state, reports to the Committee of Ministers, makes recommendations encouraging states to improve compliance with the Charter[75]. The monitoring system in place is comparable to the one regarding the FCNM, except that the reporting intervals are shorter.

[68] Committee of Ministers Resolution (97)10, *Rules Adopted by the Committee of Ministers on the Monitoring Arrangements under Arts. 24 to 26 of the Framework Convention for the Protection of National Minorities*, 17 September 1997.
[69] Ibid., paras. 29-31.
[70] So far the ACFC has adopted three commentaries: Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, 2008; Commentary on Education under the Framework Convention for the Protection of National Minorities, 2006; and The Language Rights of Persons Belonging to National Minorities under the Framework Convention, 2012. All of them are available at http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/Thematic_Intro_en.asp.
[71] So far the Committee of Ministers has adopted 90 country specific recommendations. For a list of all country specific recommendations see http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/Table_en.asp
[72] Committee of Ministers Resolution (97)10, para. 36.
[73] So far there have been 50 follow-up seminars.
For a list see http://www.coe.int/t/dghl/monitoring/minorities/4_Events/ACFC_FollowUp_en.asp.
[74] For all the relevant information see CoE, http://www.coe.int/t/dg4/education/minlang/aboutchArt.er/default_en.asp.
[75] For further information see http://www.coe.int/t/dg4/education/minlang/aboutcommittee/default_en.asp .

1.1.3.3 EU

The EU policy towards the protection of the rights of minorities takes place both at the internal and the external level. Whereas the OSCE and the CoE have been actively engaged in developing standards for the protection of minorities the EU has self-limited its role with regard to minority protection for a long time to encouraging states to comply with the OSCE, the CoE or the UN standards by using accession as an incentive[76].

Since the creation of the Union the development of a *suis generis* minority policy with clear and comprehensive provisions has been marked by ambiguity. Back in 1957 when the scope and the structure of the future economic and internal market were negotiated human rights in general and the protection of minorities in particular have not found entrance either in EU primary law or the common policy goals. The regulative developments of the first periods were centred on the development of common market and the EU did neither possess the competences nor regulative mechanisms to monitor or influence the situation of minorities in the Member states (MS). It needed some decades and treaty amendments for minority rights to find entrance in the EU legislative framework. With the Treaty of Maastricht competences in certain ambits in particular non-economic features were transferred to the Union and this 'de-economisation'[77] broadened the scope of fields were the Union got active. Still, until the Treaty of Lisbon entered into force, minority rights lacked a legal basis at the EU level and have never been directly translated in the *acquis communautaire*[78]. This is especially dissatisfying with view to the fact that the EU has encouraged candidate states to comply with CoE and OSCE standards regarding minority protection, which leads to 'the ethical question of why the EU should not bind itself by the standards which it requires others to meet'[79].

The question whether the EU and its Member states should be bound to certain standards of minority protection is not a mere academic question. Research on sustainability of minority protection rules in new EU Member states shows, that only under certain circumstances a successful and sustainable implementation of minority protection norms is possible and that there is a decline in positive developments after accession to EU[80]. An effective legal basis for minority protection at EU level is likely to counter such developments, as well as contribute to the end of double standards towards candidate states and EU MS regarding this issue. However, even though the development of own legal standards might decrease the risk of double standards, opinions on such common legal EU minority protection diverge considerably. Firstly, the diverging opinions of MS on the issue of minorities may impede a truly common, coherent and comprehensive legal framework[81]. Secondly, the question arises whether the EU should not focus on making increased use of its own non-discrimination provisions and rely on well-established CoE and HCNM standards instead of enacting its own minority rights provisions and risking to reinvent the wheel and b) pre-empt and devalue the FCNM.

Besides the EU's efforts to promote minority rights in the enlargement process[82] minority issues constitute also an important part in the EU's relations with third states and are regularly raised in the political dialogues conducted. Furthermore, minority issues are as well. At least to a certain extent included in cooperation strategies such as the European Neighbourhood Policy (ENP). The FCNM is an important benchmark for the EU as well as part of the EU's pre-accession conditionality and it has been analysed that the FCNM, in absence of EU's own minority protection regime, has penetrated into the EU legal order to a certain degree. One may even

[76] Guliyeva, G., 'Joining Forces or Reinventing the Wheel? The EU and the Protection of National Minorities', 17 *International Journal on Minority and Group Rights*, 2010, pp. 287 f.
[77] See Toggenburg, G., 'A Rough Orientation through a Delicate Relationship: The European Union's Endeavours for (its) Minorities', 4(16) *European Integration Online Papers*, 2000, available at http://eiop.or.at/eiop/pdf/2000-016.pdf.
[78] Hoffmeister, F., 'Grundlagen und Vorgaben für den Schutz der Minderheiten im EU-Primärrecht', 68 *ZaöRV (Heidelberg Journal of International Law)*, 2008, pp. 175-193.
[79] Guliyeva,G., 'Joining Forces', pp. 287 f.
[80] Schwellnus, G., Baláz, L., Mikalayeya, L., 'It ain't over when it's over: The Adoption and Sustainability of Minority Protection Rules in New EU Member States', 13(2) *European Integration Online Papers*, 2009, pp. 17f.
[81] For instance France is one of the four CoE members that has not ratified the FCNM and made complete reservations to Art 27 ICCPR due to the 'unified identity' approach basically saying that there are no minorities in France.
[82] For a more detailed analysis on these attempts see Chapter Two.

ask if an EU accession to the FCNM is a reasonable option[83]. When it comes to the question whether the EU should accede to the FCNM or develop an own regime of minority protection, it must be remembered that the EU 'does not hold legal competence to develop an overarching minority policy'[84].

In the years prior to the Lisbon Treaty, minorities have not been mentioned in EU primary law. Therefore, persons belonging to minorities had to either rely on EU secondary law, or had make use of protection mechanisms outside the EU legal system, such as the ECHR or the UN human rights protection system. Secondary law can contribute to minority protection in the EU, even if it is not explicitly aimed at this issue. Examples would be the two Equality Directives[85]and the Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law of 2008[86].

With the Treaty of Lisbon entering into force by the end of 2009, this however changed. Minorities entered the EU's primary law in a twofold way. Firstly, Art. 2 TEU now explicitly refers to the rights of minorities by stating '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities ...'. Notably it does not without further narrowing or defining the term 'minority'. Secondly, the Charter of Fundamental Rights (CFR) was given legal force on an equal footing with the rest of primary law becoming the same legal value as the Treaties[87]. Art. 21 of the CFR, which is a general non-discrimination norm, explicitly underscores, that 'membership of a national minority' is one of the grounds on which it is prohibited to discriminate a person[88].

Although the EU legal framework for minority protection is still at an early stage of development, already a few key institutions and implementation mechanisms can be identified when it comes to this issue. First and foremost the two most prominent courts at European level, namely the European Court of Justice (ECJ) and the ECtHR have a major potential to contribute greatly to the protection of minorities in the EU. While the ECJ now has justiciable minority protection norms at hand, like the CFR, also the ECtHR could play a role in minority protection within the EU. Though it is not an EU court, after the most likely accession of the EU to the ECHR, EU institutions will be subject to the jurisdiction of the ECtHR, including cases related to minority rights. While it is too early for definite statements regarding the question how exactly an accession of the EU to the ECHR will make an impact on the protection of minority rights at EU level, the ECtHR is an institution, which will be involved in EU's minority protection.

Another important institution that has to be mentioned in this context is the Fundamental Rights Agency. While this EU agency is clearly no minority institution, it deals with minority rights as part of its overarching working framework. For example, the Council of the European Union added the issue of 'discrimination against persons belonging to minorities' to the FRA's Multi-annual Framework for 2007-2012[89]. The FRA also delivers various reports, data as well as working and discussion papers devoted to or including the topic of minority protection in the EU. It does not have, however, a monitoring function. An instrument for monitoring minority rights worldwide is the Annual Report on Human Rights and Democracy in the World annually addressing minority rights issues in the world[90].

[83] Guliyeva, G., 'Joining Forces', p. 288.
[84] European Union Agency for Fundamental Rights, 'Respect for and Protection of Persons Belonging to Minorities 2008-2010', Report, 2010, p. 73, available at http://fra.europa.eu/sites/default/files/fra_uploads/1769-FRA-Report-Respect-protection-minorities-2011_EN.pdf.
[85] Council of the European Union, Directive EC/43/2000 ('Racial Equality Directive') and Directive EC/78/2000 ('Employment Framework').
[86] Council of the European Union, Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law.
[87] Art. 6 (1) TEU.
[88] Art. 21 (1) CFR reads 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'
[89] European Union Agency for Fundamental Rights, 'Respect for and Protection of Persons belonging to Minorities', p. 13.
[90] See for the last report, EEAS, Human Rights and Democracy in the World - Report on EU Action 2011, June 2012, available at http://eeas.europa.eu/human_rights/docs/2011_hr_report_en.pdf

Two other actors in the field of minority protection within the EU framework are the Commissioner for Multilingualism and the Intergroup for Traditional Minorities, National Communities and Languages[91], which was originally established in 1983. The Intergroup raises awareness for the issue of minorities in the EP and can influence the EP's legislation with the objective of promotion of minority protection. The EP in particular has been a main driving force for promoting minority rights at the EU level already at a very early stage. For instance already in 1981 it drafted a resolution on a Charter of Rights of Ethnic Minorities[92] which however was never voted on. Due to the diverging opinions on the rights of minorities in Member states and the difficulties the parliament was facing it switched its approach towards a more political claim approach trying to call upon the Commission to streamline all its measures in a minority friendly way but also to bring up the issue of minority protection in the relations with third countries[93].

In the past it has been the Parliament taking a very pro-active approach in reminding the EU of its commitment to make human rights the heart of its external actions. In particular the EP holds a permanent dialogue with the European Union External Action Service (EEAS), the Council and the Commission on how they achieved or approach the agreed policy priorities. Through public discussions, in plenary, committees and subcommittees and working groups the EP holds the aforementioned institutions to account. The EP for instance also conducts 'follow-up' meetings to the issuance of the Commission's progress reports. For instance in 2010 the Parliament's Subcommittee on Human Rights organised an 'Exchange of views on Western Balkans (following Commission progress report) and including Roma issues'. These meetings are however not only used in order to monitor the EU institutions but also to cooperate with other relevant organisations in the field such as relevant civil society actors and other international organisations such as the CoE[94]. In its resolutions to the annual report on human rights the Parliament regularly touches upon minority rights issues reminding the EU not to apply double standards in its external activities[95].

1.2 National legal frameworks and their conformity with international and regional obligations

This part of the study focuses on the way international obligations have been transformed into national legislation in the Western Balkan countries. The focus will be placed on the key areas of minority protection, consisting of the right to identify as belonging to a national minority without suffering discrimination due to the exercise of this right and connected to that the recognition policies of the various countries; linguistic rights; the right to education; the right to freedom of opinion and media and the right to effective participation in public and economic life. Each sub-chapter will assess the extent to which the national legal frameworks conform to the Framework Convention for the Protection of National Minorities, as this instrument is the only legally binding document in this area and has been ratified by all countries under consideration[96]. Similarities and differences in the approach of various countries as well as good practices or common challenges will be highlighted to the extent possible in the framework of this study.

[91] For a list of members see: Traditional National Minorities, Constitutional Regions And Regional Languages Intergroup, List of Members, available at http://www.europarl.europa.eu/pdf/intergroupes/List_VII_LEG_11_Minorities_20120719.pdf.

[92] Resolution of the European Parliament of 16 October 1981 on a Community Charter of Regional Languages and Cultures and a Charter of Rights of Ethnic Minorities (OJ C 287, 9.11.1981, P. 106). Furthermore the EP was in particular active with regard to the protection of minority languages. See for instance Resolution of the European Parliament of 11 February 1983 on Measures in Favour of Minority Languages and Cultures (OJ C 68, 14.3.1983, P. 103), Resolution of the European Parliament of 30 October 1987 on the Languages and Cultures of Regional and Ethnic Minorities in the European Community (OJ C 318, 30.11.1987, P. 160), and Resolution of the European Parliament of 11 December 1990 on Languages in the Community and the Situation of Catalan (OJ C 19, 28.1.1991, P. 42), Resolution of the European Parliament of 9 February 1994 on the Linguistic and Cultural Minorities in the European Community (OJ C 61, 28.2.1994, P. 110); Resolution of the European Parliament of 13 December 2001 on Regional and Lesser-Used European Languages (OJ C 177 E, 25.7.2002, p. 334). See as well the Ebner-Report on European Regional and Lesser-used Languages – the Languages of Minorities in the EU – in the Context of Enlargement and Cultural Diversity of 14 July 2003 (2003/2057(INI).

[93] See for instance the EU-China Dialogue where minority issues are regularly addressed.

[94] European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication, Human Rights and Democracy at the Heart of EU External Action - towards a more Effective Approach, COM(2011) 886 final, 12 December 2011.

[95] European Parliament, Report on the Annual Report on Human Rights in the World and the European Union's Policy on the Matter, including Implications for the EU's Strategic Human Rights Policy, (2011/2185(INI)), 30 March 2012.

[96] The European Charter for Regional and Minority Languages has not been signed by Albania and has been signed but not ratified by Macedonia.

1.2.1 Recognised minorities and available data on their size

Albanian legislation recognises four national minorities (Greek, Macedonian, Serb and Montenegrin) and two ethno-linguistic minorities (Vlachs and Roma). Other groups like Bosniaks and Egyptians have shown interest in being recognised as national minority, without success. Until the census in 2011, no data was available as to the size of minority groups. Of the most recent census only preliminary results are available[97], so far not including any information on the size of minority populations[98]. The ACFC criticised the lack of 'legal criteria required for recognition as a national minority' and encouraged Albania to adopt a comprehensive law on national minorities. It further encouraged authorities to examine the inclusion of Bosniaks and Egyptians in the application of the FCNM. In the context of the 2011 census, the ACFC was concerned by the introduction of fines in case the information given in the census did not correspond with the civil registry. It called on the authorities, 'to observe strictly the right to self-identification ..., and to abstain from any pressure impacting on the free choice of the persons concerned. In particular, the Advisory Committee urges the authorities not to apply any fines on persons exercising their right to free self- identification'[99].

The Preamble of the Constitution of Bosnia and Herzegovina defines three 'constituent people', namely the Serbs, Bosniaks and Croats, and 'others' as being an integral part of the population of the country. Art. 3 of the Law on the Rights of National Minorities of 2003, specifies that to these 'others' belong 'Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Romas, Romanians, Russians, Rusins, Slovaks, Slovenians, Turks, Ukrainians and other who meet requirements referred to in Paragraph 1 of this Article'[100]. This paragraph includes citizenship amongst others as a criterion for being elegible to be recognised as a minority. The ACFC first of all encouraged the state to change the wording in the consititution referring to minorities as 'others' and to consider the application of the FCNM to non-citizens on an artcile-by-article basis. Furthermore, the lack of up-to-date figures on the size of constituent people and minorities (the latest census figures are from 1991[101]) hampers the implementation of certain rights under the FCNM[102].

The Preamble of the Croatian Constitution lists Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians, Ruthenians and other ethnic minority communities that are citizens of Croatia as Croatian minorities. Another twelve minorities are listed in Art. 16 of the Law on the Election of the Deputies to the Croatian Parliament of 9 April 2003. These are Albanians, Bosniaks, Bulgarians, Montenegrins, Macedonians, Poles, Roma, Romanians, Slovenes, Turks, Vlahs and Jews. According to the results of the census held in 2001 (2011 census figures are not yet available), 7.47% of the population belong to a national minority (which is 331,383). The most sizable one is the Serb national minority, which accounts for 4.54% of the population[103]. The ACFC welcomed the extension of the list laid down in the Constitution but encouraged authorities to adopt an inclusive approach in dealings with national minorities, so that no differentiation in the application of the Constitutional Law on the Rights of National Minorities (CLNM) is made between those listed in the Constitution and those in the election law. Concerning the citizenship requirement the ACFC recommended avoiding an *a priori* exclusion of non-citizens, while recognising that 'the inclusion of a citizenship requirement is not in violation of any legally-binding international instrument'[104].

[97] Results of the 2011 Census of Population in Albania will be available at http://census.al/.
[98] The census questionnaire asks for the mother-tongue and on an optional basis for the belonging to a self-declared 'ethno-cultural group'.
[99] ACFC, (third) opinion on Albania, 2011, paras. 30-51.
[100] According to Art. 3(1) of the Law on the Rights of National Minorities, a minority is 'apart of the population-citizens of Bosnia and Herzegovina that does not belong to any of three constituent peoples and it shall include people of the same or similar ethnic origin, same or similar tradition, customs, religion, language, culture, and spirituality and close or related history and other characteristics.'
[101] A population census is scheduled for April 2013 in which questions on ethnic identity and religious orientation are optional. Jukic, E., 'Historic Bosnian Census Scheduled for 2013', *BalkanInsight*, 6 January 2012, at http://www.balkaninsight.com/en/Art.icle/census-in-bosnia-most-likely-in-2013.
[102] ACFC, (second) opinion on Bosnia and Herzegovina, 2008, paras. 33-52 and 97.
[103] Results of the 2011 Census of Population in Croatia will be available at http://www.dzs.hr/Eng/censuses/census2011/censuslogo.htm.
[104] ACFC, (third) opinion on Croatia, 2010, paras. 42-46.

According to Art. 57 of the Constitution of Kosovo '[i]nhabitants belonging to the same national or ethnic, linguistic, or religious group traditionally present on the territory of the Republic of Kosovo (Communities) shall have specific rights as set forth in this Constitution'. The Law on the Promotion and Protection of the Rights of Communities and their Members in Kosovo[105] defines communities as those 'national, ethnic, cultural, linguistic or religious groups traditionally present in the Republic of Kosovo that are not in the majority'[106]. It then goes on to enumerate those groups by listing the Serbs, the Turkish, the Bosniaks, the Roma, Ashkali, Egyptians and Gorani. The inclusion of the Croats was discussed in the final phases of review but it was decided to stick to the groups previously listed also in the Constitutional Framework, where the Croats did not appear. However, with the formulation 'and other communities' added to the list, the law leaves the possibility open that others can also fall under the scope of application of the law[107]. Kosovo held a population census in 2011 which was, however, boycotted by the majority of Serbs. According to these results, 6.26% of the overall population have declared an ethnic/cultural background other than Albanian[108]. A share of the Serbian population amounting to 1.46% according to these results is, thus, not reliable. According to estimates they constitute around 5 to 7% of the population. In terms of legislation the ACFC welcomed that neither Constitution nor the Law on Communities makes reference to the citizenship criterion. On the practical side it encouraged authorities not to use the acronym 'RAE' for Roma, Ashkali and Egyptians in official documents as a form of recognition of their distinct identities, and to consider the inclusion of Montenegrins among minorities listed in the Law on Communities[109].

As a result of the Ohrid negotiations, the Preamble of Macedonian Constitution was changed so that it now reads: 'Citizens of the Republic of Macedonia, the Macedonian people, as well as the citizens that live within its borders, who are part of the Albanian people, Turkish people, Vlach people, Serb people, Roma people, the Bosniak people, and others [...] have decided to establish the Republic of Macedonia as an independent, sovereign state.' According to the 2002 population census,[110] Albanians make 25.2% of the total population, Turks 3.8%, Roma 2.7%, Serbs 1.7%, Bosniaks 0.8%, Vlachs 0.5% and others 1% . The ACFC has encouraged to include also non-citizens within the scope of application of the FCNM and to consider the extension of the list of recognized minorities so as to include also Egyptians and Croats. '[T]he main obstacle to the recognition of Egyptians as a separate national group is the consideration by the authorities and the majority of the population, that persons identifying themselves as Egyptians are in fact Roma.' This is of course not in line with the principle of self-identification enshrined in Art. 3 FCNM[111].

The Montenegrin Constitution refers in its Preamble to nationalities and national minorities, without making a hierarchical distinction, and listing subsequently the following: Montenegrins, Serbs, Bosniacs, Albanians, Muslims, Croats and others. They are free and equal citizens of the state and are committed to a democratic and civic Montenegro. Art. 2 of the 2006 Law on Minority Rights and Freedoms contains a definition of minorities, including citizenship amongst the criteria of the definition. According to the population census in 2011, 44.9% of the country's residents have declared themselves Montenegrins, nearly 28.7% Serbs[112], 4.9% Albanians, 8.6% Bosniaks, 3.3% Muslims, 1% Roma and 0.9% Croats. A comparatively high percentage of 4.8%

[105] Law on the Promotion and Protection of the Rights of Communities and their Members in Kosovo, Law No. 03/L-047, signed on 13 March 2008, entered into force on 15 June 2008.
[106] Ibid., Art. 1(4).
[107] Weller, M., 'The Kosovo Constitution and Provisions for the Minorities of Kosovo', 6 *European Yearbook of Minority Issues,* 2006/7, pp. 499-500.
[108] Serbs: 1.46%, Turks: 1.07%, Bosniaks: 1.58%, Roma: 0.5%, Ashkali: 0.88%, Egyptians: 0.66%, Gorani: 0.59%. Results of the Population Census 2011 in Kosovo are available at http://esk.rks-gov.net/rekos2011/.
[109] ACFC, (second) opinion on Kosovo, 2009, paras. 47-52.
[110] The population census scheduled for October 2011 was interrupted and cancelled when 10 days after its start the State Census Commission resigned. See 2012 Progress Report on Macedonia, 8 and 44.
[111] ACFC, (third) opinion on Macedonia, 2011, paras. 29-39.
[112] When asked about the language 37% of inhabitants said they speak Montenegrin, about 42.9% speak Serbian. Results of the Population Census 2011 in Montenegro available at http://www.monstat.org/eng/page.php?id=57&pageid=57.

did not want to declare their ethnicity. During the first monitoring on Montenegro back in 2008, the ACFC criticised the use of the citizenship criterion in the definition of a minority. The situation has not changed since.

The Preamble of the Serbian Constitution emphasises the equality of all citizens and ethnic communities in Serbia and does not comprise any definition or listing of who these ethnic communities are. The definition is provided by Art. 2 of the 2002 Law on the Protection of Rights and Freedoms of National Minorities[113], including citizenship among the criteria. Although the chapter on the Rights of Persons belonging to National Minorities (Arts. 75 to 81) of the Constitution includes general guarantees for persons belonging to national minorities, independently of their citizenship status, the ACFC invites the authorities to remove this criterion also from the Minority Law[114].

From this overview one can draw the conclusion that the majority of Western Balkan countries (Croatia, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia) still define their minorities over their citizenship. According to the ACFC, this is not in violation of any legally-binding international instrument, but considering the break-up of Yugoslavia and the declarations of independence of Montenegro and Kosovo, it is particularly problematic for persons whose citizenship status has not been confirmed. Roma are particularly affected by this problem. Such a criterion might negatively affect the exercise of rights of these persons. In this context, the ACFC makes regularly reference to the Venice Commission's Report on Non-Citizens and Minority Rights.[115] According to this report the citizenship criterion should be used only in the context of those provisions where such a requirement is relevant, e.g. in relation to electoral rights at national level, but should not generally be used to define a minority.

Another common challenge of Western Balkan countries is the provision of reliable statistical data. To date, this is an issue in Albania, Bosnia and Herzegovina and Macedonia, due to the above described problems. As has been stressed by the ACFC in its Thematic Commentary on Participation, '[r]eliable and easily accessible data is an essential precondition for developing effective measures to address socio-economic discrimination and encourage effective equality'[116].

In terms of right to self-identification we have seen that several states have established lists, defining who the minorities on their territory are. Even when those lists are open ended it seems to be difficult for minorities not included in the list to get recognition or to make use of rights provided for 'listed' minorities or the rights under the FCNM. Although recognition by the state is not necessary in order to 'exist' as a minority, it is nevertheless important due to the otherwise exclusion from certain rights.

1.2.2 Linguistic rights[117]

Arts. 10 and 11 of the FCNM regulate the use of language in relations with the public administration (official use) as well as for topographical indications. The conditions for the former are, that an area must be 'inhabited by persons belonging to national minorities traditionally *or* in substantial numbers'[118] those persons must 'so request' and if the 'request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities.' The conditions for the latter are not as many but the area must be 'traditionally inhabited by substantial numbers of persons belonging to a national minority'.

In both cases the ACFC has underlined the need for a clear legal and administrative framework. The voluntary placement of bilingual street-signs or the *de facto* use of a minority language in relations with public

[113] Serbian Law on the Protection of Rights and Freedoms of National Minorities, No. 11, 27 February 2002.
[114] ACFC, (second) opinion on Serbia, 2009, paras. 31-38.
[115] Venice Commission, 'Report'.
[116] ACFC, *Commentary on the Effective participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs*, ACFC/31DOC(2008)001, p.4.
[117] Based on Lantschner, E., 'Emerging European Standards of Minority Protection through Soft Jurisprudence?', in: Lantschner E., Marko, J., Petričušić, A. (eds.), *European Integration and its Effects on Minority Protection in South Eastern Europe*, Nomos, Baden-Baden, 2008, pp.65-67.
[118] Emphasis added. This means, that either one criterion is sufficient to claim access to this right.

authorities does not, in the view of the ACFC, fully satisfy the requirements of Arts. 10 and 11 of the FCNM. It has to be clear under which circumstances these rights have to be granted. The ACFC repeatedly asked, for instance the Albanian authorities to adopt legislation allowing for the use of minority languages, but a respective law has not been drafted yet[119]. It also encouraged the Montenegrin authorities to clarify the conditions for implementation of the constitutionally guaranteed right to use the minority language in relations with public administration[120]. This is particularly important in terms of legal certainty as the FCNM contains in both cases limiting clauses like for example the requirement of a 'substantial number' of persons belonging to a national minority.

Although the ACFC has never given its own interpretation of what it considers to be a 'substantial number' in terms of percentage, it has given its view on the thresholds used by different states. From these opinions it becomes clear that a percentage of minority population as high as 50% of the population living in a certain area would go beyond the requirement of 'substantial numbers'. Examples for this were the legislations of Bosnia and Herzegovina and of Croatia, which were amended since[121]. Art. 11 of the 2006 Minority Law of Montenegro requires minorities to constitute 'the majority or a considerable part of the population' in order to use their minority language in relations with public administration or for topographical indications. The ACFC was of the opinion that this wording 'may be subject to restrictive interpretations' and therefore asked the authorities to 'bring legal clarity in order to ensure that local authorities interpret this requirement in a manner which is in keeping with the principles of the Framework Convention'[122].

One third, as for instance present in the (revised) Croatian legislation[123], seems to be acceptable when compared to otherwise used 50% thresholds, but does not really represent a satisfactory implementation of Art. 10. In the second opinion on Croatia, the ACFC welcomes the lowering of the necessary percentage in the population from the majority to one third, 'but it still excludes a number of municipalities with a *substantial number* of persons belonging to national minorities'[124]. Also in the third opinion it calls the still existing threshold of one third as 'high'. Similar to the first opinion on Bosnia and Herzegovina[125], the ACFC recommends encouraging authorities in areas where minorities do not constitute one third of the population but reside, nevertheless, in substantial numbers 'to use their discretionary power to introduce possibilities to use a minority language in relations with administrative authorities'[126]. In the second opinion on Bosnia and Herzegovina, the ACFC noted the amendment to Art. 12 of the State Law on National Minorities, deleting the requirement of 'absolute or relative'. However, the provision still requires persons belonging to minorities to form a 'majority' of the population in order to be allowed to use the minority language. Authorities do have the discretionary power to allow for such use even when a minority does not constitute a majority, but a minimum threshold of one third is still required. The ACFC considered 'that this requirement in practice impedes the use of minority languages, including in areas traditionally inhabited by persons belonging to national minorities' and explicitly considered it being 'too high' in the context of topographical indications[127]. One can thus conclude that if the discretionary power allows going below the one third requirement it is not ideal but acceptable under the FCNM (Croatia), but if it is applied as a minimum threshold it is not in line with the FCNM (Bosnia and Herzegovina).

[119] On topographical indications: ACFC, opinion on Albania, para. 56. On the contact with public authorities: ACFC, (first) opinion on Albania, 2002, paras. 52-53 and (third) opinion on Albania, 2012, paras. 130-133.
[120] ACFC, (first) opinion on Serbia and Montenegro (regarding Montenegro), 2003, para. 80. It has done so with the 2006 Minority Law, but the ACFC was again not satisfied in terms of legal clarity (see below).
[121] On topographical indications, e.g. ACFC, (first) opinion on Bosnia and Herzegovina, 2004, para. 82, (second) opinion on Bosnia and Herzegovina, 2008, para. 163 and (first) opinion on Croatia, 2001, para. 46. On the contact with public authorities, e.g. ACFC, (first) opinion on Bosnia and Herzegovina, 2004 paras. 78-81, (second) opinion on Bosnia and Herzegovina, 2008, para. 158, and (first) opinion on Croatia, 2001, paras. 43-45.
[122] ACFC, (first) opinion on Montenegro, 2008, paras. 73 and 73.
[123] See Art. 12 of the CLNM and Art. 4 of the Law on the Usage of Language and Script of National Minorities.
[124] ACFC, (second) opinion on Croatia, 2004, para. 112. emphasis added.
[125] ACFC, (first) opinion on Bosnia and Herzegovina, 2004, paras. 79-82. In para. 82 the ACFC says: 'The Advisory Committee is concerned that the numerical threshold (an absolute or relative majority) might constitute an obstacle with respect to certain minority languages in areas traditionally inhabited by substantial numbers of persons belonging to a national minority and expresses the hope that the competent authorities will make systematic use of the possibility they have to rely on a lower [30%] threshold.'
[126] ACFC, (second) opinion on Croatia, 2004, para. 114 and (third) opinion on Croatia, 2010, para. 141.
[127] ACFC, (second) opinion on Bosnia and Herzegovina, 2008, paras. 158 and 163.

Legislation that introduced topographical indications in a minority language or granted the use of that language with public authorities with 20%, such as the Macedonian legislation[128], or 15% minority population, as in the case of Serbia[129], were welcomed by the ACFC[130]. In these cases the ACFC found difficulties in the implementation of these rights connected with slow progress, partly connected with resistance at the local level, a lack of qualified interpreters and translators or the insufficient knowledge of minority languages by civil servants. It recommended states to make additional efforts to ensure a more consistent implementation and to provide financial means to overcome these problems.

The minority friendliest and most ambitious legislation in terms of official use of minority languages can be found in Kosovo[131]. According to the 2006 Law on the Use of Languages[132], Albanian and Serbian are both official languages and, as such, they have equal status and equal rights as to their use in all Kosovo institutions[133]. At the municipal level, other languages, such as Turkish, Bosnian and Romani, can have the 'status of an official language' if at least 5% of the inhabitants of the municipality are members of such a community. In such a case, a minority language shall be used equally alongside Albanian and Serbian[134]. By law, in Prizren, the Turkish language has the status of an official language. Speakers of a language that has the status of an official language have the same rights as Albanian and Serbian speakers[135]. In municipalities where a minority community represents at least 3% of the population or where a language is traditionally spoken, the language of that community shall have the 'status of a language in official use'[136]. Speakers of these languages have the right to present to municipal institutions oral and written submissions and documents in their mother tongue and to receive a reply in that language. Municipal regulations shall be translated and published in a language in official use only if the respective community makes a request. In the work and meetings of municipal representative bodies and in public meetings organised by the municipality, members of communities whose mother tongue is not an official language have the right to use their language. If requested, interpretation shall be ensured. They can submit documents in their mother tongue and shall get a response in the same language[137]. This legislation provides for a much higher level of protection as compared to most other European countries but implementation continues to be a huge challenge for the authorities at all levels.

1.2.3 Right to education

According to Art. 14 of the FCNM, parties shall endeavour to ensure, that in areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, persons belonging to national minorities are taught in their minority language or receive instruction in their language. In the field of education, the ACFC paid more attention to the demand rather than to percentages that minority communities hold within a certain society or their traditional settlement.

The CLNM of Croatia[138] and the Law on Education in the Language and Script of National Minorities assure the right to education in the languages and scripts of national minorities. Members of national minorities have the opportunity to receive education in their mother tongue at all levels of education, from pre-school to post-secondary education. Depending on the size of a minority, either the entire education is done in the minority

[128] Art. 7 of the Constitution; Law on Local Self-Government, Official Gazette of RM no, 5/.2002; Law on the Use of the Language Spoken by at least 20% of the Citizens of the Republic of Macedonia and the Local Government Units, Official Gazette of R.M. 101/2008. The Advisory Committee further welcomed 'the fact that local authorities have the possibility to decide on the use of languages that are spoken by less than 20% of the population (see Art. 7 of the Constitution and Art. 90 (2) of the Law on Local Self-Government of 24 January 2002).' ACFC, (first) opinion on Macedonia, 2004, para.69.

[129] Art. 11 of the Law on the Protection of Rights and Freedoms of National Minorities. For the competencies of National Councils of National Minorities in the field of official use of languages and script, see Arts. 21-22 of the Law on National Councils of National Minorities of 2009.

[130] 20% for topographical indications, ACFC, (first) opionion on Macedonia, 2004, para. 73; 20% for the contact with public authorities, ACFC, (first) opionion on Macedonia, 2004, paras. 67-68; 15% for the contact with public authorities, ACFC, (first) opinion on Serbia and Montenegro, 2003, para. 76.

[131] This paragraph is based on Lantschner, E., 'Protection of Minority Communities in Kosovo: Legally Ahead of European Standards – Practically Still a Long Way to Go', 33(4) *Review of Central and East European Law*, 2008, pp. 468-469.

[132] Law on the Use of Languages, Law No. 02/L-37 adopted on 27 July 2006.

[133] Arts. 1(1)(ii) and 2 Language Law.

[134] Arts. 1(2) and 2(3), Language Law.

[135] Art. 7 Language Law.

[136] Art. 2(4) Language Law.

[137] Art. 8 Language Law.

[138] Art. 7 and especially Art. 11.

language and script, or some classes are taught in the minority language while others are taught in the state language, or the minority language is only taught as a separate subject, often in facultative classes outside the regular curriculum. The European Court of Human Rights (ECtHR) ruled that the segregation of Roma children in three Croatian elementary schools into separate classes based on language constitutes unlawful discrimination, violating the European Convention on Human Rights (ECHR)[139]. While being generally satisfied with the system of minority language teaching established by Croatia, the ACFC encouraged the authorities to continuously assess the demand and actual needs of minorities. Further efforts should be put to the training of teachers (especially in Romanes) and the development of teaching materials. The authorities were further asked to consider encouraging bilingual education[140].

The problem of adequately responding to the demand of persons belonging to national minorities, in line with Art. 14 FCNM, exists also in Albania. The Constitution provides that persons belonging to national minorities 'have the right […] to study and to be taught in their mother tongue'[141]. In addition, the Law on Pre-University Education System[142], guarantees in Art. 10, point 1, to persons belonging to national minorities 'to study and be taught in their native language'. Further details are contained in Decision No. 396, of 22.8.1994 on Elementary Education in the Native Language of National Minority People, and subsequent Decisions of the Council of Ministers[143]. As in the case of Croatia, the Albanian authorities were asked by the ACFC to 'analyse the existing requests of minorities' to get instruction in or of their minority language[144].

In Serbia the right to education in minority languages is stipulated by the Constitution and various laws[145]. Education may also be performed bilingually or in Serbian language, if at least 50% of parents or legal guardians of children[146] agree on that. Extensive competencies of National Councils for National Minorities in the field of education are laid down in Arts. 11-15 of the Law on National Councils for National Minorities, including the possibility to participate in the development of minority education. The ACFC again was concerned about the response given by authorities to repeated demands by representatives of national minorities to include the learning of their minority language as a mandatory subject. It further required a consolidation of the legislative framework by adopting operative regulations regarding the modalities of implementation of the rights set forth[147].

In the Macedonian Constitutional framework, the area of education[148] belongs to those fields for which the adoption of laws requires a double majority: the majority of votes of the representatives attending, within which there must be a majority of the votes of the representatives attending who belong to communities not in the majority in the population of Macedonia[149]. Members of the nationalities have the right to instruction in their language in primary and secondary education, as determined by law. In schools where education is carried out in the language of a nationality, the Macedonian language is also studied[150]. The details of this right are specified in the Law on Primary School[151], the Law on Secondary Education[152], and the Higher Education Act, the latter providing for minority language education only for those minorities representing more than 20% of the population (in practice only for Albanians). According to the opinion of the ACFC, 'a well-developed system of minority language teaching exists' in Macedonia, including a number of bilingual schools[153]. Still, it encouraged authorities 'to assess whether the framework for teaching minority languages corresponds to

[139] ECtHR, *Oršuš and others v. Croatia*, Application No. 15766/03, Judgment (Grand Chamber) of 16 March 2010.
[140] ACFC, (third) opinion on Croatia, 2010, paras. 163-169.
[141] Art. 20(2) of the Constitution.
[142] Law No. 7952 dated 21.06.1995.
[143] ACFC, (first) opinion on Albania, 2002, para. 63.
[144] ACFC, (third) opinion on Albania, 2011, para. 161.
[145] Constitution of Serbia, Art. 79; Law on National Minorities, Arts. 13-15; Law on Pre-school Education RS Official Gazette, no.72/09, Art. 5(2); Law on Fundamentals of Educational System RS Official Gazette, no. 72/2009 and 52/2011, Art. 9(2). The latter law prescribes the bases of the system of pre-school, primary and secondary education, prepares legal support to the reform of educational system together with the reform of university education and introduces teaching assistants into the educational system at all schools.
[146] 50% of parents or legal guardians of children, presumably per class, but the law is not explicit on that.
[147] ACFC, (second) opinion on Serbia, 2009, paras. 218-228.
[148] Next to culture, use of language, personal documentation and the use of symbols.
[149] Art. 69 of the Macedonian Constitution, the so-called 'Badinter majority'.
[150] Constitution of Macedonia, Art. 48.
[151] Macedonian Law on Primary School, Official Gazette of RM No. 103.08.
[152] Macedonian Law on Secondary Education, Official Gazette of RM No 52/2002.
[153] ACFC, (third) opinion on Macedonia, 2011, paras. 154-156.

actual needs'. Further it called on authorities to ensure an adequate supply of textbooks in minority languages[154].

The original version of the Bosnia and Herzegovina Law on National Minorities provided for the opening of classes receiving instruction in minority languages when the absolute or relative majority of the population in the municipality concerned belonged to that minority. The amendments of 2005 lowered this threshold to one third to secure education in the minority language and to one fifth to secure optional lessons in that language. The minority laws at entity level also foresee such high thresholds (majority in case of Republika Srpska, one third or one fifth in case of the Federation). These thresholds have been considered too high by the ACFC and as there was no school in which education was imparted in minority language obviously no use was made of Art. 8 of the Framework Law on Primary and Secondary Education in Bosnia and Herzegovina[155], which stipulates that the 'language and culture of any significant minority in Bosnia and Herzegovina shall be respected and accommodated within the school to the greatest extent practicable, in accordance with the Framework Convention for Protection of National Minorities'[156]. As the field of education is mainly regulated at entity/cantonal level, the following laws have been adopted: The Law on Primary Education in Republika Srpska[157], the Law on Secondary Education in Republika Srpska[158] as well as Regulations on Upbringing and Education of Children of National Minorities[159]. In the ten cantons in the Federation of Bosnia and Herzegovina, specific laws in the field of education are in force. Critical points in the assessment by the ACFC were not only the inappropriate legislative framework but also the fact that needs expressed by national minorities were not carefully considered and teaching materials were lacking[160].

The right to receive education in minority languages is included in the Montenegrin Constitution and is further guaranteed in the Law on General Education[161] and in the 2006 Minority Law[162]. From these provisions it results that teaching in a minority language is foreseen in the municipalities where a national minority constitutes 'a majority or a significant part of the population'. The ACFC raised concerns over the legal certainty of such thresholds and found that the provision applies in practice only to the Albanian minority. The minimum number of pupils required for opening a class with minority language teaching can be lower than for classes in the state language but in no case should it be less than 50% of the number of pupils required by law. When the teaching is delivered in a minority language, the official language and its alphabets shall be compulsory.

The legislative framework that has emerged after the declaration of independence of Kosovo[163] has managed to find a way by which the Serbian schooling system can remain largely autonomous – i.e. connected with the Serbian Ministry of Education – while giving the Ministry of Education of Kosovo a say in the use of curricula and textbooks. Whether this system contributes to the removal of barriers between Serbian and Albanian pupils, particularly taking into consideration the growing lack of knowledge of the language of the other, is discussed below. The legal system[164] foresees the right of all persons belonging to communities to receive public education at all levels in one of the official languages of the Republic of Kosovo of their choice, those languages being Albanian and Serbian. The Law on Education in the Municipalities of the Republic of Kosovo[165] further regulates, that '[s]chools that teach in the Serbian language may apply curricula or textbooks developed by the Ministry of Education of the Republic of Serbia'[166]. This requires, however, prior notification to the Kosovo Ministry of Education, which can raise an objection within three months. In this case, the

[154] Ibid.
[155] Framework Law on Primary and Secondary Education in Bosnia and Herzegovina, BiH Official Gazette No. 18/03.
[156] ACFC, (second) opinion on Bosnia and Herzegovina, 2008, paras. 182-186.
[157] Republika Srpska, Law on Primary Education, Official Gazette No. 74/08, with amendments No. 71/09 and No. 104/11.
[158] Republika Srpska, Law on Secondary Education, Official Gazette No. 74/08 with amendments No. 106/09 and No. 104/11.
[159] Republika Srpska, Regulation Upbringing and Education of Children of National Minorities, Official Gazette No. 89/04.
[160] ACFC, (second) opinion on Bosnia and Herzegovina, 2008, paras. 186-192.
[161] Art. 11(2) Law on General Education.
[162] Art. 13 Law on Minority Rights and Freedoms.
[163] This paragraph is based on Lantschner, E., 'Protection of Minority Communities in Kosovo', pp. 462-465.
[164] Annex II, Art.3(1)(b) Ahtisaari Proposal; Art. 59(2) Constitution; and Art. 8(1) Law on Communities.
[165] Law on Education in the Municipalities of the Republic of Kosovo, No.03/L-068, signed 21 May 2008 (published as part of the Ahtisaari Package) (hereinafter 'Law on Education').
[166] Ibid., Art. 12(2).

curriculum or textbook has to be referred to an independent commission[167]. Kosovo's legal framework foresees also the entitlement for persons belonging to other minority communities to pre-school, primary and secondary public education in their own language.[168] In these cases, 'pupils shall also learn *an official language of their choice*'[169]. It might be reasonable to expect that more pupils would choose to learn Albanian rather than Serbian. This framework further foresees that the threshold for establishing classes or schools operating in community languages should be lower than thresholds normally stipulated for educational institutions and classes. Where there are not enough pupils to establish a class using a community's language as a language of instruction, the government 'has an obligation to offer alternatives, including subsidised transport to an area where such schooling is being offered, distance learning, roving teaching arrangements or offers of boarding'[170].

In sum, the legal situation in Western Balkan countries regarding the field of education is mostly reflecting the principles laid down in the FCNM but the practical implementation, as discussed below in part 2 of this chapter, was not satisfactory. In most cases the ACFC called on authorities to take the demands raised by minorities more seriously, as this is also a requirement under the FCNM. A further problem consisted in the lack of or inadequate training of teachers in minority language and the lack of or low quality of teaching materials.

1.2.4 Minority media

It is difficult to draw general conclusions from Art. 9 FCNM and the respective opinions of the ACFC as to concrete and clear-cut criteria that must be fulfilled in order for a legal situation to reflect the principles enshrined in the FCNM. The ACFC assessed, for instance, on a case-by-case basis the length and airtime allotted to broadcasting in minority languages, keeping in mind the size and territorial concentration of minorities, the existence of private media broadcasting in minority language and the possibility to receive minority language programmes from neighbouring countries[171]. Thus, this part will individually look at the legal situation in the Western Balkan countries and summarise the opinions of the ACFC.

The Constitutional Law on the Rights of National Minorities of Croatia ensures minorities' access to the media and public information services (receiving and disseminating information) in their language and script[172]. The laws regulating, amongst others, media shall create conditions for better acquaintance of all citizens of Croatia with the history, culture and religion of the national minorities. Radio and TV broadcasters at national, regional and local level are tasked to promote understanding for members of national minorities and to broadcast programmes in minority languages. Minority organisations shall be involved in the creation of programmes intended for minorities. The state budget and the budgets of local and regional self-government units shall co-finance such programmes on radio and TV stations owned by minorities[173]. 'The Law on the Media includes the duty of the media to promote inter-ethnic tolerance, forbidding dissemination of contents that would be degrading or insulting based on ethnicity'[174].

The Albanian Law on Public and Private Radio and Television guarantees persons belonging to national minorities access to public printed and electronic media in their mother tongue. The same law prohibits programmes inciting aggression, national and racial hatred[175]. The Law on Press guarantees freedom of press in general and contains the right for persons belonging to minorities to establish their own printed or electronic media[176].

[167] Art. 13 of the Law on Education. This commission is composed of three members selected by MEST, three of the members holding reserved seats for the Kosovo Serb community and one international member selected by and representing the International Civilian Representative. All decisions are taken by majority vote

[168] Annex II, Art. 3(1)(c) Athisaari Proposal; Art. 59(3) Constitution of Kosovo; and Art. 8(1) Law on Communities.

[169] Art. 8(10) Law on Communities (emphasis added).

[170] Art. 59(2) Constitution of Kosovo.

[171] Hofmann R., and Friberg, E., 'The Enlarged EU and the Council of Europe: Transfer of Standards and the Quest for Future Cooperation in Minority Protection', in: Toggenburg, G., *Minority Protection and the Enlarged European Union: The Way Forward,* LGI Books, Budapest, 2004, pp. 125-147, p. 131. See e.g. ACFC, (first) opinion on Croatia, 2001, para. 41 and ACFC, (first) opinion on Macedonia, 2004, paras. 62 and 64.

[172] Art. 7(6) of the Constitutional Law on the Rights of National Minorities

[173] Arts. 17 and 18 of the Constitutional Law on the Rights of National Minorities.

[174] Arts. 3(3) and 4 of the Law on Media, Official Gazette 59/2004.

[175] Law on Public and Private Radio and Television, No. 8410 of 30.09.1998, Official Journal no 24/1998.

[176] Law on Press, No. 7756 of 11.10.1993, Official Journal no 13/1997.

The Law on the Rights of National Minorities in Bosnia and Herzegovina stipulates in Art. 15 that '[m]embers of national minorities in BiH shall have a right to establish radio and TV stations, issue newspapers and other printed information journals in the language of a minority they belong to.' According to Art. 16 public radio and TV stations are obliged to provide special programmes for national minorities, which 'at least once a week' shall be broadcast in minority languages. The law does not, however, specifying the minimum length of such programmes. Entity and cantonal regulations are requested to further specify the right to special programmes for national minorities on the basis of their share in the population of the entity, canton, city or municipality. However, 'the 2005 Law on the Public Broadcasting Service does not reiterate the provisions of the State Law on National Minorities'[177].

Under the Right to preservation of specificity, Art. 79 of the Serbian Constitution lists, amongst others, the right of persons belonging to minorities to establish their own mass media. The National Councils for National Minorities have a large number of competences in the field of media, laid down in Arts. 19-21 of the Law on National Councils of National Minorities. By way of example they can determine criteria for selecting the chief editor of the media in which the program is broadcast solely in the minority language. They may 'either independently or in co-operation with another legal entity, establish the institutions and business organisations to perform the activities of newspaper-publishing and radio-television broadcasting, printing and reproduction of the recorded media and exercise the rights and obligations of the founder'[178]. They participate in institutional management, for instance by giving 'an opinion on the nomination procedure for the members of the management board, the programme board and the managing director of the Radio Television of Serbia [and of the Radio Television of Vojvodina], if this institution broadcasts programme in the language of a national minority; [...] give an opinion on candidates for the editor-in-chief of the programmes broadcasted in the language of national minority at the Broadcasting Agency where the editor-in-chief is appointed for more than one programme broadcasted in the language of a national minority'[179]. Other competences in the field of media include for instance 'to adopt a strategy for the improvement of information broadcasted in the language of a national minority in accordance with the strategy of the Republic of Serbia; [...] give suggestions regarding the distribution of [public] resources allocated through public tenders'[180].

Freedom of expression and freedom of press are guaranteed by the Macedonian Constitution. No legal barriers prevent the publication of minority language newspapers. A Codex of Journalist of Macedonia exists but does not provide for a monitoring mechanism of professional standards[181].

The Montenegrin Law on Minority Rights and Freedoms, contains in Art. 12 an extensive provision on the rights of persons belonging to national minorities in the field of media. According to this provision, persons belonging to minorities 'shall have the right to freely establish media and their unhindered work based on freedom of expression, research, collection, dissemination, publication and receiving information, free access to all sources of information, protection of personality and dignity and free flow of information. [...] An appropriate number of hours for broadcasting news, cultural, educational, sports and entertainment programmes in the languages of minorit[ies shall be provided], as well as programme contents related to life, tradition and culture of minorities. [Also] the financial means for funding those programme contents [shall be provided].' Programmes on life, culture, and identity of minorities 'shall be broadcasted at least once a month in the official language, through the public services.' The Law on Electronic Media[182] stipulates in Art. 55 that the 'usage of Montenegrin language shall not be obligatory in program[s] intended for members of minority groups and members of other minority national communities.' According to Art. 74, public broadcasters shall: 'produce and broadcast programs intended for all segments of the society, without any discrimination, especially taking into account [amongst others] minority ethnic communities; [...] 5) produce and broadcast the programs expressing the cultural identity of nations, nationalities and ethnic groups; 6) produce and broadcast programs in native languages of national and ethnic groups in the areas inhabited by them. According to Art.

[177] ACFC, (second) opinion on Bosnia and Herzegovina, 2008, para. 152.
[178] Art. 19(1) of the Law on National Councils of National Minorities.
[179] Art. 20 of the Law on National Councils of National Minorities.
[180] Art. 21 of the Law on National Councils of National Minorities.
[181] ACFC, (third) opinion on Macedonia, 2011, para. 109.
[182] Law on Electronic Media, Official Gazette of MNE, no 46/10.

76 the budget comes partly from state or local self-government units. Print media are mostly financed from the funds of the Fund for Minority Nations[183].

The Constitution of Kosovo guarantees persons belonging to national minorities 'access to, and special representation in, public broadcast media as well as programming in their language'[184]. The Law on Radio Television of Kosovo stipulated that the two channels of RTK[185] 'are obliged to share 15% of their programme scheme with the languages of other communities of Kosovo'[186]. Primary responsibilities of RTK include the 'cultivation of the official language and the languages of other communities in Kosovo'[187]. Contents inciting discrimination based on, amongst other, connection with any community shall not be broadcast by RTK[188]. The composition of the RTK Board shall reflect the multi-ethnic and gender character of Kosovo[189].

The points of critique of the ACFC circulated around the issue of funding and equitable distribution of funds, especially for print media[190], the mainstreaming of minority interests and concerns in general programming and the recruiting of more minority representatives[191], the revision of legislative frameworks for broadcast media to ensure appropriate coverage for each minority and the allocation of sufficient broadcasting times[192], and the support for initiatives to increase mutual understanding and inter-cultural dialogue.[193]

1.2.5 Effective participation in political and economic life

In the following, political participation in the form of representation of persons belonging to national minorities in elected bodies at local, regional or national levels, and in the form of consultation between the government and the minority, in particular on issues affecting the minority concerned will be discussed[194]. Further, relevant provisions on the participation of persons belonging to national minorities in economic life, such as provisions concerning access to employment in the public administration, judiciary or the police, will be presented.

Representation in elected bodies

Constitutions and other legal acts of the Western Balkan countries foresee various means by which the representation of national minorities in elected bodies can be guaranteed or at least facilitated. Only the legal systems of Macedonia and Albania do not provide for special mechanisms. In Macedonia, the Albanian minority is big enough to easily reach representation even without special measures and even other minorities seem to have gained seats both at national (usually not as separate lists) and local level elections. In Albania, most minoritiesare not represented in parliament and at local level, especially Roma and Egyptians are disadvantaged in this context[195].

Guaranteed representation in parliament is foreseen in Croatia[196] and in Kosovo[197]. National minorities in Croatia elect in a special electoral unit at least 5 and a maximum of 8 MPs. National minority members representing more than 1.5% of the overall population (i.e. Serbs) are guaranteed at least 1 and a maximum of 3 parliamentary seats, while national minority members representing less than 1.5% of the overall population

[183] For details see Second State Report of Montenegro under the FCNM, p. 70-79.
[184] Art. 59(10) of the 2008 Constitution.
[185] Two TV channels, one broadcasting in Albanian and one in Serbian, and two radio channels.
[186] Art. 8(3) of the Law on Radio Television of Kosovo, No. 04/L-046, adopted on 29 March 2012.
[187] Ibid., Art. 18(1.8).
[188] Ibid., Art. 18(4).
[189] Ibid., Art. 25(6).
[190] For instance in relation to Croatia, Albania, Macedonia and Kosovo.
[191] See for instance in relation to Croatia.
[192] See for instance in relation to Albania and Kosovo.
[193] See for instance in relation to Macedonia.
[194] Lantschner, E., 'Emerging European Standards of Minority Protection through Soft Jurisprudence', p. 76.
[195] Law No. 7502 dated 25 July 1991 on political parties prohibited the formation of parties on a religious, ethnic and regional basis and thus excluded a Greek organisation as a political party. The law has been abolished in the meantime and the party has been registered although as formally open for Albanians. See on this Salamun, M., 'Albania', in: Lantschner E., Marko, J., and Petričušić, A., (eds.), 'European Integration and its Effects on Minority Protection in South Eastern Europe', p. 239.
[196] Art. 19 of the Constitutional Law on the Rights of National Minorities and Art. 16 of the Law on the Election of Representatives to the National Parliament. For details see Petričušić, A., 'Croatia', in: Lantschner E., Marko, J., and Petričušić, A., (eds.), 'European Integration and its Effects on Minority Protection in South Eastern Europe', pp.174-176.
[197] Art. 64(2) of the Constitution of Kosovo.

have the right to elect at least 4 national minority representatives together[198]. In Kosovo, out of the 120 seats, a minimum of 20 seats is guaranteed for representatives of minority communities. Ten of these seats are reserved for the Serb community, but they can have more than ten seats if they succeed in winning more through open elections. Other minority communities receive the total number of seats won through open elections; but, in any case, they are guaranteed a certain minimum number of seats[199]. In Bosnia and Herzegovina, the constitutional focus is not on minorities but on the three constituent people. The House of Peoples (as well as Presidency) is composed of an equal number of representatives from the three constituent people. The *Sejdic and Finci* judgment of the ECtHR[200], imposed an amendment of the constitution to eliminate this discrimination of persons not declaring to belong to one of these three groups, but the amendments have not been made yet[201].

Guaranteed representation at local and regional level is provided by the constitutional and legal system of Croatia[202] and Bosnia and Herzegovina. Art. 20 of the Croatian CLNM considers cases when not even one member of a particular national minority has been elected into a representation body of a local self-government based on the general voting right and this minority represents more than 5% and less than 15% of the population of the local self-authority. In this case the number of members of the representation body for this local self-government will be increased for one, and the national minority member not elected as the first one on the list based on the proportional success of each list at elections will be considered as elected, unless a special act establishes the appointment of representation body members for a local self-government differently. In regional self-government units, in which a minority represents more than 5% of the population, this minority has a right to proportional representation in the elected self-government body. If the regular election results have not brought this level of representation for such a minority, the number of members in this representation body will be adequately increased to the number needed for achieving the proportional representation.

In the case of Bosnia and Herzegovina, amendments to the Election Law introduced in 2004 would have foreseen one seat in a municipal council where minorities made up less than 3% of the population and one to two seats if they constituted more than 3%. However, another amendment in 2008 provides for guaranteed representation only if the minority population is bigger than 3%. The ACFC deplored that representation possibilities for minorities have thus been reduced as only a very few municipalities fulfil this requirement. Besides, the ACFC was sceptical about sole reliance on 1991 census data due to the considerable demographic changes that have taken place in the last two decades. On the other hand it welcomed the two reserved minority seats in the Assembly of the Brcko District[203].

Guaranteed representation, both at central and local level, was foreseen also by the Montenegrin legislation but was struck down by the Constitutional Court in 2006 on the grounds that guaranteed representation lacked coverage by the then valid constitution[204]. The 2011 Law on Election of Councillors and Members of the Parliament, based on Art. 79(9) of the 2007 Constitution, which now explicitly foresees 'authentic representation' in Parliament 'according to the principle of affirmative action', provides for what could be described as conditionally guaranteed representation. If no minority list reaches the threshold of 3% but individually wins at least 0.7% of the valid votes, minority party lists gain the right to participate in the distribution of seats as one. The cumulative number of valid votes received is the basis for the distribution of

[198] The Hungarian and Italian national minority groups elect one member each; the Czech and Slovak national minority group one member; the Austrian, Bulgarian, German, Polish, Roma, Romanian, Ruthenian, Russian, Turkish, Ukrainian, Vlach and Jewish national minority groups elect one member and the Albanian, Bosniak, Montenegrin, Macedonian and Slovenian national minority groups also elect one member for the Croatian Parliament.

[199] This minimum for the Bosniak community is three seats, for the Turkish community two seats, and for the Gorani, Roma, Ashkali and Egyptian communities one seat each. One additional seat is awarded either to the Roma, Ashkali or Egyptian community, depending on which community has won the highest overall vote. For further details see Lantschner, E., 'Protection of Minority Communities in Kosovo: Legally Ahead of European Standards', pp. 474 ff.

[200] ECtHR, *Sejdic and Finci v. Bosnia and Herzegovina*, Application no. 15766/03, Judgement of 22 December 2009.

[201] See on this e.g. Human Rights Watch, *World Report 2012 Bosnia and Herzegovina*, at http://www.hrw.org/world-report-2012/bosnia-and-herzegovina .

[202] Art. 20 of the Constitutional Law on the Rights of National Minorities. For details see Petričušić, A.,'Croatia', pp. 176-177.

[203] ACFC, (second) opinion on Bosnia and Herzegovina, 2008, paras. 193-197.

[204] Ruling of the Constitutional Court of the Republic of Montenegro, No. 53/06 of 11 July 2006.

up to three seats. This goes only for those minorities forming more than 15% of the population of the respective constituency[205].

Another possibility not to guarantee but facilitate representation in parliament is by exemption from threshold requirements. In Serbia, for instance, Art. 100 of the Constitution stipulates that minorities should be represented in Parliament in accordance with the law. Since 2004, the Law on Election of Representatives lays down that national minority parties are exempted from the generally valid threshold of 5%[206]. For autonomous provinces and local self-government units with the population of mixed nationalities, the Serbian Constitution foresees that a proportional representation of national minorities in assemblies has to be provided for, in accordance with the Law[207].

One can conclude that the legal systems of Western Balkan countries provide for a variety of means to allow for minorities' representation in elected bodies. Generally this has been welcomed by the ACFC. The Committee was critical towards lowering a previously existing standard and the general exclusion of minorities from the possibility of being elected and is concerned about the representation of numerically smaller minorities.

Consultative bodies

Especially for smaller minorities, who cannot reach representation in elected bodies, the existence of consultative bodies might be vital. Such advisory bodies of some kind exist in all countries under consideration. For example in Serbia the National Councils for National Minorities[208] have competence in the fields of culture, education, information and official use of language and script. The councils can influence personnel and management choices in institutions that wholly or partly serve to satisfy minority rights in schools, media and cultural institutions. The law regulates in detail the election procedure to the Councils, their funding and their relations with state authorities. In Kosovo the Community Consultative Council[209] is affiliated with the president and the Committee on Rights and Interests of Communities with the Assembly. There further exist advisory bodies at the Prime Minister's office and various ministries. Although it is commendable that Kosovo pays a lot of attention to issues related to minority communities, there exists, however, a 'danger of an excessive fragmentation of competences in this field [which] may weaken minority protection'[210]. National Councils for National Minorities exist also in Croatia[211], Montenegro[212], and Bosnia and Herzegovina[213]. The Macedonian Parliamentary Committee for Inter-community relations[214] consists of 19 members, elected by the Parliament from within its ranks: seven members each are from the Macedonian and Albanian community, and one member each from among the Turks, Vlachs, Roma, Serbs and Bosniaks. The Committee's tasks include considering issues of inter-community relations and making assessments and suggestions for their solution. The Macedonian Parliament is obliged to consider the views of the Committee[215]. The Albanian State Committee on Minorities[216] 'on the one hand, is a governmental body answering directly to the Prime Minister, on the other, its membership, composed of persons belonging to national minorities makes it a quasi-representative body appearing to speak on behalf of some national minorities'[217]. In this context the ACFC criticised the fact that not all minority groups are represented in the Committee, that 'its composition is arbitrary' considering that members are elected by the authorities without

[205] Law on Election of Councillors and Members of the Parliament. Additional facilitations include a lower number of candidates required for the minority lists as well as a lower number of signatures necessary to present a list. For more details see Second State Report of Montenegro under the FCNM, 2012, p. 89.
[206] Art. 81(2-3) of the Law on Election of Representatives, No. 10/2003, as amended on 25 February 2004, 12/2004.
[207] Art. 180(4) Constitution of Serbia, Art. 35 of the Statute of the Autonomous Province of Vojvodina.
[208] Law on National Councils of National Minorities, Official Gazette of the Republic of Serbia, No. 72/2009. Constitutional basis in Art. 75(3).
[209] Art. 60 of the Constitution, Art. 12 of the Law on Communities, Statute for the Establishment of the Communities Consultative Council in Kosovo of 15 September 2008.
[210] ACFC, (second) opinion on Kosovo, 2009, para. 236.
[211] Arts. 35 and 36 of the Constitutional Law on the Rights of National Minorities.
[212] Arts. 33-35 of the 2006 Law on Minorities
[213] Council of National Minorities established at the Bosnia and Herzegovina Parliamentary Assembly, Arts. 21 and 22 of the Law on the Rights of National Minorities, adopted on 12 April 2003.
[214] Established on the basis of Amendment XII of the Constitution which refers to Art. 78.
[215] Law for the Committee for Inter-Community Relations, Official Gazette of R.M. no. 150/ 2007.
[216] Council of Ministers' Decision No 127, dated 11 March 2004 on the creation of the State Committee of Minorities, as amended.
[217] ACFC, (third) opinion on Albania, 2011, para. 169.

involving the minority groups concerned, and that it is not independent. As such it cannot be considered a 'truly representative body'.[218]

Local and regional Councils of National Minorities exist in Croatia[219], Bosnia and Herzegovina (Councils of National Minorities at Entity level)[220], and Serbia[221]. Serbian Councils for Interethnic Relations in nationally mixed municipalities have the competence to discuss issues concerning the realisation, protection and promotion of national equality in local communities and can start proceeding before the Constitutional Court if municipal regulations are considered to directly violate the rights of national and ethnic communities.

The ACFC generally welcomed the establishment of consultative bodies. It has mostly been critical when the composition of the councils was not representative of the minorities living in a specific country or when minorities where not adequately involved in the appointment of members as this can result in a lack of independence from the government. Other problems circulated around the funding of councils or the coordination among various bodies responsible for minority related issues.

Participation in public administration

Albania is the only country in which no formal barriers exist regarding the representation of minorities in public administration but also no provisions promoting the increase of minority representatives in public employment. The Albanian legal system only provides for non-discrimination on grounds of ethnicity in labour relations. As no data exist on the number of persons belonging to national minorities employed in public administration it is impossible to get a clear picture of the situation[222].

All other countries have special constitutional or other provisions in this field. In Croatia, minorities have a right to proportional representation in public administration[223]. Macedonian legislation prescribes 'equitable representation' for all minorities, also those smaller than 20%[224]. Also Montenegro makes use of the principle of proportionality when it comes to employment in the administration[225]. The Serbian Constitution foresees that 'the ethnic structure of population and appropriate representation of persons belonging to national minorities' has to be taken into account in the employment in public administration at state, provincial and local level[226]. In Kosovo the Constitution ensures communities and their members 'equitable representation in public bodies and publicly owned enterprises at all levels'[227]. In Bosnia and Herzegovina proportional representation of persons belonging to minorities (however corresponding to the last census of 1991) at all levels has to be ensured[228].

In this context, the ACFC criticised mostly the implementation of well-intended legislation. It was sceptical about the reliance on census data, especially when they are contested or not reflecting the demographic changed occurred over the past decades. The ACFC is generally of the opinion that 'proportional' or 'equitable' or otherwise similarly described representation should not 'aim to reach a rigid, mathematical equality in the representation of various groups, [as this] often implies an unnecessary multiplication of posts [...] They risk undermining the effective functioning of the State structure and can lead to the creation of separate structures in the society'[229].

[218] Ibid., paras. 169-171.
[219] Arts. 23-34 of the Constitutional Law on the Rights of National Minorities. For details see Petričušić, A., 'Croatia', pp. 177-178.
[220] Art. 23 of the (State) Law on the Rights of National Minorities, adopted on 12 April 2003, and Law on the Protection of Rights of Persons belonging to National Minorities of Republika Srpska, adopted in December 2004 and the Law on the Protection of Rights of Persons belonging to National Minorities of the Federation, adopted in July 2008.
[221] Art. 98 of the Law on Local Self-government, Official Gazette of the Republic of Serbia, No 129/07.
[222] See Salamun, M., 'Albania', pp. 242 and 246.
[223] Art. 22 of the Constitutional Law on the Rights of National Minorities.
[224] Ohrid Framework Agreement, Art. 4(2); 2008 Law on Promoting and Protecting the Rights of Persons Belonging to Communities which Represent Less than 20% of the Population, Law on Civil Servants.
[225] Art. 79(10) of the Constitution and Art. 25 of the Law on Minority Rights and Freedoms. According to the Second State Report of Montenegro under the FCNM the result of a non-representative survey showed the following shares: Montenegrins: 79.03%; Serbs: 8.59%; Albanians: 2.80%; Bosniaks: 4.14%; 2.39%; 0.01%; 0.89%; 0.42%.
[226] Art. 77(2) of the Constitution of Serbia.
[227] Art. 61 Constitution.
[228] Art. 19 of the BiH Law on National Minorities, 2003 as amended 2005.
[229] ACFC, Thematic Commentary on Participation, para. 123.

1.2.6 Conclusions

With the exception of Albania and Kosovo, all other Western Balkan countries define their minorities over their citizenship. Although this is not in violation of any legally-binding international instrument, it is particularly problematic for persons whose citizenship status has not been confirmed. Roma are particularly affected by this problem. In terms of right to self-identification, several states have established lists, defining who the minorities on their territory are. Even when those lists are open ended it seems to be difficult for minorities not included in the list to get recognition or to make use of rights provided for 'listed' minorities or the rights under the FCNM. Although recognition by the state is not necessary in order to 'exist' as a minority, it is nevertheless important due to the otherwise exclusion from certain rights. Another common challenge of Western Balkan countries is the provision of reliable statistical data.

The legal situation in Western Balkan countries regarding the fields of linguistic rights and education mostly reflects the principles laid down in the FCNM. The legal guarantees for minority languages provided in Kosovo even go much beyond the protection provided in other European countries, raising however the question whether they might be overly ambitious. The points of critique of the ACFC if the field of minority media circulated around the issue of funding and equitable distribution of funds, especially for print media, the mainstreaming of minority interests and concerns in general programming, the recruiting of more minority representatives, the revision of legislative frameworks for broadcast media to ensure appropriate coverage for each minority and the allocation of sufficient broadcasting times, as well as the support for initiatives to increase mutual understanding and inter-cultural dialogue. In terms of participation of persons belonging to national minorities in public life, the legal systems of Western Balkan countries provide for a variety of means to allow for minorities' representation in elected bodies. Generally this has been welcomed by the ACFC. The Committee was critical towards lowering a previously existing standard and the general exclusion of minorities from the possibility of being elected and is concerned about the representation of numerically smaller minorities. Advisory bodies of some kind, particularly important for smaller minorities who cannot reach representation in elected bodies, exist in all countries under consideration and were generally welcomed by the ACFC. It has mostly been critical when the composition of the councils was not representative of the minorities living in a specific country or when minorities where not adequately involved in the appointment of members as this can result in a lack of independence from the government. Other problems circulated around the funding of councils or the coordination among various bodies responsible for minority related issues. In terms of participation in economic life the study only looked at the representation of persons belonging to national minorities in public administration. In this context, the ACFC criticised mostly the implementation of well-intended legislation, requiring 'proportional' or 'equitable' or otherwise similarly described representation of minorities in public bodies. The ACFC was sceptical about the reliance on census data, especially when they are contested or not reflecting the demographic changed occurred over the past decades. The ACFC is generally of the opinion that 'proportional' or 'equitable' or otherwise similarly described representation should not applied in a mathematical manner as this often leads to an unnecessary multiplication of posts and risks undermining the effective functioning of the State structure.

2. ASSESSMENT OF THE PRACTICAL IMPLEMENTATION OF MINORITY PROTECTION LEGISLATION: CASE STUDIES

The protection of minority rights in the Western Balkans is characterised by generally high legal standards and a very uneven pattern of implementation. The ambitious legal frameworks are in part a legacy of Socialist Yugoslavia that promoted the establishment of an international minority rights regime and provided for extensive group rights.[230]

In addition, high standards of minority protection have been an integral part of international assistance, monitoring and pressure in the region to prevent the mistreatment of minority resulting in renewed conflict. Some minority rights mechanisms date back to the conditionality associated with the recognition of the countries (i.e. Croatia), while others evolved particularly after 2000 after the beginning of the Stabilisation and Association Process. In this section, we will explore the implementation of the minority rights regime in three cases, namely Croatia, Vojvodina (Serbia's Northern province) and Kosovo. All three cases are characterised by elaborate legislation that includes minority representation and some forms of self-government. This section will discuss the level of implementation today and how they have evolved in recent years to ascertain not just the extent to which the legislation has been put into practices, but also the (potential) obstacles and whether the legislation in place is adequate for the minority communities.

2.1 Croatia

Minority rights have been a central theme in the EU accession process of Croatia. The violent conflict during the 1990s has left a particularly profound mark on the relations between the majority and the largest minority, the Serb community. Today the country is characterised by a large dominant community – Croats constitute 89.6% of the population according to the 2001 census, the larger Serb community (4.5%) (much decimated as a result of the 1991-1995 war) and smaller minorities all numbering less than 0.5% of the population. Among the smaller minorities there are communities associated with other Yugoslav successor states (i.e. Albanians, Slovenes, Bosniaks/Muslims) and other traditional minorities (i.e. Hungarians, Slovaks and Roma). All key minorities are recognised in Croatia and the only ambiguity surrounds Muslims. Between 1968 and 1991 Slavic Muslims whose mother tongue was Serbo-Croatian were recognised as a distinct nation. With the dissolution of Yugoslavia the Muslims of Bosniak adopted the self-identification as Bosniaks to highlight the link to the state. However, in Croatia not all Muslims followed this shift of identity and in the 2001 census, nearly equal numbers declared themselves to be Muslims and Bosniaks. However the Croatian state only recognises the Bosniak minority[231].

The legal framework for the protection of national minorities gradually evolved since independence and key legislation was put into place by the early 2000s. Here the most important piece of legislation is the Constitutional Law on the Rights of National Minorities, passed in 2002 and shaped also through extensive advice of the Council of Europe's Venice Commission and the OSCE High Commission on National Minorities.[232] The last major piece of legislation is the Discrimination Prevention Act, passed by parliament in 2008[233].

[230] The Yugoslav legal system distinguished between nations (*narodi*)—encompassing the core nations of Yugoslavia (i.e. Slovenes, Croats, Muslims, Montenegrins, Serbs, and Macedonians) and nationalities (*nacionalnosti*), a category akin to minorities including groups who had a kin-state outside Yugoslavia (i.e. Hungarians and Albanians) as well as the more ambiguous category of ethnic groups (*etničke grupe*), often entailing groups without a kin-state (i.e. Roma).

[231] ACFC, (third) opinion on Croatia, 2010, paras. 39 and 41.

[232] Venice Commission, Report on the Draft Constitutional Law on the Rights of National Minorities in Croatia, 23 September 2002, CDL (2002) 114); Draper, M., 'The Activities of the OSCE High Commission on National Minorities: June 2002-June 2003,' 2 European Yearbook of Minority Issues (2002/2003), p. 477.

[233] ACFC, (third) opinion on Croatia, 2010, paras. 13-16.

2.1.1 Minority Representation

In Croatia, minorities are represented through reserved seats in parliament, regional and municipal Councils of National Minorities and state-wide minority councils. The elaborate system with a large number of councils for minorities at the local level is often marred by limited participation from the minorities themselves. Low turnout both for seats reserved for minorities[234] and councils of national minorities at the local level reduces their democratic legitimacy[235].

Minority councils are established at the different levels of decentralisation and in 2011 included 113 councils in 98 municipalities, 127 in 69 towns and cities, 71 in 19 regions and the city of Zagreb. In addition some 227 minority representatives were elected. A problem for these elections has been that in a significant number of cases the councils and representatives were not elected due to a lack of candidates or voters[236]. Turnout for minority councils has been overall around 10% during three electoral cycles[237]. Furthermore, the government noted that the councils have received insufficient funding from local authorities, thus undermining their effectiveness and presumably electoral support[238].

A key source of controversy has been minority representation in parliament. Parliamentary representation has given minorities a key role not just in parliament, but also in government. Between 2003 and 2007 the minority government of Ivo Sanader relied on support mostly from the Independent Serb Democratic Party (SDSS) and other minority MPs and between 2008 and 2011, the SDSS joined the government. The current law provides eight seats for all historic minorities, including three for Serbs and five for all others. The ACFC has criticised the distribution of reserved seats for 'strong favouritism towards smaller and historical minorities which does not accurately reflect the current situation of the country and the needs of its minorities'[239]. The oddity of the current system lies in the fact that besides the three MPs for the Serb community and one each for the Hungarian and Italian minority, the remaining three MPs represent up to 12 different minorities with vastly different needs (i.e. the German and the Roma community).

An amendment to the law on minorities in 2010, which was later rejected by the constitutional court, distinguished between the Serb minority and others. While small minorities (less than 1.5%) were given double voting rights – one in the general elections and one in specific minority electoral units for reserved seats – Serbs were granted seats in the general electoral units. The differentiation between the minorities has been a source of controversy, as the apparent political trade-off as the dominant Serb party was seen as the prime beneficiary of the rule. After this change was rejected, all minorities have to decide whether to vote on the minority list or for general party lists in their regional constituency.

In addition to the minority MPs at the state level, a Council of National Minorities advises the government on minority issues. The members are proposed by councils and association of individual minorities and appointed by the government[240].

[234] In the parliamentary elections 2011, turnout for the minority seats was as follows Serb 12,65%, Hungarian 49.56%, Italian 31.57%, Czech and Slovak 48.56%, Austrian, Bulgarian, German, Polish, Roma, Romanian, Rusyn, Russian, Turkish, Ukrainian, Vlach and Jewish 35.24%, Albanian, Bosniak, Montenegrin, Macedonian and Slovene, 23.78%. Among minorities, the total turnout was 18.19%, whereas the total turnout was 61.95%. For all the data see http://www.izbori.hr/izbori/dip_ws.nsf/public/index?openform.
[235] ACFC, (third) opinion on Croatia, 2010, para. 28.
[236] Vlada Republike Hrvatske, *Izvješće o provođenju ustavnog zakona o pravima nacionalnih manjina i o utrošku sredstava osiguranih u državnom proračunu republike hrvatske za 2011. Godinu za potrebe nacionalnih manjina*, Zagreb, July 2012, p. 29.
[237] Petričušić, A., 'Izbori za vijeća i predstavnike nacionalnih manjina – legalitet bez legitimiteta', *Informator*, No. 6004 - 6005 (2011), pp. 17-18.
[238] Vlada Republike Hrvatske, *Izvješće o provođenju ustavnog zakon*, p.32.
[239] ACFC, (third) opinion on Croatia, 2010, para. 26.
[240] Vlada Republike Hrvatske, 'Izvješće o provođenju ustavnog zakon', p.33.

2.1.2 Public administration and employment

According to the 2002 Constitutional Law on National Minorities, state bodies (administration and judiciary) have to take into account the share of the national minorities (Art. 22(2)). Although this does not constitute a firm commitment to equitable representation, it suggests that the state institutions have to undertake efforts to avoid a gross underrepresentation of minorities. Overall minorities are underrepresented in the public administration. According to a state report on National Minorities for 2011, of 52,165 civil servants, only 1,779 or 3.41% hail from national minorities (2.43% Serbs)[241], as opposed to a population share of 7.47% according to the 2001 census[242]. In particular in some ministries minorities remain considerably underrepresented, such as the Foreign Ministry (0.94% minorities) and the Health Ministry (1.4%)[243].

In all municipalities with a population share of minorities higher than 15% proportional representation is required. However, this has not been the case, in particular in Serb majority areas that have been war affected. In 2011, only 127 of 576 units of local government secured the representation of minorities in the administration. The share for municipalities, cities and regions (županja) is higher, but still relatively low with only 64 of 97 that include minorities[244].

Similarly, minorities are further underrepresented in the judiciary with less than 4% among judges and other court staff[245].

The advisory committee for the Framework Convention has also noted that in addition to being underrepresented in terms of employment, members of minorities are discriminated against in hiring procedures[246]. Overall the government has lacked clear plans in increasing the representation of national minorities and while now it publishes clear data on the underrepresentation, a strategy and specific steps remain underdeveloped.

2.1.3 Use of languages

Generally speaking, the current legislation provides for the broad use of minority languages in public life. The threshold at the local level is one third of the population speaking the minority languages (a relatively high hurdle), but minority languages can also be introduced by decision of the municipality, region or by international agreement. The use of minority languages varies depending on the region and the minority in question. In Istria for example, Italian is widely used despite the small size of the minority, while in post-war areas populated by the Serb minority the use of Serbian is not fully implemented, including for street signs[247].

Members of minorities can obtain bi-lingual Croatian and minority language personal documents anywhere in Croatia and can use their name in their language and script and can request court proceedings to be held with translation or in the minority language. In terms of personal documents in minority languages, mostly members of the Italian minority make use of this possibility (of 2,434 documents issues in minority languages in 2011, 95.3% were issued in Italian)[248]. Italian is also the main minority language used in court proceedings. In 2010 a total of 338 court cases were heard in minority languages, mostly in Italian, followed by Serbian.[249] This constitutes only a very small share of court cases (less than 1%).[250]

[241] Ibid., p.23.
[242] The numbers of the 2001 census are available at http://www.dzs.hr/Hrv/censuses/Census2001/Popis/H01_02_02/H01_02_02.html .
[243] Vlada Republike Hrvatske, 'Izvješće o provedbi Akcijskog plana za provedbu Ustavnog zakona o pravima nacionalnih manjina za razdoblje od 2011.-2013. godine, za 2011, Godine. Zagreb, July 2012, p.85.
[244] Vlada Republike Hrvatske, 'Izvješće o provođenju ustavnog zakon', pp. 24-25.
[245] Ibid., p. 26.
[246] ACFC, (third) opinion on Croatia, 2010, para. 22.
[247] Ibid., para. 33.
[248] Vlada Republike Hrvatske, 'Izvješće o provedbi Akcijskog plana'.
[249] Ibid., p. 7.
[250] Committee of Experts on the Charter, (fourth) Report of the Committee of Experts in respect of Croatia, para. 4.1. L, ECRML (2010)9, 8 December 2010.

According to the Committee of Experts on the European Charter for Regional or Minority Languages 'in the field of administration, the use of regional or minority languages in state administration bodies and in public services remains on the whole unsatisfactory. In municipalities where regional or minority languages are in equal and official use, the situation varies to a large degree from equal use with Croatian to only emblematic use. … There exist particular problems linked to the use of Serbian and in particular the Cyrillic script in some municipalities, including putting up bilingual signs. It has been reported that Serbian-speakers have refrained from using Serbian and the Cyrillic script because of fear of resentment'[251]. The main minority which is not benefiting from language rights is the Roma community. There is no official recognised version of Romani and several variants are in use. The language is not standardised and there are no facilities in place to provide either education or otherwise use of the language in public life.

2.1.4 Education and culture

Croatia has three schooling models for minorities. One includes teaching of all subjects in the minority language, a second model bi-lingual teaching and a third teaching in Croatian with only language and culture taught in the minority language. Of 6,880 primary pupils studying in minority languages, 62% (4,242 in the school year 2011-2) have the minority language as language of instruction (Italian, Hungarian, Czech, Jewish and Serb minorities), and pupils from smaller minorities (and some from bigger minorities) have only mother tongue teaching. At the level of secondary education only 1,697 pupils receive education in minority languages, 87% with all their education in the minority language, the vast majority Italians and Serbs[252].

Textbooks in minority languages, mostly produced in kin-states are widely available at the level of primary education, but less for secondary schools[253].

There is a great range in the number of children from minorities attending mother tongue education. All smaller minorities (except five minorities) have a total of less than 150 children attending minority language education (i.e. Ukrainians, Macedonians), and only Hungarians, Italians and Serbs have more than 1,000 children in mother tongue education programmes[254].

Discrimination against Roma in the educational system remains common with 80% of Roma children sent to special classes with a lower level of education provided therein, reducing the opportunities to continue with secondary education and job opportunities[255]. The European Court of Human Rights ruled that the segregation in Croatian schools (in this case in the Medjumurje region) constituted a form of discrimination[256].

2.1.5 Interethnic relations

Overall interethnic relations have improved steadily in Croatia. However, relations between the Croat majority and the Serb minority remain often tense in post-war regions and communities remain often segregated, especially in Eastern Slavonia. Attacks against minorities, especially Serbs and Roma and the expression of extreme nationalist position during sports events remains a problem[257]. As a conflict country, the issue of refugee return remains relevant for minorities, in particular the Serb minority 17 years after the end of the conflict. Of more than 300,000 Serb refugees from Croatia who fled to Serbia, only 93,000 registered as returnees by 2010 (or around 27%), where most either opted for Serb citizenship or remain registered as

[251] Ibid., para. 4.1. G.
[252] Vlada Republike Hrvatske, 'Izvješće o provedbi Akcijskog plana', pp.13-18.
[253] ACFC, (third) opinion on Croatia, 2010, para. 149.
[254] Vlada Republike Hrvatske, 'Izvješće o provedbi Akcijskog plana', p. 13.
[255] ACFC, (third) opinion on Croatia, 2010, para. 156.
[256] ECtHR, *Oršuš and Others v. Croatia*, Application no. 15766/03, Judgement (Grand Chamber) of 16 March 2010.
[257] ACFC, (third) opinion on Croatia, 2010, para. 23.

refugees in Serbia[258]. While housing has been largely returned, the returns were often not sustainable due to other factors, resulting in a situation where 54% of all Serb returnees left Croatia again[259].

2.2 Vojvodina/Serbia

Vojvodina is characterised by a high level of minority protection. This is in part due to the legacy of advanced minority protection during the late Socialist period. Although many of the rights and the autonomy of Vojvodina were severely curtailed by the regime of Slobodan Milošević between 1988 and 2000, many laws and/or their practice survived. Since 2000, Vovojvodina saw a gradual increase in competences and even if its powers are considerably less than before 1988, it has both factually and symbolically shaped minority policies in the region. Minority parties have been part of the governing coalitions in the province since 2000 and many minority candidates are elected on main stream party lists to the assembly. As a result, the status of minorities in Vojvodina differes significantly from that in the rest of Serbia[260]. Nevertheless, minorities in Vojvodina are also affected by the treatment of minorities by the central government in Belgrade. As minorities are largely residing in the periphery of Serbia and few at the centre, government institutions often lack adequate sensitivity to minority issues and the high level of centralisation negatively impacts minorities[261].

In Vojvodina, the Serb majority makes up 65.05% of the population according to the 2002 census, followed by 14.28% Hungarians as the largest single minority in the region. All other minorities are less than 3% of the population of Vojvodina and include Slovak (2.79%) and Croats (2.78%). The large number of different small communities is a key characteristic of Vojvodina and has shaped the self- perception of Vojvodina as a multinational region.

2.2.1 Minority Representation

Minorities in Serbia and Vojvodina are represented through elected National Councils and at the local level in Councils on Interethnic Relations. In addition, National Minority Parties have easier access to the Serbian parliament than other parties.

The representation of national minorities in Serbia, however, was in limbo for a long period of time as the first relevant law, the Law on Protection of Rights and Freedoms of National Minorities was passed in 2002 by the Yugoslav parliament and it took seven years until a Law on National Councils of National Minorities was adopted in 2009 that regulated the election and work of the councils as the prime body of minority representation.

National Councils enjoy a certain degree of cultural autonomy, especially in the fields of education, media and culture. According to the law, schools exclusively in the minority language, cultural institutions catering to one community and media in a single minority language (and state run), can be transferred to the exclusive responsibility of the minority council. For example, the councils are involved in the management of minority language schools and the teaching (including syllabi and textbooks). There are practical conflicts with both the ministry of education and local authorities over sharing these competences in the case of some schools due to ambiguities in the law. The ombudsman institution of Vojvodina noted in its 2011 report the lack of full implementation of the law on National Councils[262].

Councils also have somewhat unclear competences in regard to cultural institutions and have a say in the appointment of staff in state owned media in minority languages. Current difficulties arise from the lack of a

[258] Allen, R., Li Rosi, A., and Skeie, M., '*Should I Stay or Should I Go? A Review of UNHCR's Response to the Protracted Refugee Situation in Serbia and Croatia*,' UNHCR, December 2010, PDES/2010/14, p. 1, available at http://www.unhcr.org/4d, 08e19a9.html .
[259] ACFC, (third) opinion on Croatia, 2010, para. 192.
[260] Other factors contributing to the variation are socio-economic standards, the fact that in Vojvodina the largest minority, Hungarians, have an effective kin state. There is also a difference between minorities that had a status during Yugoslav times and 'new minorities' that lacked such a status (Albanians or Bosniaks).
[261] Pokrajinski Ombudsman Autonomne Pokrajina Vojvodine, 'Izveštaj pokrajnskog ombudsmana za 2011', *Godine*, Novi Sad 2012.
[262] Ibid.

clear definition of what constitutes an object of special interest for minorities (both for cultural objects and schools) that would be a prerequisite for minority councils acquired particular powers in their management. The transfer of founding rights of schools in minority languages to minority councils has been particularly delayed due to the lack of practice with the transfer[263]. While generally speaking National Councils have a say in the naming of the members of school boards in minority language schools, there are cases where the councils have not been consulted[264]. National Councils can declare cultural monuments to be of particular interest which provides them with rights over their management. As in other spheres, the Hungarian National Council has been considerably more active than others. It declared 28 cultural institutions in ten municipalities to be of particular interest for the Hungarian minority, followed by the Croat minority Council with 22 in three municipalities. Altogether some 72 institution have acquired such a status (as of 2011). Many other rights granted to National Councils have not been used at all as of 2011 or only in few cases, such as taking over the full ownership over cultural institutions[265].

The Vojvodina Ombudsman institution furthermore expressed doubts whether the autonomy granted to the Council is appropriate for all minorities, especially when the minority in question does not have its own mother tongue education[266]. The main problem has been the lack of a clear definition of the councils' competences for the first decade of their existence. In particular at the local level the function of the councils are not yet fully understood. The report notes that many interlocutors at the local level 'do not differentiate between the Councils of National Minorities and the Councils on Interethnic Relations and some take them for non-governmental organisations'[267].

In 2010 the national councils were elected for the first time in accordance with the new law on National councils (16 councils were directly elected, three through a system of indirect elections). The most active council is the Hungarian National Council, while councils of small minorities are struggling to make a mark. The effectiveness of the elections for the councils also depended on the size and means of the community and/or political parties, as the support from the state for the establishment of councils has been minimal[268]. The councils have been strongly shaped by political parties, especially among larger minorities that have well organised parties[269].

In addition, councils for inter-ethnic relations have been established in Serbia in municipalities with one minority over 5% or all minorities totalling more than 10%. These bodies established by local authorities (which also determined the composition) are aimed at advising local decision-making on minority issues and improving interethnic relations. In the first years of their establishment the composition was often very arbitrary (including representatives of the Serbian Orthodox Church in some cases) and they were either not constituted despite the legal obligation or only met once. The councils remain dominated by political parties and lack resources and support to become effective[270].

The representation of minorities in the state parliament is facilitated by not applying the 5% threshold to minority parties. This means that a minority party only requires the proportional number of votes needed to gain one seat to enter parliament, i.e. approximately 20,000 votes in the 2012 elections. However, minority

[263] Ibid., pp. 6-7.
[264] Ibid., p. 8.
[265] Ibid., p. 16.
[266] Ibid., p. 5.
[267] Pokrajinski Ombudsman Vojvodine, 'Dve godina primene Zakona o nacionalim savetime nacionalnih manjina', Novi Sad, 2011, p. 5.
[268] Beogradski Centra za Ljudska Prava, 'Ljudska Prava u Srbiji, 2011,' Belgrade 2012, pp. 255, 257-8.
[269] This has been a particular problem for the National Council of the Bosniak Minority which was sharply divided between representatives supportive of the Mufti of Novi Pazar Muamer Zukorlic, and those aligned to the main Bosniak parties led by long-time rivals Sulejman Ugljanin and Rasim Ljajić. Maksimovic, Z., 'Rival Bosniak Councils Likely in Serbia's Sandzak,' *Balkan Insight*, 5.2.2011, available at: http://www.balkaninsight.com/en/article/rival-bosniak-councils-likely-in-serbia-s-sandzak.
[270] Đorđević, L., 'Jačanje Lokalne demokratije multietničkim sredinama u centralnoj Srbiji kroz Savete za Međunacionalne Odnose i Lokalne Ombudsmane', in: Ethnicity Research Center (ed.), *Savet za Međunacionalne Odnose i Lokalni Zaštitnik Građana u Multietničkim Sredinama*, Belgrade 2011, pp. 65-86 and Ethnicity Research Center, 'Održivi model osnivanja i rada Saveta za međunacionalne odnose,' Belgrade 2010, available at: http://www.ercbgd.org.rs/index.php?option=com_docman&task=doc_download&gid=59&lang=sr

parties are not exempt from the requirement of gathering 10,000 signatures to participate in elections, a considerable obstacle for participation and undermining the lower threshold[271]. In total 10 MPs were elected in 2012 from minority party lists, including one member of a Roma party who ran on the list of the Progressive Party (SNS)[272]. This constitutes less than 5% of the MPs with minorities constituting around 17% of the population in 2002 (without Kosovo). Furthermore, there have been instances of abuse of the status of minority parties, with the party 'None of the Above' registering as the party of the Vlach community, but clearly presenting itself as a protest party[273]. Representation of minorities in parliament thus remains weak and the ability to influence decision making has been limited.

There are no specific rules to ensure the representation of minorities in the Vojvodina assembly and only the party of the Hungarian minority has been able to enter the assembly independently, whereas other minority MPs are elected on lists of mainstream parties. The assembly has a special Council of National Communities which needs to be consulted in all matters pertaining to minority issues. The council is composed of 30 members, half of which have to be composed from MPs identifying as members of minorities and the other half identifying as Serbs. The Committee has to secure a double majority of both the majority and the minorities MPs[274]. Minorities have also been well represented in the Vojvodina government. The government also includes a designated member responsible for minority affairs, currently the deputy President of Government and Secretary for Education, Administration and National Communities.

2.2.2 Public administration and employment

In terms of representation of minorities in the public administration, the constitution in Art. 77 (2) requires in 'employment in state bodies, public services, bodies of autonomous province and local self-government units, the ethnic structure of population and appropriate representation of members of national minorities shall be taken into consideration' However, the ACFC notes that no systematic data has been made available[275]. The latest state report for the FCNM does provide some data for the representation of minorities in provincial institutions and state institutions in Vojvodina. This data suggests that minorities remain underrepresented in Vojvodina, despite an overall more minority-friendly environment than elsewhere in Serbia. For example in the Ministry of Interior (including police), Serb members of staff constitute 76.6% of the staff in comparisons to 65.05% of the population, while Hungarians only make up 4.98% of the staff and 14.28% of the population[276]. In the institutions of Vojvodina, 67.24% of the employees are Serbs, 6.55% Hungarians and all other minorities are represented by less than 2% of the staff. In general minorities are underrepresented in the institutions, often by 50%[277]. There are few discernible efforts by the public administration, in particular of those of the central institutions to increase the recruitment of minorities.

2.2.3 Use of languages

The use of minority languages in communication with institutions remains limited by the fact that many minority members are not fully aware of their rights and, as the Provincial Ombudsman notes, authorities often do not implement the law.

The use of minority languages is regulated through national legislation, municipal rules, as well as at the provincial level in the case of Vojvodina. At the municipal level, minority languages are to be used if the community constitutes more than 15% of the population. In Vojvodina, a more flexible approach has been

[271] ACFC, (second) opinion on Serbia, 2009, para. 232.
[272] OSCE/ODIHR, *Limited Election Observation Mission Final Report, Republic of Serbia. Parliamentary and Early Presidential Elections*, 6 and 20 May 2012, p. 19, available at http://www.osce.org/odihr/elections/92509.
[273] See http://nopo.org.rs/
[274] For details see http://www.skupstinavojvodine.gov.rs/?s=SavetNacionalnihZajednica.
[275] ACFC, (second) opinion on Serbia, 2009, para. 239,
[276] Para. 374. Second Report Submitted by Serbia Pursuant to Art. 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities, Received on 4 March 2008, ACFC/SR/II(2008)001.
[277] Pokrajinski Ombudsman Vojvodine, Izveštaj pokrajinskog ombudsmana za 2011, p. 54.

introduced in case more than 25% of the population in a settlement of the municipality speak a minority language and minority languages enjoy official status in 39 of 45 municipalities[278].

A report of the Serbian Ombudsperson draws attention to the gap between legal standards and practice: 'the Republic of Serbia has introduced high standards for the protection of rights for the official use of minority languages, but neglected the conditions in which these standards have to be implemented. Sometimes it appears that while preparing the some [sic] legal solutions no serious feasibility study was conducted and some aspects of the laws have been set up in a manner that is practically impossible to completely implement...'[279].

The use of minority language is probably best secured in the provincial institutions, but to a lesser degree by municipal authorities[280]. The problem is even more pronounced in central Serbia. As a study of the Serbian Ombudsperson notes, in Vojvodina multilingual documents are regulated at the provincial level, but many municipalities in Central Serbia do not provide documentation other than in Serbian, using the Cyrillic alphabet[281]. In Vojvodina multilingual topographic signs have been generally put up in line with legal requirements (as opposed to Central Serbia), but even here, often not all signs are multilingual, especially at the level of street signs[282]. Another advance has been the consultation with Minority Councils in establishing traditional names of topographic signs in Vojvodina[283].

While minority languages can be used in the national parliament according to the rules of procedure, in practice the parliament lacks the facilities for MPs to speak in languages other than Serbian (i.e. translation) and documents are exclusively provided in Serbian. In the Assembly of Vojvodina translation and documents are provided in minority languages[284]. In three municipalities in Vojvodina Hungarian is also used while elsewhere only Serbian is used, despite requests for the use of minority languages. The lack of facilities for translation and interpreting are the reasons why sessions of local assembly meetings are held only in Serbian. The province also provides for annual funds for implementing the rights of minority languages and thus enable municipalities to provide services in minority languages[285]. Nevertheless, even here few municipalities have the personnel to provide translation[286].

2.2.4 Education and culture

Education in minority languages is offered through two models, full education in the minority language, available to the larger minorities and a special course on the minority language and culture available to other minorities and in municipalities were larger minorities are not strongly represented. In terms of primary education in Vojvodina, there are 71.96% mono-lingual schools, 27.46% bilingual schools (mostly Serbian-Hungarians, followed by Serbian-Slovak) and three tri-lingual schools. Altogether a third of all schools are teaching (also) in minority languages. While most Hungarian children attend schools in Hungarian (approx. 80%) some minority children either do not have instruction of minority languages (i.e. Roma) or largely attend Serbian school programs (i.e. Croats, 89.2% attend Serbian programs)

In the sphere of education, some key aspects remain insufficiently clarified, in particular teaching of minority languages as a special course 'mother tongue with elements of national culture' and teaching of Serbian as a

[278] ACFC, (second) opinion on Serbia, 2009, para.170.
[279] Bašić, G., Ljubica Đorđević, 'Ostvaranje prava na službenu upotrebu jezika i pisama nacionalnih manjina u Republici Srbiji', Belgrade: Zaštitnik Građana Republika Srbije, 2010, pp. 46-47, available at: http://www.ombudsman.rs/index.php/lang-sr/izdavacka-delatnost/1288-2011-03-04-11-03-48.
[280] Pokrajinski Ombudsman Vojvodine, 'Izveštaj pokrajinskog ombudsmana za 2011', p. 50.
[281] Bašić, Đ., 'Ostvaranje prava na službenu upotrebu jezika', 2010, p. 40.
[282] Ibid., p.44.
[283] ACFC, (second) opinion on Serbia, 2009, para. 184,
[284] Bašić, Đ., 'Ostvaranje prava na službenu upotrebu jezika', p.53.
[285] Ibid., p.57
[286] Ibid.

foreign language[287]. The special language and culture courses in minority languages are offered both for larger minorities which also have full minority language classes (Hungarian, Slovak, Romanian, Croatian, Rusyn) and to minorities that do not have minority language as language of instruction (Ukrainian, Bulgarian, Bunjevac[288], Czech, and Roma). However, few Roma children seem to benefit from these special courses. Only 7.2% of all Roma pupils (569) enrolled in courses on Roma language and culture. For example, 92.3% of Slovak pupils attend either schools with Slovak as language of instruction or a separate course in Slovak language and culture. Even among Croats, who are more likely to attend Serbian instruction, the share of pupils is 22.9%[289].

In terms of textbooks in minority languages, these are generally available, but a problem is constituted by inadequate teacher training and obstacles by the state for support from kin-states[290].

A particular problem in the sphere of education is posed by Roma children being placed in 'special classes' or 'special schools'. The ACFC notes that between 50 and 80% of Roma children are placed in such 'special schools', *de facto* depriving them of the ability to receive adequate education[291]. According to data from the Educational Department of Vojvodina, Roma constitute 27.09% of pupils in schools for children with development difficulties (in comparison to a share of 5.11% in all primary schools). This means that approximately 8% of all Roma pupils in primary schools attend special schools. The real number is probably considerably higher[292].

2.2.5 Interethnic Relations

During the period 2004/5, Vojvodina registered a sharp increase in incidents of interethnic violence. While the ethnic motivations were often not clearly established, the patterns of violence suggested a nationalist background. The violence subsided as quickly as it had emerged, but the incidents were of twofold significance. First, they shed light on the inability (or unwillingness) of institutions at first to effectively confront the violence. Bodies charged with improving interethnic relations, especially the local level, were ineffective. Second, the violence highlights that a key threat for minorities no longer emanated from the state, as had been the case in the previous decade, but rather through radical social groups and individuals[293].

Altogether minority protection has advanced considerably since 2000, marked by a decade of the gradual codification of the legal framework and in recent years by its (partial) implementation. The main challenge besides a sometimes too ambitious legal and institutional infrastructure has been the lack of priority placed on minority issues at the level of the Serbian government. This is not least reflected in the fact that the responsible institution for minority rights changed multiple times[294]. The main obstacles in regard to the incomplete implementation of minority rights according to the Serbian ombudsperson are largely the results of five features of state capacity, namely not tracking the realisation of rights, the lack of control of the implementation of laws and regulations at the municipal level, the lack of harmonization of laws and regulations with international standards and the constitution, the lack of administrative capacity to implement the legal obligations of the state and insufficient funding for minority self-government[295].

[287] Pokrajinski Ombudsman Vojvodine, 'Izveštaj pokrajinskog ombudsmana za 2011', p. 45.
[288] The Bunjevac community is catholic and closely linked to the Croat community.
[289] All data on number of schools and pupils taken from Pokrajinski Sekretarija za Obrazovanje, 'Uprava i Nacionalne Zajednice, O osnovnom obrazovanju I vaspitanju učenika sa posebnim osvrstom na obrazovanje pripadnika nacionalnih manjina u AP Vojvodini u školskoj 2011/2012. Godini'.Novi Sad, May 2012, available at http://www.obrazovanje.vojvodina.gov.rs/images/stories/Dokumenti/Informacije/2012/1/Informacija%20o%20osnovnom%20obrazovanju%20i%20vaspitanju%20ucenika.pdf.
[290] ACFC, (second) opinion on Serbia, 2009, para. 195.
[291] ACFC, (second) opinion on Serbia, 2009, para. 204.
[292] Pokrajinski Sekretarija za Obrazovanje, 'Uprava I Nacionalne Zajednice, O osnovnom obrazovanju'.
[293] Bieber, F., and Winterhagen, J., 'Ethnic Violence in Vojvodina: Glitch or Harbinger of Conflicts to Come?', 27 *ECMI Working Paper*, 2006.
[294] 2001-2004 Ministry for Ethnic and National Minorities at the Yugoslav level, 2004-2006 Ministry for Human and Minority Rights at the level of the state union, 2006-2008 Minister of Public Administration and Local Self-Government, 2008-2001 Minister of Human and Minority Rights and since Ministry of State Administration and Local Self-Government.
[295] Zaštitnik Građana Republika Srbije, *Komentar o pojedinim pitanjima zakona I propisa kojima je uređen položaj nacionalnih manjina*, Belgrade, February 2011.

2.3 Kosovo

The legal and institutional system of minority rights protection in Kosovo is extensive and comprehensive. The current system largely derives from the institutions and laws put in place by the UN administration between 2001 and 2008 and from the Ahtisaari Plan that laid out detailed legal provisions as preconditions for the independence of Kosovo. These have been enshrined in the 2008 constitution and a number of laws, in particular the Anti-Discrimination Law, the Law on the Use of the Official Languages, Law on Freedom of Religion, Law on the Protection and Promotion of the Rights of Communities and their Members and the Law on Cultural Heritage.

Formally all ethnic and national groups in Kosovo are considered to be 'communities' by the constitution, irrespective of the size (Art. 57). In practice, the Albanian community constitutes a majority except for the municipalities in the North of Kosovo (Zubin Potok, Leposavić, North Mitrovica and Zvečan) not under control of the Prishtina government and in the municipalities that have been established since 2008 in the rest of Kosovo to provide minority community self-government (Graćanica, Klokot, Parteš, Ranilug, Novo Brdo, Dragaš, Mamuša). The exact size of the different communities remains unclear as the last census in which all communities participated took place in 1981. The results of the 2011 are only indicative for non-Serb communities as most Serbs boycotted the census. Approximately 90 % of the population hail from the dominante Albanian community and the next largest group are Serbs, approximately 120,000 or around 6% of the population. All other communities constitute less than 2% each, including Bosniaks, Turks, Roma, Ashakali, Egyptians and Gorani[296].

In Kosovo the gap between the legal framework and the social reality has long been particularly striking. In assessing the degree of minority protection, one needs to distinguish the regions under control of the Kosovo government and the northern municipalities that are *de facto* governed by the Republic of Serbia and thus Kosovo legislation is generally not applied here. Even in some areas populated by Serbs and other minority communities in the south, education and other services are provided by the Serbian authorities; especially all Serbian-language schools are funded and administered by the government of Serbia, and not by Kosovo authorities.

2.3.1 Minority representation

There is an impressive institutional infrastructure to protect minority communities. The President is advised by a consultative Council for Communities in which all communities are represented[297] . With the Office of the Prime Minister, a special office is devoted to Community Affairs. In addition, there is a Ministry devoted to Communities and Returns, traditionally headed by a member of the Serb community. The Assembly has a standing Committee on Rights, Interests of Communities and Returns. Finally, the government also includes a Serb deputy Prime Minister, who is also one of two Serb ministers[298] in addition to a minister from another minority community and 20 seats in the assembly are reserved for minority communities (ten for Serbs, four Roma, Ashkali and Egyptians, three Bosniaks, two Turks and one Gorani)[299]. There is furthermore an Office of the Language Commissioner to oversee the implementation of the Law on Languages and the Ombudsperson Institution.

A problem of these institutions has been the question to which degree they fully represent the minorities in question. In particular low participation of Serbs in Kosovo institutions has undermined the legitimacy of Serb representatives. With reserved seats in the assembly and a low turnout of the community, MPs from communities have been elected by as few as 50 votes (although in most cases a few hundred votes were cast).

[296] For official census results see Kosovo Population and Housing Census 2011 Final Results, Main Data, 2012, p. 60. These numbers only include 25,532 Serbs, as most Serbs, especially in the North of Kosovo boycotted the census.
[297] Art. 60 of the Constitution.
[298] A constitutional requirement, Art. 96 of the Constitution.
[299] Art. 64 of the Constitution.

In addition, MPs from Roma, Ashakali and Egyptians communities have been marginalised partly due to their weak base and the dominance of the Serb-Albanian conflict as the main theme of community relations. The MPs rarely participated in parliamentary debates, if they participated at all in sessions[300].

At the local level Committees of Communities were established to make recommendations to the municipal assemblies on matters pertaining to communities and is comprised by local assembly members from the different communities with the non-dominant communities constituting a majority in the committee. Even though these bodies were established already in 2003, their performance has been limited in the eyes of the OSCE: 'committees' performance cannot be considered as satisfactory, despite the long lasting existence of the mechanism in almost all the municipalities in the region [Gjilan/Gnjilane]'[301]. While in most municipalities the committees have been established, they often do not function regularly, lack representation of key communities or legitimacy for the community, a particular challenge for Serbs. Other mechanisms to include communities at the municipal level, such a deputy mayors and deputy chairs of municipal assemblies have been in similarly weak positions.

2.3.2 Public administration and employment

By law, minority communities are guaranteed equitable representation in all public bodies and enterprises[302]. As a consequence, recruitment procedures require public bodies to encourage the inclusion of minority communities[303]. Formally, these procedures are largely followed, i.e. by placing bi-lingual job advertisements, but in practice, smaller communities remain underrepresented.

A study of minority community employment found that among 9197 municipal civil servants, some 94.55% hailed from the majority community, 3.04% Serbs, 1.14% Bosniaks and the remainder from smaller groups[304]. In state level institutions, the situation is similar with 92.02% Albanians and 5.08% Serbs, 1.38% Turks and less than 1% from the other communities. The share of Albanians is slightly higher at the managerial level than at the administrative level (94.6% vs. 91.01%)[305].

2.3.3 Use of languages

The use of languages remains a particular problem for the implementation of minority rights. According to the constitution, both Serbian and Albanian are official languages and Turkish, Bosnian and Roma can have official status at the municipal level[306]. According to the Law on the Use of Languages, the latter three become an official language if the speakers constitute more than 5% of the municipal population and it can become a language in official use (with less obligations on the municipalities) for minorities above 3%[307]. While equal status of Serbian and Albanian has been established in the assembly, the implementation of the law remains patchy elsewhere. Municipalities and also central authorities often do not provide all official documents in Serbian or these contain mistakes (including in officials signs). The main reason appears not to be intentional discrimination, but rather the inability of authorities to provide full documentation in Serbian, especially in municipalities which have only a small share of the population from the community[308]. As a result a survey indicates that of 10 municipalities seven do not provide all information in all languages that enjoy official

[300] Visoka, G., and Beha, A., 'Minority Consultative Bodies in Kosovo: A Quest for Effective Emancipation or Elusive Participation?', 10(1) *Journal on Ethnopolitics and Minority Issues in Europe*, 2011, pp. 21-22.
[301] OSCE Mission in Kosovo, *Protection and Promotion of the Rights of Communities in Kosovo: Local Level Participation Mechanisms*, Prishtina, 2009, p. 8, available at http://www.osce.org/kosovo/40722.
[302] Art. 61 Constitution.
[303] Ibid., p. 27.
[304] Ibid., p. 61
[305] Ibid.
[306] Art. 5 Constitution.
[307] Doli, D., Cabiri, K., and Korenica, F., 'Equalizing the Use of Language: A View to Kosovo Law's Guarantees Upon Minority Languages', 3 *The Open Law Journal,* 2010, p. 10.
[308] Karadaku, L., 'Overcoming Language Barriers in Kosovo', *SEE Times*, 27.8.2012, available at: http://setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2012/08/27/feature-03.

status, as opposed to more than 95% of central institutions[309]. Other problems pertain to the use of alphabets. While Serbian is recognised with the Cyrillic alphabet in most cases the Latin alphabet is used[310].

A systematic study of the use of languages in Kosovo institutions indicates that basic information is available or given in Serbian (on websites, signs, etc.), but that the information remains incomplete. The ministries and institutions in question also employ generally above 90% Albanians and lack resources and language competence to implement the law[311]. Similarly, the complexity of the law and the demanding requirements meant that few institutions are fully aware of their obligations, including training staff in use of minority languages[312]. It is important to note that the law sets particularly high demands for authorities in providing bi-lingual documentation in a largely monolingual context. Whereas the intention has been to provide access especially for Serbs, the limitations of the institutions suggest that the legal provisions might be excessively ambitious.

2.3.4 Education and culture

The educational system is marked by strong segregation. As Albanian and Serbian pupils attend different schools, there is little interaction and learning of the others languages, rendering communication difficult. The legal framework provides for schooling in Serbian, however, a Serbian language curricula is to date not available in Kosovo schools. This is largely caused by the boycott of the Serb community of efforts to establish Serbian language education by the Kosovo government. At the same time, the Kosovo authorities have not pursued the establishment of such schools and instead *de facto* accept the existence of school funded by the government of Serbia operating on the curriculum of the Republic of Serbia[313].

Bosnian textbooks have to be imported from Bosnia and Herzegovina and Serbia[314]. The problems Roma, Ashkali and Egyptians (RAE) face are similar to elsewhere in the region. In addition, there is no education in Romani and dropout rates among RAE children is high[315].

Few efforts are undertaken by the state to support the culture and language of small communities[316].

2.3.5 Interethnic relations

Interethnic relations in Kosovo remain severely burdened by war and past instances of ethnic violence. This has been compounded by the conflicting views of Serbia and many Serbs and most Albanians over the independence of Kosovo. This affects particular relations between Serbs, Albanians and Roma. Other communities have largely accommodated themselves with the Albanian majority and open discrimination or tensions are less common.

A problem particular to Kosovo is the perceived lack of freedom of movement for Serbs. Many Serbs fear attacks and discrimination in majority Albanian environments. While the seriousness of incidents has declined considerably since 1999, ethnically motivated violence remains an issue and Serbs a target of sporadic attacks[317]. The overall decrease of attacks against Serbs has improved the freedom of movement, but fear

[309] Office of Community Affairs, Office of the Prime Minister, *Policy Study II, Language Policies in Kosovo. Implementation in Relations to Public Bodies*, September 2011, p. 241.
[310] Ibid.
[311] Ibid.
[312] Ibid., pp. 240-241.
[313] Ombudsperson Institution, *Annual Report 2010*, Prishtina, 2011, p. 102.
[314] Ibid, p. 101
[315] Ibid. pp. 103 and 207. ACFC, (second) opinion on Kosovo, 2009.
[316] Ombudsperson Institution, *Annual Report 2010*, p. 101.
[317] UN security Council, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2012/603, 12 August 2012, paras. 17, 29 and 30; UN Security Council, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2012/275, 27 April 2012, para. 21-22.

remains potent among some Kosovo Serbs and political conflicts, such as in 2011 over the border crossings with Serbia can quickly lead to deterioration of relations[318].

In addition the existence of Serbian institutions has often been a source of conflict and led to efforts of the Kosovo government to assert its authorities, resulting in heavy handed interventions against Kosovo Serbs, such as the arrest of Serbian postal workers in early 2012[319].

Refugee return of minority communities in Kosovo has remained far below comparable levels in other post-war regions of former Yugoslavia. At the same time, citizens of Kosovo have been forcibly repatriated by third countries, especially in Western Europe. Of the more than 250,000 displaced persons, between 1999 and 2011 22,906 returned. The mass violence against minorities in 2004 saw further displacements undoing earlier returns and putting a break on returns[320].

The Ahtisaari Plan also foresaw the establishment of special protected zones around key Serbian Orthodox religious sites to protect them from illegal construction and other threats. This special status has been particularly controversial in Kosovo, as its critics saw it as a form of extra-territoriality giving Belgrade direct control[321]. As a result, the government and parliament has been reluctant to pass the necessary legislation and there have been frequent tensions between local authorities and Serb-Orthodox Churches and Monasteries over municipal plans that appeared to contravene the protected status[322].

The political environment of the Northern Kosovo municipalities is characterised by the polarisation with Kosovo and a strong nationalist atmosphere. Similarly in Kosovo itself, the past remains a taboo and open debate over past crimes remains difficult. A report of the Norwegian Helsinki Committee from 2011 noted that '[t]here is very little space to discuss crimes committed by the KLA and others against Serbs, RAE and other individuals over the last 12-13 years. Addressing and processing past crimes committed by either side of past conflicts is of primary importance as a basis of future reconciliation and peaceful co-existence'[323].

Altogether, Kosovo has a much elaborated mechanism of minority protection, established with the goal to secure support for Kosovo's independence. The extensive rights, especially for the Serb community, have largely not been fully used due to the continued contestation of Kosovo's statehood. The minority rights mechanisms are largely the product of external institutional engineering and domestic commitment is limited. As a result of these features of the minority rights system and the lack of institutional resources to fulfil the legal obligations, the gap between goal and reality is particularly stark.

2.4 Conclusions

Even though Croatia, Vojvodina (Serbia) and Kosovo find themselves in greatly different positions today, both in terms of proximity to full EU membership and the state of political reforms, there are a number of striking similarities in the respective systems of minority rights protection. All three cases have elaborated and detailed legislation in place to secure the inclusion of minorities. This includes in all three cases extensive mechanisms of minority participation through either local or national minority councils in Croatia and Serbia or local committees and national representative mechanisms in Kosovo. This legislation was put into place as a result of domestic initiative and external advise and expertise. Whereas in Croatia and Vojvodina the legislation has

[318] Norwegian Helsinki Committee, *'Authorities in Kosovo must Ensure Access to Justice and Show Practical Support to Minorities'*, 25 November 2011, available at http://nhc.no/no/nyheter/Authorities+in+Kosovo+must+ensure+access+to+justice+and+show+practical+support+to+minorities.9UFRDQZL.ips.
[319] UN Security Council, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2012/275, 27 April 2012.
[320] Ministry for Communities and Returns, *Strategija za Zajednice i Povratak, 2009-2013*, available at: http://www.mkk-ks.org/repository/docs/313R_KOMUNITETE_DHE_KTHIM_2009_-_2013_SERB_.pdf ; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2012/72, 31 January 2012 http://www.unmikonline.org/SGReports/S-2012-72.pdf
[321] Vetevendosje, 'Letter to Quint Ambassadors', 8.9.2012. http://www.vetevendosje.org/?cid=2,2,4973.
Para 46 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2012/275, 27 April 2012
[322] Ibid., para. 45.
[323] Norwegian Helsinki Committee, 'Authorities in Kosovo', 2011.

been drafted domestically, in Kosovo, the relevant laws are largely the result of external legislative drafting. The main weakness in all three systems is not the legal framework which is in many cases exemplary in comparison to most other European countries. Instead, implementation is considerably lagging behind the legal framework.

There is not a single reason that can account for this discrepancy. The three cases suggest the following reasons at play:

1. *Insufficient commitment to legislation by government*. As laws in the field of minority rights are often the result of external pressure and intervention, the level of domestic commitment might not always be given to secure full implementation.
2. *Laws that are impossible to implement*. Some laws include prescribe requirements that the institutions of the case studies lack the capacity to fulfil and the question arises whether the legislation might be insufficient in tune with specific limitations and constraints.
3. *Insufficient monitoring of implementation at local level*. Significant aspects of minority rights protection takes place at the local level, from language rights, to employment and representative bodies. However, municipal authorities often lack capacity, the ability to act autonomously and are not monitored or advised by central institutions (or international actors).
4. *Insufficient societal support for the legislation*. Stereotypes and ethnic distance remain a problem in all three cases, both in cases when the majority and a minority were directly involved in a conflict during the 1990s or when a legacy of nationalism taints majority-minority relations. As a result, implementation is obstructed by lack of support that expresses itself in administrative practices, obstruction and discrimination.
5. *Small size or insufficiently organised minority community*. In some cases, the minority communities are either very small in size or characterised by strong internal divisions that reduce the effectiveness of minority rights mechanisms, espescially in terms of education and political representation.

The multitude of reasons for the lack of implementation requires a multifaceted approach to improving minority rights regimes in Southeastern Europe. In addition, the current legal mechanisms for the protection of national minorities remain inadequate for addressing the needs of the Roma community. Many of the needs of the Roma community relate to economic opportunity and social affairs, not covered by most of the minority legislation. In addition, significant aspects of minority rights legislation do not benefit Roma (i.e. education) as in most cases Romani is not officially recognised nor taught in schools. Instead, many Roma children attend special schools and Roma still remain stigmatised by societies and in their interaction with state institutions.

CHAPTER TWO – MAINSTREAMING HUMAN AND MINORITY RIGHTS IN THE EU ENLARGEMENT PROCESS AND THE EUROPEAN NEIGHBOURHOOD POLICY

3. ENLARGEMENT PROCESS

Under the impression of the wars in former Yugoslavia from 1991-1995 minority protection, as an integral part of the international protection of human rights, has been considered as a precondition for maintaining stability along the EU's borders and ultimately within its territory. In 1993 the Copenhagen criteria enshrined 'stability of institutions guaranteeing … human rights and respect for and protection of minorities' as a condition for membership and regular monitoring mechanism through annual country reports have been established. Furthermore, in the Stabilization and Association Process (SAP) the principle of conditionality was employed[324]. It was perceived that through the political and financial backing by the EU, the accession process would bring improvements in the area of human rights and in the daily lives of minorities in the Western Balkans more specifically. However, it is to be examined whether the message sent by the EU to countries in the Western Balkans with regard to the protection of human and minority rights was sufficiently strong, relevant and foremost consistent[325].

This part of the study aims to explore to which extent the political Copenhagen criterion for the protection of minority rights has been reflected in and how its compliance has been monitored throughout the different stages of the EU enlargement process in the Western Balkans. The documents analysed for that purpose include first and foremost the annual progress reports but also the European and Accession Partnerships, Stabilization and Association Agreements, (so far existing) opinions of the Commission on the application for membership of individual countries as well as the annual Enlargement Strategy Papers. The documents are analysed starting with the year 2005, as in this year the EU's relations with the Western Balkans were moved from External Relations to Enlargement policy.

The first part of the analysis makes a general evaluation of the SAP in terms of monitoring and mainstreaming activities of the EU in the area of minority protection. It does so by first asking whether specific targets and/or benchmarks are set, which would help measuring if the situation has improved from one year to the next. It then goes on to check whether there has been an appropriate follow-up to such priorities/benchmarks in the progress reports, both in those chapters where minority rights are generally dealt with[326], as well as in other areas, thus shedding light on the mainstreaming efforts undertaken by the European Commission. Some thoughts will finally be given to the entry into force of the Lisbon Treaty and the interrelations with Council of Europe monitoring of minority rights.

The second part provides for a case study on Croatia as the first country who has gone through the whole process of enlargement negotiations, awaiting its accession to the EU in 2013. The issues analysed in the first part will also serve as guiding point for the case study.

[324] See Bieber, F., 'Introduction: Unconditional Conditionality? The Impact of EU Conditionality in the Western Balkans', 63(10) *Europe-Asia Studies*, 2011, pp. 1775–178; and Bieber, F., 'The Western Balkans are Dead - Long Live the Balkans! Democratization and the Limits of the EU', in: Dzihic, V., Hamilton, D., (eds.), *Unfinished Business: The Western Balkans and the International Community*, Brookings Institution Press, Washington DC, 2012, pp. 3-10.

[325] See Zivanovic, M., 'Lessons (not) Learned with regard to Human Rights and Democracy: The Case Study of Bosnia and Herzegovina', in: Benedek, W. (ed.), *Lessons (not) Learned with regard to Human Rights and Democracy, A Comparison of Bosnia and Herzegovina, Kosovo and Macedonia*, NWV/Intersentia, Vienna/Antwerp, 2009, pp. 30-85.

[326] These are the chapter on 'Political criteria' and (for countries, for which candidate status has been recommended by the Commission) Chapter 23 of the progress reports, dealing with Judiciary and Fundamental Rights

3.1 Monitoring human and minority rights in the Stabilisation and Association Process

3.1.1 Setting priorities and benchmarks

European and Accession Partnerships[327] 'guide the countries' reform efforts and indicate the concrete actions needed to achieve progress through the road-map. They identify the short and medium-term priorities for each particular stage of the pre-accession process'[328]. As such they are an important instrument for the Commission in setting specific targets to be met in specific areas and constitute the main reference documents in the intensified political dialogue on those key priorities[329]. When analysing the EU's record of monitoring and mainstreaming the rights of persons belonging to minorities in the enlargement process, the Partnerships are an important source of information.

The European Partnerships (EP) with Bosnia and Herzegovina remain at a quite general level when asking as a short term priority for an improvement of the legal framework 'so that it fully meets the requirements of the CoE FCNM and to ensure its implementation throughout Bosnia and Herzegovina.' As a medium term priority, Bosnia and Herzegovina is requested to '[e]nsure the protection of minorities in accordance with EU and international standards'[330]. It goes into a bit more of a detail when identifying as short term priority to establish (in 2005) the Council of National Minorities and (in 2006 and 2008) to ensure its proper operation. Similarly, the European Partnership with Montenegro of 2007 focuses primarily on the provision of an adequate legal framework for the protection of the rights of minorities, with the exception of the medium term priority to ensure the inclusion of minority children in mainstream education. This is a medium term priority also for Serbia. Common to both, Serbia and Montenegro, is also the quite general requirement to continue efforts to promote integration of minorities and good inter-ethnic relations.

The 2006 and 2008 European Partnerships with Albania set the quite general short term priority of implementing commitments under the CoE FCNM, but specifies that the areas of minority language use with authorities, the display of traditional and local names and minority language education are of particular importance.

The most extensive and detailed priorities are set in the European Partnerships with Kosovo. They are identical in 2006 and 2008. Apart from generally requesting as well to complete the legislative framework in line with CoE recommendations, they set as short term priorities that special attention has to be paid to the enforcement of the law on official languages, the clarification of responsibilities concerning the return of refugees and internally displaced persons and the facilitation of their return as well as the regularization of informal settlements and the sustainable solution for the housing and integration of Roma communities.

All European Partnerships identify in different language the improvement of living conditions and the integration of Roma as one priority, requesting for example the adoption and implementation of dedicated strategies and action plans. Common to the European Partnership of Bosnia and Herzegovina and Albania is further the priority to develop data 'that can serve as sound basis to foster further developments of social inclusion strategies, action plans and their evaluation'[331].

From the fact that most priorities continue to resurface in subsequent European Partnerships various conclusions could be drawn. One could be that short term priorities (normally to be fulfilled in a timeframe of one to two years) should have been rather categorised as medium term and that it was objectively impossible for a state to fulfil the requirements in the time foreseen. Linked to that, one could conclude that short term

[327] So far exist European Partnerships with Albania (2006 and 2008), Bosnia and Herzegovina (2005, 2006 and 2008), Croatia (2004), Serbia (and Montenegro) and Kosovo (2004, 2006 and 2008) and Montenegro (2007) and Accession Partnerships with Croatia (2006 and 2008) and Macedonia (2006 and 2008).
[328] European Commission, 2005 Enlargement Strategy Paper, COM(2005) 561 final, 9.11.2005, p. 11.
[329] European Commission, Enlargement Strategy and Main Challenges 2008-2009, COM(2008) 674 final, 5.11.2008, p. 6.
[330] European Partnership 2005, 2006 and 2008.
[331] Here quoted from the European Partnership with Bosnia and Herzegovina of 2006.

priorities are formulated too broadly and that it would be more effective to set more specific targets, leaving the state less room for manoeuvre. A third possible conclusion is simply that the political climate in a state is not conducive to the promotion and development of the rights of persons belonging to national minorities and that no matter how priorities would be set there is a too strong internal resistance against meeting them.

In terms of mainstreaming rights of persons belonging to minorities it is striking that only the European Partnership with Kosovo deals with this subject outside the dedicated chapter on human and minority rights. The Kosovo European Partnership includes the following key priorities:

> 'Ensure full respect for the rule of law, human rights and protection of minorities. Create a climate for reconciliation, inter-ethnic tolerance and sustainable multi-ethnicity which is conducive to the return of displaced persons. Ensure the respect, security, freedom of movement and participation of all communities. Explicitly condemn all manifestations of anti-minority sentiment. Vigorously prosecute all inter-ethnic crime.'

Under the chapter 'Democracy and rule of law' it identifies a further increase of minority representation in all institutions and the civil service at local and central level as a short term priority. Under the chapter 'Judicial system' it requests Kosovo to '[s]trengthen the access to justice of minority communities' as well as to '[c]ontinue to take measures to facilitate an equitable ethnic representation of judges.' Also these priorities appear in both European Partnerships so that the above conclusions apply also in these cases.

In the Enlargement Strategy Paper 2008-2009, the Commission states that '[c]ontinued efforts were made to improve the quality of the enlargement process, including by laying down rigorous benchmarks as conditions for opening and closing negotiating chapters'[332]. As has been discussed elsewhere, 'the idea of introducing benchmarking procedures in the realm of … human rights is a quite challenging undertaking', benchmarking being a very complex procedure that requires the reliance 'on clear concepts, objectives, and transparent time tables.' Further to that, 'in order to develop a proactive strategy for the support of … human rights, a clear ex-ante definition of what is meant by the central concepts of … human rights, and which key features they comprise, is imperative'[333]. These findings can be applied also to the area of minority rights. On this basis, the authors of the same report differentiate between naïve and intelligent benchmarking. They state that 'all benchmarking models require an ex ante decision as regards the measurement methods, the units to be measured, the chosen and appropriate (quantitative and/or qualitative) indicators, and the preferred data collection method. Eventually, this somewhat determines whether the process in question can be considered as naïve benchmarking or as intelligent benchmarking. Whereas the former is characterised by intuition and superficial comparisons, which can be easily misinterpreted and – depending on how seriously they are taken – have problematic and sometimes even socially damaging implications, the latter, i.e. intelligent benchmarking, is much more concrete, systematic and holistic'[334]. As mentioned above, benchmarks are used in the enlargement process as conditions for opening or closing negotiation chapters. They have, thus, so far only been developed for Croatia and are just about to be developed for Montenegro. An evaluation of so far existing benchmarks will be made below when assessing Croatia's experience with accession negotiations.

3.1.2 Monitoring and mainstreaming minority rights in the progress reports

This part will analyse whether the Commission is regularly and adequately following-up on the priorities set in the European and Accession Partnerships, whether it is consistent in addressing a specific issue, thus also measuring progress or decline, whether it makes use of the opportunity to regularly set intermediate targets which would help a state to move towards meeting priorities and benchmarks and finally, whether it does so

[332] Ibid., p. 6.
[333] Del Sarto, R., et al., *Benchmarking Democratic Development in the Euro-Mediterranean Area: Conceptualising Ends, Means, and Strategies*, A EuroMeSCo Report, October 2006, 17.
[334] Ibid., 15.

only in the chapters specifically dedicated to human and minority rights or has started mainstreaming these rights into other areas.

Regional cooperation and reconciliation are regularly addressed in the Enlargement Strategy Papers as key challenge. These cannot be met without addressing human and minority rights. The Enlargement Strategy 2007-2008 specifies that '[a]ll countries need to encourage a spirit of tolerance towards minorities and take appropriate measures to protect persons who may be subject to discrimination, hostility or violence. This is essential to achieve reconciliation and lasting stability'[335]. In the most recent Enlargement Strategy it described civil, political, social and economic rights, as well as the rights of persons belonging to minorities as key issues in most enlargement countries.

> 'These *fundamental rights* are broadly guaranteed in law but issues concerning implementation persist in many cases. In some cases legislative gaps remain, for example as regards the scope of anti-discrimination legislation. National human rights institutions such as Ombudspersons often require significant strengthening, as does the law enforcement bodies' handling of issues such as hate crimes and gender based violence. General societal attitudes to vulnerable groups such as ethnic minorities, people with disabilities and lesbian, gay, bisexual and transgender persons remain a common problem'[336].

It thus summarises the issues which transversally appeared in the individual state reports as major challenges to be addressed in the area of human and minority rights. The human and minority rights section under the heading 'Political criteria' is regularly divided into civil and political rights, economic and social rights as well as minority rights.

Under civil and political rights the Commission's monitoring focuses on the prevention of torture and ill-treatment, prison conditions[337], access to justice (including fair trial, length of proceeding, free legal aid), freedom of religion, freedom of expression and media as well as freedom of association and assembly. Under economic and social rights it monitors gender equality, childrens' rights and the rights of socially vulnerable and persons with disabilities, non-discrimination, property rights and labour rights. Depending on the country, a few additional issues are addressed, but the core remains the same. It could be questioned, why these rights have been chosen. If the aim of the Commission was to be as complete as possible, one has to look into the ICCPR and the ICESCR to see whether this has been achieved. It appears, however, that important rights are left out, such as freedom of movement, right to privacy and political participation rights in the former and right to social security, right to education, and the right to an adequate standard of living[338] in the latter case. It is also unclear why the rights of the child are categorised under economic and social rights, considering that the CRC is a treaty setting out the civil, political, economic, social, health and cultural rights of children. In terms of consistency it can be mentioned positively that the above mentioned issues are to a large extent monitored each year in the progress reports. In many cases the Commission starts the assessment with a statement on whether the situation has, according to its sources, improved or deteriorated. It is not always clear on which basis such a statement is made, considering that points of critique then often remain the same.

In the sub-section dealing with minority rights, the Progress Reports vary in their focus. While e.g. the reports on Croatia are organised thematically, dealing with the key areas of education, participation in public life, media and language and analysing separately the situation of Serbs and Roma, the reports on Serbia take a regional approach, monitoring the situation of minorities in the Vojvodina, Sandjak and Southern Serbia, again

[335] European Commission, 'Enlargement Strategy 2007-2008', p.6.
[336] European Commission, 'Enlargement Strategy and Main Challenges 2012-2013', COM(2012) 600 final, 10.10.2012, pp. 5-6, under the heading 'Putting the rule of law at the centre of enlargement policy'.
[337] These could be analysed as part of the prevention of torture and ill-treatment, as does the European Committee for the Prevention of Torture of the Council of Europe.
[338] This right has been taken into consideration only within the context of the situation of the Roma population.

analysing separately the situation of Roma. Only in more recent reports key areas of minority protection are monitored at a more general level, although in a very cursory way.

The Progress Reports on Montenegro consistently monitor only the adoption of the Law on Minorities and its harmonization with the Constitution, the issue of political participation and the situation of Roma. Other issues, like the official use of minority languages, minority language education and National Minority Councils are not monitored consistently throughout the reports, or, like minority media, not at all.

The Progress Reports on Albania are quite consistently monitoring the key areas of minority protection, with some weakness in the area of participation of minorities in elected bodies, and losing out of sight over time the issues of the use of minority languages in relations with public administration and access to media. Strong focus is placed on the collection of reliable statistical data on the size of minorities as well as on the situation of Roma.

Also the Progress Reports on Macedonia monitor the key minority rights, with a strong focus on education, language rights and (in line with Accession Partnerships) on equitable representation in public administration. Less in focus are media rights and participation in elected bodies. All progress reports deal extensively with the situation of Roma, including their access to education, housing, health services and employment. Another focus of all reports is the situation of Internally Displaced Persons (IDPs) and refugees. Economic and social rights are generally not tackled by Progress Reports, with the exception of the worrying socio-economic situation of persons belonging to the Roma minority.

With the exception of Serbia, most Progress Reports are thus organised thematically and cover in varying intensity and depth the core principles enshrined in the Framework Convention for the Protection of National Minorities. Generally, with a few exceptions[339], it can be said that Progress Reports consistently address the issues selected for monitoring, making also statements concerning progress or deterioration of a situation. Progress is often attested in cases in which requested legislation, strategies or action plans have been adopted. Only rarely, progress or setback is documented by statistics or numbers[340], more often by events based evidence. Hardly ever, reference is made to the assessment made by minority organisations, minority members in elected bodies or NGOs. Only in the case of Albania, reference is made to the opinion of the ACFC, which could also serve as argument in support of certain conclusions drawn. For these reasons and in lack of clear indicators it is often unclear, how the Commission reached certain conclusions. Indicators are not to be understood as a uniform checklist which will inevitably lead to a certain result depending on the number of "boxes ticked". There would reasonably be a core set of indicators but they should be adapted, in cooperation with the respective state authorities and civil society actors, to local specificities. Further, they would provide a solid basis for the findings of the Commission without depriving it of some room of manoeuvre in evaluating what is possible under the specific political circumstances and what not. As such, indicators as a tool to measure progress or decline would on one hand contribute to a more systematic assessment by the Commission of the situation of minorities and on the other to making planning and further implementation processes within the state concerned more efficient and transparent.

In terms of correspondence of issues monitored in the Progress Reports with priorities set in European and Accession Partnerships it can be said that the reports broadly cover the identified priorities. By way of example, the Commission is consistent in monitoring Albania's performance in relation to the implementation of specific FCNM commitments, to the registration of members of the Roma minority and to the provision of data on minorities in Albania. With the exception of the priority of promoting access of minorities to justice and social welfare, the Commission's Progress Reports on Macedonia regularly monitor progress towards priorities set in the Accession Partnerships. Regarding Serbia, however, the Commission does not monitor whether

[339] See e.g. above on Montenegro.
[340] See e.g. Progress Report on Macedonia on equitable representation of minorities in public administration or the increase or decrease of number of cases dealt with by Ombudspersons; Progress Report on Serbia on the increase or decrease of number of ethnically motivated incidents in Vojvodina.

Serbia is taking any effort towards ensuring mainstream education for children from minorities, which has been identified as a medium term priority[341]. Also the short term priority of promoting the participation of minorities in the judiciary and the law enforcement bodies is not monitored through the progress reports.

For the sake of making the overall monitoring process more transparent it would, however, be useful to spell out in the Progress Reports more explicitly which priorities have been identified in the European and Accession Partnerships and make a concrete statement as to the degree in which these priorities are met or work is taking place in order to reach them, and as to the measures to be taken to reach the goal[342].

This goes not only for priorities set in European and Accession Partnerships but can be made as a general point. The Commission is very reluctant in giving recommendations to states as to concrete measures to be taken in order to move towards fulfilling the political criterion of respecting the rights of persons belonging to minorities. It often concludes that 'more efforts' or even 'heavy investments' are needed to improve a situation but does not provide any guidelines as to how this could be achieved. The most concrete recommendation is when the Commission requests from the state to adopt and implement a specific piece of legislation, or a national strategy or action plan on a specific issue, or to collect general or specific statistics. Compared to this approach, the ACFC, which also engages in a political dialogue with the state parties to the FCNM, is much more concrete.

So far it has be discussed how the Progress Reports monitor human and minority rights in the chapters dedicated to this issue (Political Criteria and Chapter 23: Judiciary and Fundamental Rights). But have minority rights been addressed also in the context of other chapters? In other words, has the Commission started mainstreaming minority rights into all its policy fields? De Schutter adapts the definition used by the Commission for gender mainstreaming to fundamental rights, but the same can be done also for minority rights. Doing so, mainstreaming of minority rights means 'the systematic integration of [minority rights] in all policies [...] with a view to promoting [minority rights] and mobilising all general policies and measures specifically for the purpose of [realising them] by actively and openly taking into account, at the planning stage, their [impact on minority rights]'[343]. This definition makes clear that mainstreaming 'is pro-active, rather than reactive'[344]. This is true both for rule adoption or creation, but also for rule transfer, as in the case of the EU accession process. Ideally, the Commission would mainstream human and minority rights into its monitoring activities and throughout the political dialogue with (potential) candidate countries and (potential) candidate countries would embrace this approach during their domestic efforts to align with political and economic criteria and the overall EU *acquis*.

This study reviews the EU's record of mainstreaming the rights of persons belonging to minorities in the enlargement process. It can be anticipated that this record is quite modest. Minority rights have very rarely been invoked in chapters not dealing specifically with this issue. Most often reference to these rights appeared in the context of social policy and employment (Chapter 19), where developments in the field of non-discrimination and equal opportunities are assessed. In this context, the issue of double discrimination is also addressed. The 2012 Progress Report on Montenegro finds, for instance, that 'Roma women experience double discrimination – as members of a minority group and as women.'[345] The 2006 Progress Report on Macedonia comes to the conclusion that there has been 'substantial progress' in the field of equal opportunities, 'but there is need for considerable additional action on […] the situation of women from ethnic minorities'[346]. In

[341] The same is true regarding Progress Reports on Montenegro.
[342] Priorities for human and minority rights set out in European Partnership 2004 are evaluated (even if very briefly) in 'European Partnership: Overall Assessment' of the 2005 Progress Reports.
[343] De Schutter, O., 'Mainstreaming Human Rights in the European Union', in Alston, P. (ed.), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Hart Publishing, Oxford, 2005, p. 43, quoted from Commission of the European Communities, *Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities*, COM(96) 67 final of 21 February 1996, p. 2.
[344] Ibid., 44.
[345] Montenegro 2012 Progress Report, p. 41.
[346] The Former Yugoslav Republic of Macedonia 2006 Progress Report, p. 40.

2012 the Commission found on the same issue that '[l]ittle was achieved to improve the Roma women's condition'[347]. In the years in between it always made the point that minorities, especially Roma, suffer most from discrimination in various sphere of economic and social life, without however pointing explicitly at existing double discriminations. This is a finding of several other Progress Reports[348]. Although the field of discrimination is the one most covered outside the dedicated minority chapters, the consistency in doing so generally and in addressing double discrimination in particular is unsatisfactory. Namely, the issue is not addressed in the Progress Reports on a specific country every year, although the situation has not changed (which can be deduced from information in other chapters), and it is not addressed with regard to all (potential) candidate countries.

'[A]ctive employment measures' asked for in the 2006 Progress Report on Montenegro 'need to tackle employment of women and minorities.' In the following year the Commission reports about the adoption of human resources development strategy which focuses amongst other on the '[i]ntegration of … women and minorities into the labour market'[349]. 'As regards social inclusion and anti-discrimination' the 2009 Progress Report on Montenegro finds that 'reliable data and comprehensive analyses are needed to provide a sound basis for social inclusion policies.'

Occasionally, reference is made to minorities also in other fields: In the Croatian Progress Reports of 2006 and 2007 the Commission tackled the problem of ethnic bias in domestic war crimes' prosecution not only as a human rights issue but also as a regional issue, as it constituted an impediment for return for Serbs. It further criticised that witness security measures are still not sufficient and asked for further efforts to address witness (particularly minority witness) confidence in police, as there persisted reluctance to turn to the police among potential witnesses. Under the heading of 'Regional Issues' the conclusion of bilateral agreements and the establishment and functioning of respective Joint Intergovernmental Commissions is partly mentioned. Under 'Economic Criteria' only two reports made reference to minorities. The first is the one on Macedonia of 2005, where the Commission found that the share of working age economically active is low, especially among minorities. The Progress Report on Montenegro of 2009 found that the Agency for Employment adopted programmes for the integration of minorities into the workforce. In the field of education, several but still sketchy statements were made in the Progress Reports on Kosovo, Montenegro and Albania. The Commission asked for instance for '[f]urther efforts … to provide adequate conditions for education for persons belonging to minorities, including access to education in their languages.[350] It found that '[a]mendments to the Law on general education and upbringing were adopted [which] provide for education programmes tailored to minorities', after it had criticised two years before that it was not possible for minorities to adapt curricula to local circumstances.[351] And finally it found that school curricula have been revised to meet minority needs[352]. In the Kosovo 2012 Progress Report, under the heading of *'Asylum, migration, visa policy, control of borders/boundary*',[353] the Commission came to the conclusion that the 'lack of access to employment, education and training continues to be an obstacle to the sustainable reintegration of repatriated persons, in particular from minorities'. In the field of health protection, reference to minorities was made only in Progress Reports on Albania. According to the 2011 Report, Roma minorities are affected by health inequalities[354], whereas in 2012 the Commission requested that mental health service system accessible for minorities have to be established[355]. The 2009 Progress Report on Kosovo[356] reported under the chapter 'Information society and

[347] The Former Yugoslav Republic of Macedonia 2006 Progress Report, pp. 46-47.
[348] E.g. Progress Reports on Serbia, 2008, p. 38; 2009, p. 37; 2010, p. 37; (Analytical Report) 2011, p. 94; 2012, p. 46. Progress Reports on Croatia, 2007-2009, Progress Reports on Kosovo 2011, p. 40.
[349] Progress Report on Montenegro, 2007, p. 32.
[350] Progress Report on Kosovo 2012 – Education Training, Research and Innovation, p. 42.
[351] Progress Reports on Montenegro 2006 and 2008.
[352] Progress Report on Albania, 2010, p. 105.
[353] Ibid., p. 32.
[354] Ibid., p. 63.
[355] Ibid., p. 62.
[356] Ibid., p. 42

media' about the restart of the Minority Media Fund after a two years absence. It further provides information about the fact that 14 media have received grants in that year and that out of 110 licensed broadcasters, 41 represent minority media (32 Serbian, three Turkish, three Bosnian, two Gorani and one Roma). However, there 'is no independent minority channel with Kosovo-wide coverage.'

This summary shows that the European Commission's Progress Reports have taken into account the protection of persons belonging to national minorities only to a very limited extent in other fields. As the Commission is not systematically integrating minority rights 'in all policies [...] with a view to promoting [minority rights]'[357] it is clearly not putting enough effort into mainstreaming minority rights in the enlargement process. If human rights and minority rights in particular, are seen 'as a set of values that should guide law- and policy-making, and which are to be progressively realized',[358] this clearly requires a more pro-active approach by the commission also in terms of mainstreaming.

On 1st of December 2009 the Treaty of Lisbon entered into force. Have there been changes or improvements in the monitoring by the Commission in the enlargement context? One can anticipate that the answer to this question is to the negative. The Treaty of Lisbon has brought three innovations which are relevant in the context of minority protection: first, the protection of minorities appears for the first time explicitly among the values upon which the Union is founded (Art. 2 TEU). Second, the European Charter of Fundamental Rights, containing in its Arts. 21 and 22 minority relevant provisions, is elevated into the rank of primary law, and thirdly, the EU will accede to the ECHR. Will all this contribute to a stronger role of the EU in the areas of monitoring or standard setting? According to de Schutter 'the European Commission considered, even before the Treaty of Lisbon, that Art. 6(1) EU (where the 'values' of the Union were listed) included respect for the rights of minorities.'[359] He is further of the opinion that any monitoring performed by EU should be based explicitly on FCNM standards and findings of the ACFC and the CM[360]. Although he is referring to a (anyway unlikely) internal monitoring of EU member states, the same can be said also for external monitoring in the context of EU enlargement. And finally, he concludes that 'while the fact that the European Union legislates in fields which concern minority rights[361] should in principle be welcomed, […] it should in doing so aim at achieving a standard of protection at least as strong as the standard defined by the instruments of the Council of Europe. The risk otherwise may be to undercut the efforts of the Council of Europe.'[362]

The lead in terms of standard setting and monitoring would thus remain with the CoE, and regarding monitoring especially with the ACFC. When analysing the Progress Reports after the entry into force of the Lisbon Treaty one cannot sense any difference in terms of strength of wording, detailedness of recommendations or mainstreaming efforts. One can therefore conclude that the Commission has not revised its approach. This is of no surprise, considering that the overall legal framework has remained unchanged. One could, however, have wished for a more systematic reference to the findings of the ACFC.

If reference to the minority protection instruments of the CoE is made at all, it regards mostly whether the FCNM and the European Charter for Regional or Minority Languages have been ratified by the (potential) candidate countries or not[363] or it is generally stated that the implementation of the FCNM remains incomplete[364]. It sometimes mentions, when a state report under the FCNM is due[365]. Occasionally, the

[357] See above definition of mainstreaming.
[358] De Schutter, O., 'A New Direction for the Fundamental Rights Policy of the EU', 33 *REFGOV Working Paper Series*, 2010, p. 8.
[359] Ibid., p. 99.
[360] Ibid., pp. 111-113.
[361] He excludes, however, that the changes brought about by the Lisbon Treaty 'establish new competences for the EU to legislate on minority rights.' De Schutter, O., 'Recognition of the Rights of Minorities and the EU's Equal Opportunities Agenda', 11 *European Antidiscrimination Law Review*, 2010, p. 24.
[362] De Schutter, O., 'A New Direction for the Fundamental Rights Policy of the EU', pp. 113-115.
[363] See e.g. 2005 Progress Report on Macedonia; 2005 Progress Report on Serbia and Montenegro; 2006 Progress Report on Montenegro; 2005-2012 Progress Reports on Albania (regarding non ratification of ECRML)
[364] See e.g. 2005 and 2006 Progress Reports on Albania.
[365] See e.g. 2007 Progress Report on Montenegro; 2008 Progress Report on Serbia.

Commission finds that legislation is in line with the FCNM[366] or that FCNM principles are reflected in the Constitution[367]. Only rarely it explicitly states that a certain legal situation is not in line with the FCNM[368]. Only two Progress Reports make explicit reference to findings of the ACFC[369].

In view of the fact that both, standard setting and monitoring of the rights of persons belonging to minorities has been and will remain, also after the entry into force of the Lisbon Treaty, the strength of the Council of Europe, its instruments and monitoring bodies, it is to be wished, that the assessment of the Commission is based on and makes more explicit reference to the findings of the ACFC[370].

Another novelty introduced by the Treaty of Lisbon is a mainstreaming obligation for the EU in the field of non-discrimination, based on Art. 19 of the TFEU. Even if this can be interpreted as not including discrimination based on language and the belonging to a national minority[371] it certainly includes discrimination based on religion and ethnic origin. For the sake of sustainability of legal transformation in Western Balkan countries, this mainstreaming obligation should have its repercussions also in the enlargement process.

Finally, the direct and indirect role the Fundamental Rights Agency could play in the enlargement process should be mentioned. On the basis of Art. 28 of the Council Regulation establishing the Fundamental Rights Agency the Commission could propose to the Council to invite all countries with which an SAA has been concluded to participate in the Agency as an observer. So far, only Croatia participates as an observer in the FRA's work, which gives the Agency the possibility to deal with fundamental rights issues in Croatia 'to the extent necessary for its gradual alignment to Community law' and to this end, 'to carry out in Croatia the tasks laid down in Arts. 4 and 5 of Regulation (EC) No 168/2007' establishing the FRA[372]. If this mandate of the FRA would be extended to all countries with which an SAA has been concluded, the Commission could benefit in its monitoring activities from country or thematic studies to be produced by the Agency. Even without these countries being granted an observer status, the FRA could indirectly play a role in the accession process. According to Art. 4(1)(e) the Agency shall 'publish an annual report on fundamental-rights issues covered by the areas of the Agency's activity, also highlighting examples of good practice'. Such examples of good practice could be used in the dialogue with Western Balkan countries. Further, it has started developing indicators on specific human rights issues. The fact that its mandate is, for the time being, limited to EU member states and Croatia does not prevent the Commission from making use of these indicators in its evaluation of states' progress in realizing these human rights. The Commission could, thus, try to find ways and means to make use of the existing work of the FRA for its monitoring activity.

3.2 Experiences of accession negotiations with Croatia

The Council has adopted a European Partnership (2004) and two Accession Partnerships (2006 and 2008)[373] with Croatia containing amongst others priorities that 'have been selected on the basis that it is realistic to expect that Croatia can complete them or take them substantially forward over the next few years. The

[366] See e.g. 2012 Progress Report on Serbia, p. 16.
[367] See e.g. 2008 Progress Report on Montenegro.
[368] See e.g. 2010 Progress Report on Montenegro, where it found that the definition of a minority over the citizenship criterion is not in line with the FCNM.
[369] 2010 and 2012 Progress Reports on Albania.
[370] In 2008, the Commission refers to the ECRI report on Serbia. In 2006 it refers to the CPT report on Serbia and Montenegro. Reference to reports of these monitoring mechanism, while only reluctantly referring to the monitoring mechanism of the FCNM can be explained by the fact that neither ECRI nor the CPT have a catalogue of rights or principles to which the Commission could alternatively make reference.
[371] See Toggenburg, G., 'The EU's evolving policies vis-à-vis Minorities: A Play in Four Parts and an Open End', report compiled in the frame of the FP6 project 'Human and Minority Rights in the Life Cycle of Ethnic Conflicts', 2008, 13 available at http://www.eurac.edu/en/research/institutes/imr/Documents/Web_del30EUandminortiyprotection.pdf.
[372] Art. 2 of Decision No 1/2010 of the EU-Croatia Stabilisation and Association Council of 25 May 2010 on the participation of Croatia as an observer in the European Union Agency for Fundamental Rights' work and the respective modalities thereof.
[373] Council Decision of 13 September 2004 on the principles, priorities and conditions contained in the European Partnership with Croatia (2004/648/EC); Council Decision of 20 February 2006 on the principles, priorities and conditions contained in the Accession Partnership with Croatia and repealing Decision 2004/648/EC (2006/145/EC); Council Decision of 12 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with Croatia and repealing Decision 2006/145/EC (2008/119/EC).

priorities concern both legislation and the implementation thereof.'[374] The first two establish short term and medium term priorities (the former are expected to be accomplished within one to two years, the latter within three to four years), whereas the last does not foresee such a distinction.

The short term priorities of 2004 include generally to improve the respect for minority rights and more specifically to '[e]nsure implementation of the Constitutional Law on National Minorities. In particular [Croatia is supposed to] ensure proportional representation of minorities in local and regional self-government units, in the State administration and judicial bodies, and in bodies of the public administration as regulated by the Law.' Considering that the implementation of the right to proportional representation of the German speaking minority in the administration of the Italian province of Bolzano has taken around 30 years, it does not seem realistic to set such an endeavour as a short term priority.[375] As a matter of fact this priority reappears as a key and medium term priority in the Accession Partnership 2006 and as a key priority in the Accession Partnership 2008. The progress reports regularly deal with this issue, but could not report about a satisfactory fulfilment of this priority up until 2012.

Also the Advisory Committee to the FCNM showed its deep concern about the underrepresentation of persons belonging to national minorities in the executive and judiciary bodies and considered this situation as incompatible with Art. 15 of the FCNM. In the first two monitoring cycles the 'authorities were urged to focus on the improved implementation of Art. 22 of the Constitutional Act on the Rights of National Minorities'[376]. Also in its most recent opinion the ACFC found that the situation has not improved, and that 'allegations that ethnic Croats are being favoured over higher-qualified persons belonging to the Serbian minority' persist. 'In fact, the number of persons belonging to national minorities is decreasing in some public offices as previously hired persons of minority background are retiring and being replaced by ethnic Croats'.[377] The ACFC as well as the Committee of Ministers thus reiterated their recommendation that authorities take urgent steps to remedy this situation[378], proposing to 'review the procedures applicable to the implementation of [this] right … ;[to] observe stricter monitoring and enforce possible sanctions, in order to ensure the full and effective implementation of this provision at all levels.'[379]

Another short term priority set by the European Partnership in 2004 was to '[p]rovide the necessary means, including adequate funding, to ensure proper functioning of elected Minority Councils.' In this case a time span of one to two year would be realistic to expect some results. Considering that the priority did not reappear in subsequent Partnerships one could assume that this priority has been satisfactorily met.

The Commission regularly reports about the financial situation, working conditions and effectiveness of local Councils of National Minorities. Their budget continuously increased and as of 2008 the Commission reports also about an improvement concerning their capacity and premises. However, until 2010 the Commission noted that the capacity of local Councils of National Minorities to advise local governments in relation to minority issues continues to go unrecognised by the majority of local authorities. The last two reports do not mention the issue any longer.

In the monitoring under the FCNM the issue of local Councils of National Minorities still figures among the issues of concern of the Committee of Ministers' Resolution. It finds that '[t]he functioning of the councils of national minorities is, in many self-government units, unsatisfactory. In particular, co-operation between the councils of national minorities and local authorities is lacking. In addition, the low turnout at elections to the councils of national minorities undermined the democratic legitimacy of the electoral process. The funding for

[374] Art. 3 of the Partnerships.
[375] See Lantschner, E., Poggeschi, G., 'Quota System, Census and Declaration of Affiliation to a Linguistic Group', in Woelk, J., Palermo, F., and Marko, J. (eds.), *Tolerance through Law. Self Governance and Group Rights in South Tyrol*, Martinus Nijhoff Publishers, The Hague/Boston/London, 2008, pp. 221-222.
[376] ACFC, (third) opinion on Croatia 2010, para. 177.
[377] Ibid., para. 178.
[378] Ibid., para. 179
[379] Committee of Ministers, Resolution CM/ResCMN(2011)12 on the implementation of the Framework Convention for the Protection of National Minorities by Croatia, 6 July 2011.

the councils, which should be secured through the local self-government units and the state budget, remains inadequate, seriously limiting their capacity to function effectively.'[380]

Another recurring priority in the European and Accession Partnerships concerns the Roma minority. The first Partnership required from Croatia in a medium term to continuously improve the situation of the Roma, by providing the necessary financial support at national and local levels, by anti-discrimination measures aimed at fostering employment opportunities, by increasing access to education and by improving housing conditions. This priority was repeated in the subsequent Partnerships.

The Commission's Progress Reports are very detailed in assessing the situation of Roma. Although the Commission has found steady improvement in their situation, it also had to invariably repeat that problems still persist in the area of non-discrimination, employment, education and housing. One of the main findings of the Comprehensive Monitoring Report on Croatia's state of preparedness for EU membership of 2012 was that '[t]he Roma minority faces particularly difficult living conditions, and challenges remain in the areas of education, social protection, health care, employment and access to personal documents.'[381]

Similarly the ACFC reports about persisting discrimination of Roma in various spheres as well as of ethnically motivated violence against them with many attacks remaining unreported due to a lack of trust in the police and justice systems. According to the information of the ACFC, 'the response from the law enforcement officials to ethnically-motivated incidents is inadequate.'[382]

The 2006 and 2008 Accession Partnerships identified such a proper investigation and prosecution of ethnically motivated crimes as a priority. The Commission is focusing in its reports on ethnically motivated attacks against members of the Serb (and partly also Roma) minority. The most recent Resolution of the Committee of Ministers on the implementation of the FCNM of 2011, identified as an issue for immediate action to 'prevent, identify, investigate, prosecute and sanction, as necessary, all racially and ethnically-motivated or anti-Semitic acts'[383].

This overview has shown that the Commission regularly monitors the progress in implementing European and Accession Partnership priorities predominantly by means of its annual progress reports. In other words, the partnership priorities 'serve as a checklist against which to measure progress'[384]. The success of accession conditionality in the analysed fields remains, however, limited.

Another instrument against which progress could be measured are the benchmarks imposed for the opening or closure of specific negotiation chapters[385]. For the closure of Chapter 23, dealing with Fundamental Rights and the Judiciary, Croatia was – in the area of minority protection – very vaguely requested to strengthen the protection of minorities, including the effective implementation of the Constitutional Law on National Minorities. As a result of this benchmark the Croatian government adopted an Action Plan for the Implementation of the Constitutional Law on National Minorities. On 12 May 2011, the Croatian Government submitted a report on the fulfilment of benchmarks[386]. Neither the benchmarks nor the reaction to them by the Croatian government are publically available. The Commission's Progress Report of the year 2011 does not make reference to the benchmarks nor to the report by the Croatian government on their fulfilment. This lack of availability of documents as well as the lack of reference to them in Commission's Progress Reports makes the overall process quite un-transparent.

[380] Ibid.
[381] Ibid., p. 4.
[382] ACFC, (third) opinion on Croatia 2010, p. 2.
[383] Committee of Ministers, Resolution CM/ResCMN(2011)12 on the implementation of the Framework Convention for the Protection of National Minorities by Croatia, 6 July 2011.
[384] Petričušić, A., 'Croatia', p. 168.
[385] European Commission, ' Enlargement Strategy 2008-2009', p. 6.
[386] Availabe in Croatian at http://www.mvep.hr/custompages/static/hrv/files/pregovori/5/p23.pdf.

From the available sources it is does not appear that the Commission has engaged in a complex exercise as described above[387] nor that benchmarks identified for the closure of a negotiation chapter have been developed having clear concepts, measurement methods, indicators, collection methods or time frames in mind.

In terms of mainstreaming the rights of persons belonging to minorities into policy fields other than human and minority rights, Croatia is no exception to the generally negative evaluation made above. Only under Chapter 19 – Social Policy and Employment, the Commission deals with issues related to the discrimination of national minorities. Until 2008, when a comprehensive law on anti-discrimination was adopted, the Commission regularly criticised the lack of such legislation. After that, it was not satisfied with the act's implementation, finding, that the practice is still not in line with EU standards. From 2007 to 2009 the Commission regularly found that vulnerable groups and ethnic minorities continue to face discrimination in economic and social life and that limited statistics do not allow for monitoring as required by the *acquis*. In the Comprehensive Monitoring Report of 2012, the Commission found that 'Croatia is meeting the commitments and requirements arising from the accession negotiations and is expected to be in a position to implement the acquis as of accession in the fields [amongst others] social policy and employment'. Still, in this field, 'further efforts are required, in particular to complete legal alignment in the field of equal opportunities.'[388]

3.3 Role of EU Financial Instruments

3.3.1 Introduction

Since the early 1990s the EU has provided the Western Balkan States with financial assistance and became one of the largest donors in the region. Whereas this assistance during the first period of time was humanitarian aid in response to, firstly, the conflict and then the post-conflict situation, in the end of the 1990s it took a more systematic form not aimed anymore only to reconstruct the destroyed infrastructure or to reintegrate refugees and displaced persons but placing emphasis on strengthening cooperation with the EU on the one but also within the region on the other hand. The Stabilisation and Association Process (SAP) launched in 1999 provided a comprehensive approach *inter alia* towards the Western Balkan States setting out political and economic conditions for enhanced cooperation with the EU[389]. The main financial instrument for the SAP, the CARDS programme (2000-2006) aimed at enabling the countries in Southeastern Europe to build an institutional, legislative, economic and social framework directed at the values and models subscribed to by the EU and on promoting a market economy with due regard for priorities agreed with the partners concerned[390]. The CARDS programme covered in particular reconstruction and stabilisation of the region, aid for the return of refugees and displaced persons, the support for democracy, the rule of law, human and minority rights, civil society, independent media and the fight against organised crime, the development of a sustainable market-oriented economy, poverty reduction, gender equality, education and training, and environmental rehabilitation, and regional, transnational, international and interregional cooperation between the recipient countries and the Union and other countries of the region[391]. The CARDS already recognised that the protection of minority rights was a precondition for the democratic process, that 'the treatment of minorities lies at the heart' of it[392]. The protection of minority rights was identified as a medium-term challenge to be addressed both at the national and the regional level[393]. Despite that there has been a rather strong commitment to address minority rights within CARDS national and regional programmes in terms of

[387] See above, section 1.1.1.
[388] European Commission, Comprehensive Monitoring Report on Croatia 2012, p. 16.
[389] See above section 1.2.
[390] Council of the European Union, Council Regulation (EC) No 2666/2000 of 5 December 2000 on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia, repealing Regulation (EC) No 1628/96 and amending Regulations (EEC) No 3906/89 and (EEC) No 1360/90 and Decisions 97/256/EC and 1999/311/EC, OJ L 306, 7.12.2000, recital 6.
[391] Ibid., Art. 2.
[392] Commission, CARDS Assistance Programme to the Western Balkans, Regional Strategy Paper, 2002-2006, p. 9.
[393] Ibid., p. 16.

implementation its impacts were however limited due to inherent structural deficiencies regarding the access to funding and the in part unrealistic objectives[394].

3.3.2 Instrument for Pre-Accession Assistance (IPA)

The IPA, the successor of the CARDS, was introduced by the Commission as the single financial instrument covering the pre-accession process for the period 2007-13 covering EU acceding (Croatia) candidate (Iceland, Montenegro, Serbia, Turkey and the Former Yugoslav Republic of Macedonia) and potential candidate countries (Albania, Bosnia and Herzegovina, and Kosovo under UNSCR 1244)[395]. The major objective of the IPA is to support these countries in their efforts to harmonise national legislations to and implement the *acquis communautaire* and facilitate thereby the accession to the Union. The granting of funding under the IPA is clearly based on the respect for human and minority rights principles as it is set forth by the establishing Council Regulation:

> 'Assistance for candidate countries as well as for potential candidate countries should continue to support them in their efforts to strengthen democratic institutions and the rule of law, reform public administration, carry out economic reforms, *respect human as well as minority rights*, promote gender equality, support the development of civil society and advance regional cooperation as well as reconciliation and reconstruction, and contribute to sustainable development and poverty reduction in these countries, and it should therefore be targeted at supporting a wide range of institution-building measures'[396].

In this regard, minority concerns are integrated as cross-cutting issues in all activities planned under the IPA. The commitment that minority issues will be reflected in the relevant IPA activities can be found in the Annexes to the multi-annual indicative planning documents (MIPDs) that will be discussed below. However, even though the Commission already in 2005 has declared to apply a strengthened approach towards the mainstreaming of cut-crossing issues in its development policy[397], the inclusion of this commitment in the IPA seems to follow rather a 'copy-paste-approach' with the same formulations appearing over and over again in the MIPDs without taking into account specific circumstances or national peculiarities.

The IPA consists of five components, I) Transition Assistance and Institution Building, II) Cross-Border Cooperation, III) Regional Development, IV) Human Resources Development, and V) Rural Development, whereas for the protection of minorities components I and IV were most relevant[398]. Funds are allocated in line with a running three year multi-annual indicative financial framework on the basis of multi-annual indicative planning documents (MIPDs) prepared for each country. The MIPDs are prepared by the European Commission after consultations with the national governments, other relevant stakeholders and donors. Additionally, part of the funding is used for a multi-country programme designed to complement the national IPA programs and to foster regional cooperation. The MIPDs for 2011-13 which were prepared in 2010, introduced a shift towards a sector approach and nine different sectors have been identified being most relevant for the European integration process, namely i) public administration reform; ii) justice and home affairs; iii) private sector development; iv) transport; v) energy; vi) environment and climate change; vii) social

[394] For an analysis of the impacts the CARDS programme had in the Western Balkans, see Minority Rights Group International, *EU Financial Assistance to the Western Balkans: a Minority-Focused Review of CARDS and IPA*, 2010, available at http://www.minorityrights.org/10375/reports/eu-financial-assistance-to-the-western-balkans-a-minorityfocused-review-of-cards-and-ipa.html . See as well European Agency for Reconstruction, *A Synthesis of Findings from Evaluation Reports 2001-2005*, EU/12/034/05, February 2006, p. 24.

[395] Council of the European Union, Regulation No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA), OJ L 210, 31.7.2006.

[396] Ibid., recital 13 (emphasis added).

[397] European Parliament, Council and Commission, Joint Statement, 'The European Consensus On Development', 2006/C 46/01, OJ C 46, 24.2.2006. Paras 100 and 101 read: 'Some issues require more than just specific measures and policies; they also require a mainstreaming approach because they touch on general principles applicable to all initiatives and demand a multisectoral response. In all activities, the Community will apply a strengthened approach to mainstreaming the following cross-cutting issues: the promotion of human rights, gender equality, democracy, good governance, children's rights and indigenous peoples, environmental sustainability and combating HIV/AIDS. These cross-cutting issues are at once objectives in themselves and vital factors in strengthening the impact and sustainability of cooperation.'

[398] Ibid., Art. 3.

development; viii) agriculture and rural development; and ix) support and other activities. In the individual MIPDs a lesser number of priority sectors were selected[399].

Under IPA component I (Transition Assistance and Institution Building) the protection of human rights and the protection of minorities are included in the areas political requirements, socio-economic requirements and alignment to European standards. At the strategic planning level minority rights are integrated in all the MIPDs in particular in the context of the political criteria related to justice and home affairs, public administration reform, legislative matters and support for civil society organisations[400].

Since the IPA is directly linked to the enlargement policy framework, the MIPDs should be connected to and reflect the observations made in the progress reports. When analysing how the progress report observations and recommendations are reflected in the MIPDS the following can be stated:

When one compares the Commission's annual Progress Reports (PR) with the MIPDs no clear influence of the reports on the plans can be discovered. While taking reference to the PRs the MIPDs repeat the basic challenges and problems as described there, but the objectives and choices, as well as the expected results, remain very open and general. Mostly, the programming of the IPA does not take on or respond to the new information on developments provided by the annual reports. Most IPA plans include the same general statements for the different countries. Country specific situations like in Kosovo or Bosnia and Herzegovina are looked at, but the subscribed framework of strategies for the different regions is framed in a very common way. Even if there are concrete problems mentioned, like the lacking of textbooks in minority languages in Kosovo PRs, the planning documents do not reflect this. Furthermore, minority issues in the MIPDS are often integrated and combined with the situation of other vulnerable groups such as handicapped persons without further explanation for this conjunction.

At the operational level a variety of projects have been developed also having impact on the rights of minorities[401]. Most notably, in 2011 a multi-beneficiary project has been launched under the IPA with the title 'Promoting Human Rights and Protecting Minorities in the Western Balkans'. By the € 3.6 million four year project that is implemented by the Council of Europe (CoE), human rights and in particular minority protection shall be strengthen in practice by enhancing the capacities of the various national bodies involved and the regional coherence of their activities. The project is directly linked to the MIPDs and addresses the priority areas identified under the justice and home affairs (JHA) section and the observations and recommendations made in the progress reports. The project is explicitly aimed at fostering the implementation of legal standards and frameworks largely in place with regard to the protection of minority rights in the region since implementation was considered to be 'too slow, too asymmetric, [and] too much exposed to political discretion.'[402]

3.3.3 European Instrument for Democracy and Human Rights (EIDHR)

Different from the IPA the European Instrument for Democracy and Human Rights (EIDHR) that was introduced in 2006 replacing the European Initiative for Democracy and Human Rights (2004-2006)[403] is aimed at strengthening in particular civil society organisations (CSO) in order to promote human rights and democracy. With a budget of €1.104 billion for the period 2007-2013 projects have been financed in non-EU countries on the basis of Strategy Papers[404] and Annual Action Programmes (AAPs) specifying *inter alia* the objectives

[399] European Commission, 2010 Annual Report on Financial Assistance for Enlargement (IPA, Phare, CARDS, Turkey Pre-Accession Instrument, Transition Facility), COM(2011) 647 final, 11.10.2011, pp. 3-4.
[400] For all the MIPDs see http://ec.europa.eu/enlargement/instruments/how-does-it-work/index_en.htm.
[401] All the funding providing to Western Balkan States under the IPA can be found at the country Delegations websites to the EU.
[402] All information on the projects is available at http://ec.europa.eu/enlargement/pdf/financial_assistance/ipa/2011/pf_1_ipa_2011_human_rights.pdf.
[403] European Parliament and Council of the European Union, Regulation (EC) No 1889/2006 of 20 December 2006 on Establishing a Financing Instrument for the Promotion of Democracy and Human rights Worldwide, OJ L 386, 29.12.2006.
[404] The strategy papers are available at http://www.eidhr.eu/library.

pursued, the fields of intervention and the expected results. Under the EIDHR funding is granted at the regional, national or international level complementing and reinforcing action under relevant external assistance instruments, such as the IPA, or will be applied where no EU established development cooperation does exist. Most importantly, funding under the EIDHR can be granted without the agreement of the governments in which the beneficiary operates. Basically, the work of the EIDHR falls into three main areas: a) supporting civil society groups or individuals to defend human rights and to support national or regional mechanism in charge of implementing international or regional mechanism for the protection of human rights; b) support international instruments directly such as the International Criminal Court (ICC) or the Office of the High Commissioner for Human Rights (OHCHR); and c) to organise and fund EU election observation missions. By doing so more than 1600 projects have been funded worldwide out of which more than 90% have been implemented by CSOs in countries where human rights are most at risk[405].

The EIDHR in its response strategy towards human rights problems pursues five different objectives identified by the strategic papers as follows: 1) enhancing respect for human rights and fundamental freedoms in countries where they are most at risk; 2) strengthening the role of civil society in promoting human rights and democratic reform, in supporting the peaceful conciliation of group interests and, in consolidating political participation and representation; 3) supporting actions on human rights and democracy issues in areas covered by EU Guidelines, including on human rights dialogues, on human rights defenders, on the death penalty, on torture, on children and armed conflict, on the rights of the child, on violence against women and girls and combating all forms of discrimination against them, on International Humanitarian Law and on possible future guidelines; 4) supporting and strengthening the international and regional framework for the protection and promotion of human rights, justice, the rule of law and the promotion of democracy; 5) building confidence in and enhancing the reliability and transparency of democratic electoral processes, in particular through election observation. Whereas Objective one has a rather global focus, the support schemes under Objective two, the strengthening of the role civil society has a strong national character and is based on so called Country-based Support Schemes (CBSS). The thematic priorities for actions under Objective two make all reference to the inclusion and protection of minorities for instance with regard to strengthening political participation of minority groups or to enhance the inclusiveness and pluralism of a society[406].

Various projects having impact on human right in general and on the rights of minorities in particular have been implemented under the EIDHR in the Western Balkans under the CBSS, just to mention a currently financed project aimed at improving the political participation and representation of Roma and other national minorities in Bosnia and Herzegovina (BiH), thus promoting their inclusion, interests and rights[407].

The EIDHR is basically understood to enhance democracy and strengthen the protection of human and minority rights by applying a 'bottom up' approach rather than relying on diplomatic and/or political elites. Despite the EIDHR's vocation to work with non-state actors, it has also been designed to support the cooperation between the EU and international organisations such as the cooperation between the EU and the UN or the OSCE and funding is made available for joint projects.

[405] EIDHR, Compendium 2007-2010, available at http://www.eidhr.eu/files/dmfile/EUAID_EIDHR_Compendium_LR_20110609.pdf
[406] EIDHR, Strategy Paper 2011-2013, p. 9. All of the Strategy papers so far refer to the same objectives.
[407] For an overview see EIDHR, Compendium 2007-2010, available at http://www.eidhr.eu/files/dmfile/EUAID_EIDHR_Compendium_LR_20110609.pdf.

4. EUROPEAN NEIGHBOURHOOD POLICY (ENP)

4.1 Introduction

The ENP was introduced in 2004 as alternative to enlargement for those countries which had not been considered as potential Member states[408]. Built upon the mutual commitment to common values, such as democracy, human rights, rule of law, good governance but also market economy principles and sustainable development, the ENP appeared the logical consequence of the latest enlargement round and the commencing 'enlargement fatigue' offering neighbouring states a new framework for economic integration and security related cooperation with the Union in exchange for political commitments made. The major aim of the ENP was and is to share the benefits of enlargement also with neighbouring countries in the East and the Mediterranean South without granting them a perspective of membership, avoiding thereby the drawing of new dividing lines within Europe and promote stability and prosperity beyond the new borders of the Union[409]. The ENP offers third countries 'everything but institutions', i.e. progressive integration in most of the EU policy areas with accompanying processes of monitoring and reporting is offered as 'silver carrot' to the participating countries instead of the 'golden carrot' of membership[410]. To achieve the objectives to offset negative effects of enlargement to new neighbouring countries, to boost economic development but also institutional reforms and democratic processes, and to create a 'ring of friends'[411] of likeminded states around the Union, a bilateral and differentiated approach is applied being in theory responsive to the national and regional particularities of neighbouring countries. The ENP is built around three central principles: differentiation, partnerships and joint ownership all reflected in the national Action Plans (APs), the prevailing instruments for the setting of the agenda for the cooperation between the EU and a neighbouring country. The principle of differentiation in the relations with neighbouring countries reflects the understanding that a 'one size fits all approach' was rather counterproductive and not suited to address the heterogeneity of the countries participating in the ENP. Additionally, the differentiated approach allowed the EU in pursuing a multi-speed approach in the relations with neighbouring countries depending on the progress made in the individual countries and to adapt the setting of priorities to the actual circumstances in the neighbouring countries[412]. Partnership and joint ownership are the other two key principles governing the ENP. The APs as the main delivery instruments are negotiated by the Commission on the side of the EU in partnership with the neighbouring country and their implementation is based on joint ownership. The EU in this regard has been keen to strengthen domestic ownership with regard to the implementation of the APs. However, the latter principles have to be taken with caution. Even though there is a clear and explicit commitment by the EU that the partnerships under the ENP will be not only mutually beneficial but also counterbalanced[413] the relations between the EU and its neighbouring countries have been characterised and are somewhat undermined by the excessive power-asymmetry. This imbalance is reflected in the APs setting forth that the vast majority of actions has to be taken by the neighbouring countries and commitments are mostly made on the part of the

[408] The ENP covers 16 countries in the Eastern and Southern neighbourhoos, namely Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Occupied Palestinian Territory, Syria, Tunisia and Ukraine. The idea of the ENP was first brought forward in the Communication of the Commission, Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours, COM(2003) 104 final, 11.3.2003

[409] European Commission, European Neighbourhood Policy – Strategy Paper, COM(2004) 373 final, 12.5.2004.

[410] European Commission, 'Wider Europe— Neighbourhood'.

[411] Prodi, R., *A Wider Europe - A Proximity Policy as the Key to Stability*, Speech at the Sixth ECSA-World Conference, Brussels 5-6 December 2002, SPEECH/02/619, available at http://europa.eu/rapid/press-release_SPEECH-02-619_en.htm.

[412] For instance in the aftermath of the outbreak of the Arab spring revolution the EU reacted by adapting its ENP, introducing the Partnership for democracy and shared prosperity and proclaiming the need for new responses to new challenges by for instance providing greater support to partners engaged in building deep democracy. See European Commission, A Partnership for Democracy and shared Prosperity with the Southern Mediterranean, COM (2011) 200 final, 8.3.2011 and, A new response to a Changing Neighbourhood, COM(2001) 303, 25.5.2011. Similarly, the 2012 Joint Communication, Delivering on a New European Neighbourhood Policy, JOIN(2012) 14 final, 15.5.2012, strengthens the 'more for more' principle in particular in the relations with the countries in the Southern neighbourhood.

[413] 'The EU does not seek to impose priorities or conditions on its partners.' See for instance European Commission, European Neighbourhood Policy – Strategy Paper, COM(2004) 373 final, 12.5.2004, p. 8.

partner countries whereas the commitments by the EU are only modest and framed in a very vague way[414] and contributions rather limited[415].

The APs constitute the main instrument for furthering the relations between the EU and the neighbouring country. As already mentioned they are agreed by the Commission and the neighbouring state laying down specific actions that will be taken by the neighbouring state, the EU or by both of them together. So far 12 Action Plans[416] have been adopted setting out political and economic short and middle-term priorities for cooperation. Albeit the differentiated approach pursued the APs themselves are structures in a similar way broadly covering two areas: a) actions confirming common values such as human rights, democracy and the rule of law; and b) actions that are aimed to bring the neighbouring country closer to the EU by means of for instance trade reforms etc.[417] The set of priority actions identified by each AP varies from country to country. Importantly, the APs are political documents with no legal underpinning; therefore the ENP relies on and builds upon legally binding agreements concluded between the EU and the countries in question within the framework of regional cooperation such as the Mediterranean (now Union for the Mediterranean) and Eastern Partnership in form of Partnership and Cooperation Agreements (PCA) or Association Agreements (AA). These PCAs and AAs set out the general principles for cooperation between the EU and the partner states. The protection of human rights is considered as an essential element for the cooperation and specific reference is made with regard to their respect and their protection.

4.2 Bilateral cooperation with neighbouring countries and minority rights

In the ENP context the EU has spelled out concrete actions with regard to the protection and promotion of human and fundamental rights reflected in specific sections in all of the APs. The political chapters of all the APs – human and fundamental rights forming a part of – cover a wide range of issues connected to human rights, good governance and democracy with a varying emphasis and differentiation but all with the aim to attain concrete objectives such as the strengthening of legal guarantees or freedom of speech. Whereas the protection of human and fundamental rights forms integral part of the APs the protection of minority rights seems to be only subordinated. Albeit most of the APs, with the exception of the APs of Morocco, Tunisia, and Jordan, include a broad and standardised reference to the protection of minority rights under the broader priority of protecting human rights[418] it is only the AP of Ukraine addressing the issue of minority rights more comprehensively also explicitly referring to concrete actions the Ukraine has to take in order to enhance the protection of minorities[419]. The progress made with regard to the implementation of the actions planned and commitments made in the APs is monitored by consecutive annual reports. When analysing and comparing the progress reports from 2007 to 2011 it is striking that with regard to minority rights in none of the countries considerable progress was made. With the exception of Armenia, where the progress report of 2011 notices that 'there are no major difficulties on national minorities'[420], minority issues remain areas of concerns in all the European neighbouring countries and only limited progress has been made[421]. Therefore the question arises to which extent the EU truly uses its leverage to push neighbouring countries in the direction of democratic

[414] With regard to commitments of the EU the APs mostly only refer to 'establishing a dialogue' or the 'EU is ready to consider'.
[415] Sasse, G. 'The European Neighbourhood Policy: Conditionality Revisited for the EU's Eastern Neighbours', 6(2) *EuropeAsia Studies*, p. 307.
[416] For all the APs see http://ec.europa.eu/world/enp/documents_en.htm.
[417] See European Commission, European Neighbourhood Policy – Strategy Paper, COM(2004) 373 final, 12.5.2004
[418] The standard clause reads more or less in all the APs 'Ensure respect for the rights of persons belonging to national minorities'. A list of all the APs is available at http://ec.europa.eu/world/enp/documents_en.htm.
[419] The AP sets forth that Ukraine has to a) continue efforts in designing relevant legislation and effectively protecting the rights of persons belonging to national minorities, based on European standards; and b) continue close cooperation between government authorities and representatives of national minorities. See the AP for Ukraine point 7 of the political chapter.
[420] The ACFC and the CM in their last opinion and resolution on Armenia in 2011/2012 come to a similar conclusion acknowledging the efforts the Armenian authorities have made in the field of minority protection by stating that '[a] general climate of tolerance and understanding between national minorities and the majority population prevails in Armenia'. See ACFC, (third opinion) on Armenia, 2011, and Committee of Ministers, Resolution CM/ResCMN(2012)1 on the implementation of the Framework Convention for the Protection of National Minorities by Armenia, 1 February 2012.
[421] With the exception of Egypt, Jordan and Lebanon which progress reports are not concerned with the protection of minorities and/or minority rights in general.

and human rights reforms and whether the AP can be considered an appropriate instrument. First of all, the APs are very comprehensive including long lists of 'priorities for action.' Even though the Council stated that APs 'should be comprehensive but at the same time identify clearly a limited number of key priorities and offer real incentives for reform'[422] the shire mount of things partner states should accomplish is remarkable and it is really hard to imagine how the action plans provide 'incentives for reform'[423]. Secondly, even when concrete actions or objectives are foreseen with regard to the protection of human rights and minority protection the APs remain silent on how progress actually will be judged since there is a lack of comprehensive and straightforward benchmarks. For instance, what entails 'ensure the respect for the rights of persons belonging to national minorities' remains unclear. Notably, the fulfilment of the action is not coupled with the benefits on offer made by the EU. Partner countries have a rather wide margin of prioritisation when it comes to the fulfilment of their obligations eventually focusing on priority actions that are well-known as major priorities for the EU and neglecting those that might be trickier at the internal level. This might render the inclusion and prioritisation of human rights issues as political criterion a lip-service rather than providing an effective tool for enhancing the situation. In this regard it shall be noticed, as it has been argued before that the ENP embeds a 'dose of EU self-interest'[424] reflected in the APs. The ENP attempts to implement the objectives of the 2003 European Security Strategy[425] in a wider European policy and it is not surprising that in the APs strong emphasis is placed on cooperation in related fields such the fight against terrorism, irregular migration etc. In the progress reports these topics are represented more prominently and also in the responsible sub-committees of the Eastern Partnership and the Union for the Mediterranean – the responsible bodies for monitoring the jointly agreed commitments of the APs – they are more frequently discussed. Another disadvantage of the APs is that they lack concrete timelines for implementation. Even though the APs are designed for three years there are no further limitations foreseen till when progress has to be made. This again leads to a rather wide margin of appreciation for the implementing states and leads to the scenario as already described above, namely that consecutive reports take up over and over again the failure by neighbouring countries to comply with minority rights commitments made without providing new solutions, incentives or consequences.

4.3 ENP financial instruments and minority rights

In 2003 the Commission issued its plans about a financial instrument supporting the ENP[426].The new instrument, the European Neighbourhood and Partnership Instrument (ENPI) was to draw on and combine the existing regional instruments (in particular the Tacis for the Eastern partners and the Meda for the Mediterranean partners) to one single instrument for all the current 16 partner states under the framework of the ENP. The introduction of the ENPI not only streamlined funding for neighbouring countries but also brought a 32% increase in allocations in comparison with the Tacis and Meda programme (2000-2006) to over € 12 billion for the period 2006-2013[427]. The main focus of the ENPI is on country programmes supporting the neighbouring states to implement the commitments made and the activities foreseen under the ENP in particular political, social, and economic reform, sectoral cooperation in sectors of common interest such as energy, transport, health etc., and regional and local development and regional integration. Programmes funded under the ENPI follow a strict programming process. As a first step priorities and indicative amounts of

[422] General Affairs and External Relations Council, European Neighbourhood Policy—Council Conclusions, 14 June 2004, press release 10189/04.
[423] The only AP that differs in this regard is the Israeli one not placing so much emphasis on what Israel has to do in order to receive commitments by the EU but rather emphasising on what the EU and Israel have both to do in order to improve the relations and cooperation. Some critical voices argued that the EU was offering too much carrots and not enough of the stick nin the relations with Israel. See Diab, K., 'Commission wants closer EU–Israeli ties', *European Voice*, 16 Dec. 2004–12 Jan. 2005 In the context of minority rights this argument seems not to be too farfetched, since all the progress reports emphasise that the situation in the Arab minority in Israel remains unsatisfactory.
[424] Smith, K., 'The Outsiders: The European Neighbourhood Policy', 81(4) *International Affairs*, 2005, p. 765.
[425] Council of the European Union, A Secure Europe in a Better World: European Security Strategy, Brussels, 12 December 2003, available at: http://consilium.europa.eu/uedocs/cmsUpload/78367.pdf.
[426] European Commission, Paving the Way for a New Neighbourhood Instrument, COM(2003) 393 final, 1 July 2003.
[427] European Commission, European Neighbourhood and Partnership Instrument (ENPI) Funding 2007-2013, available at http://ec.europa.eu/world/enp/pdf/country/0703_enpi_figures_en.pdf.

funding are anticipated in Country Strategy Paper (CSP) covering the entire period of the ENPI. Subsequently, National Indicative Programmes (NIPs) set out the EU's operational responses to the objectives, the expected results and which conditions have to be met under the priorities as have been identified under the CSPs in principle covering three years. As a last step, annual action programmes provide more details on the financial allocations and timetables are adopted accordingly. On the basis of this timetable national and multi-country programmes for each partner country are developed determined by the national and regional characteristics, the partner's ambition and the progress achieved so far. Additionally, cross-border cooperation programmes for those partners sharing a border with a Member state can be developed and presented in Joint Operational Programmes (JOPs)[428].

The CSP are naturally aligned with the APs. None of the CSPs includes an explicit reference to the protection of minority rights. However, the protection of human rights is in each and every CSP outlined as strategic objective for the EU[429]. The NIPs subsequently specify this general objectives, explain the expected results, the indicators of achievement and in some the indicative budget or even potential risks. Again minority rights are not explicitly mentioned in the NIPs but human and fundamental rights are indeed included in all of them. The benchmarks – the indicators of achievement – vary from country to country, however, in each case they remain rather vague and there are no indications for eventual consequences in case a country fails to meet these objectives.

The ENPI has been criticised on various grounds. Firstly, it has been pointed out that the sum allocated to 16 partner countries in comparison for instance with the IPA is relatively small[430]. Secondly, the programming process was rather lengthy and complex undermining the relevance of the assistance[431]. And thirdly, it is hard to actually assess the impact of the ENPI. The funding under the ENPI is directly paid into the state's budget and used to implement the planned reform projects and programs. However, this makes it difficult to actually assess the effectiveness of the money allocated under the ENPI for instance with regard to improvements made in the field of human rights. No records are available on how states used the ENPI funding and it is nearly impossible to trace for which projects the allocated money was used[432].

The ENPI in 2013 will be replaced by a new financial instrument the European Neighbourhood Instrument (ENI). The latter will continue the financial support to neighbouring countries but will be adapted in order to react to changing circumstances in the neighbourhood in the shadow of the Arab Spring revolutions. Emphasis will be placed on supporting neighbouring countries in building democratic societies in line with the 'more for more' principle providing for a higher level of differentiation and emphasizing democracy and shared prosperity[433]. For the period 2014-2020 approximately € 18 billion will be granted.

4.4 Comparison between enlargement and neighbourhood strategies

Enlargement is often seen as the most successful foreign policy of the EU since the prospect of membership combined with the strict conditionality criteria attached to the accession process have granted the Union considerable power in transforming accession and candidate countries. The ENP as a strategy to expand the enlargement logic further beyond the EU's borders is clearly modelled on the enlargement process trying to apply the same strategies, i.e. the transformational diplomacy of the EU but without having the golden carrot,

[428] For more information see European Neighbourhood and Partnership Instrument (2007- 2013), available at http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/eastern_europe_and_central_asia/r17101_en.htm.
[429] For a list of the CSPs see http://ec.europa.eu/world/enp/documents_en.htm.
[430] Chilosi, A., 'The European Union and its Neighbours: Everything but Institutions', 925 *Munich Personal RePEc Archive Paper*, 2006, available at http://mpra.ub.uni-muenchen.de/3386/1/MPRA_paper_3386.pdf.
[431] European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a European Neighbourhood Instrument*, COM(2011) 839 final, 7 December 2011, p. 3.
[432] A similar observance was made in the context of the impacts of the ENP on the human rights of migrants. See European Parliament, DROI, 'Study on the Effects of Migration Policies on Human Rights in the European Neighbourhood', study authors Benedek, W., Heschl, L., et al., EXPO/B/DROI/2010/13, 2011, p. 15.
[433] Ibid.

the EU membership at its disposal[434]. The ENP not offering membership but the prospect of wide and substantial benefits ties both participation in the ENP and the level of cooperation to the neighbouring countries' adherence to common values and European standards. Contrarily to the enlargement's hard conditionality, i.e. countries only receive membership when the Copenhagen criteria are met, the ENP follows a 'soft conditionality' approach aimed at avoiding the one-size-fits all approach and rather addressing change of policies in accordance with common values[435]. So in theory the ENP has the potential for being a successful and effective policy tool using the attraction of increased EU-approximation as carrot and applying a softened version of the conditionality stick. With regard to the latter, it is in particular the differentiation approach involving tailor-made agreements that differs the ENP from the rigid political criteria set forth for all countries under the enlargement process. Still, with regard to differentiation the approach of the ENP can be criticised: Whereas countries under the enlargement process at least to a certain extent are comparable in terms of development and political structures and even systems, the ENP countries are highly heterogeneous and hardly comparable. This raised criticism that the EU tries to reconcile 'apples and pears' under the ENP umbrella[436].

Beyond the obvious fact that the ENP is not guiding participating countries towards membership, further differences between the ENP and the enlargement process can be identified[437]. The first one concerns incentives others than membership. Whereas throughout the enlargement process economic integration and the free movement of nationals towards the EU gradually increased, under the ENP this might well be undermined by protectionist attitudes of Member states. Commitments made in return for commitments to common values generally exclude economic sectors were Member states have competitive edges or fears of crimes or soft security threats such as irregular migration[438]. The latter example shows best the ambiguity inherent in the ENP. As has been mentioned the APs as well foresee the facilitation of movement for ENP countries' nationals towards the EU. The vehicle for the preferential treatment of partner countries with regard to free movement are so called Mobility Partnerships[439] as means of the ENP toolkit. In exchange for the cooperation in migration control measures, i.e. for instance the conclusion of readmission agreements, partner countries are promised increasingly liberalised access to the labour market of EU Member states. However, the EU does not have the competence to enter into binding commitments for the Member states in this regard and it is upon the Member states to agree to and accede to the Mobility Partnerships, an opportunity only few states have taken advantage of so far. So the ENP and its far reaching benefits on offer, albeit having the potential for an effective policy, have remained in the realm of possibilities and that in fact it only offered modest gains to partners. This ambiguity and imbalance is reflected in the APs being vague and illusive[440].

Furthermore, different from the enlargement process the ENP is not directed at the full implementation of the EU *acquis* but emphasis is rather placed on the alignment with EU legal norms in sectors where it makes economic sense and fosters development of the partner countries. The APs aimed at achieving these objectives are a result of bilateral negotiations between the EU and the neighbouring country rather than the unilateral imposition of measures based on the *acquis*. This principle of joint ownership governs the ENP and differentiates it from the enlargement process and might be considered as strength of the ENP reflecting the

[434] See Danreuther, R., 'Developing the Alternative to Enlargement: The European Neighbourhood Policy', 11 *European Foreign Affairs Review*, 2006, pp. 183-201.
[435] Paramentier, F., *The European Neighbourhood Policy as a Process of Democratic Norms Diffusion in Ukraine: Can the EU Act Beyond Conditionality?*, Center for European Studies, Paris 2006, p.3, available at www.cee.sciences-po.fr/erpa/docs/wp_2006_2.pdf.
[436] See Balfour, R., and Missiroli, A., *Reassessing the European Neighbourhood Policy,* EPC Issue Paper No. 54, p. 6, available at http://www.epc.eu/documents/uploads/963724382_EPC%20Issue%20Paper%2054%20-%20Reassessing%20the%20ENP.pdf
[437] Schimmelfennig, F., 'Europeanization beyond Europe', 7(1) *Living Review in European Governance*, 2012, p. 1, available at http://europeangovernance.livingreviews.org/Articles/lreg-2009-3/.
[438] Sedelmeier, U., 'The European Neighbourhood Policy: A Comment on Theory and Policy, in: Weber, K., Smith, M., and Baun, M., (eds.), *Governing Europe's Neighbourhood*, Manchester University Press, Manchester, 2007, pp. 201-205; and Occhipinti, J., 'Justice and Home Affairs: Immigration and Policing', in: Ibid., pp. 114–133.
[439] MPs have been concluded so far with Georgia, Moldova, Cap Verde and Armenia; negotiations are on the road with Egypt, Tunisia and Morocco.
[440] Whitman, R., and Wolff, S., 'Much Ado about Nothing? The European Neighbourhood Policy in Context', in: Whitman, R., and Wolff, S. (eds.), *The European Neighbourhood Policy in Perspective: Context, Implementation and Impact*, Palgrave Macmillan, Basingstoke/New York, 2010, p.12.

socialisation mechanism of European integration by making it easier for EU sceptic actors in the EU to approach it gradually and on the basis of commonly agreed principles[441]. Still, the tasks as set forth in the APs are clearly biased towards the interests of the EU with many of them directly related to the EU's internal security agenda such as the fight against irregular migration. Secondly, the principle of joint ownership might even undermine the effectiveness of the conditionality left in the ENP in particular when it comes to the protection of human rights. Those countries that do not share the EU's values on democracy and human rights can water down the APs and minimise the political conditionality criterion in the APs to a minimum by making a simple cost benefit calculation[442]. One has to keep in mind that when the ENP took off and the APs were negotiated in particular in the Mediterranean South autocratic regimes were at power not really willing to jeopardise established structures for vague promises made that eventually were not even about to be fulfilled. The ENP and in particular its financial assistance instruments indeed have to offer some short term benefits. These benefits however are too modest to encourage partner states to undergo the often very costly reforms as envisaged by the EU in the mid- and long-term perspective[443]. The membership perspective under the enlargement pays off as a long-term compensation for painful reforms, whereas the ENP is lacking a comparable instrument. Additionally, the cooperation with autocratic regimes that were anything but known for their good human rights records allows for the conclusion that the EU in order to achieve its own economic or security objectives was willing to jeopardise its own commitments towards human and minority rights.

The ENP for the above mentioned reasons has been a rather ineffective tool for improving the human rights records in the ENP. The vagueness of the APs, the weak commitments made from the side of the EU combined with the overriding importance granted to EU security related interests and the absence of clear conditions and benchmarks lead to the conclusion that the EU has reversed the logic of conditionality in the ENP. Instead of offering a clear incentive from the outset, as it is the case with the membership perspective in the enlargement process, the EU requires to undertake reforms in accordance with the values of the Union, and only once these reforms have been implemented the EU considers whether it will offer the neighbouring country the prospect of deeper cooperation and further integration[444]. And lastly, whereas the enlargement clearly offers accession and candidate states a new perspective it is questionable whether the ENP actually has an added value to previous initiatives such as the Barcelona Process[445] or whether it was just 'old wine in new bottles'[446]. Clearly, the EU tried to adapt its strategy within the ENP recently due to the changing situation in particular in the Mediterranean South. However, even though there is the emphasized commitment to democracy the new approach of the ENP failed to establish a primacy on an active policy of value-based transformation and risks ineffectiveness in particular with regard to democracy promotion and the protection of human rights[447].

[441] Schimmelfenning, 'The European Neighbourhood Policy', p. 150 and Sasse, G., 'The European Neighbourhood Policy: Conditionality Revisited for the EU's Eastern Neighbours', 60(2) *Europe-Asia Studies,* 2008, pp. 295–316.
[442] Ibid.
[443] Whitman, R., and Wolff, S., 'Much Ado about Nothing?', p. 13.
[444] Ibid., p. 14.
[445] The antecessor of the UfM.
[446] On the discussion see for instance Reiterer, M., 'From the (French) Mediterranean Union to the (European) Barcelona Process: The 'Union for the Mediterranean' as Part of the European Neighbourhood Policy', 14 *Foreign Affairs Review*, 2009, pp. 313-336.
[447] Lang, K., and Lippert, B., 'The EU and its Neighbours: A Second Chance to Marry Democratisation and Stability', *SWP Comments*, January 2012, available at www.swp-berlin.org/fileadmin/contents/products/comments/2012C02_12_lng_lpt.pdf.

5. CONCLUSIONS

Human and minority rights indeed have become a matter of priority in the EU's enlargement and neighbourhood policies. The approach chosen in both of the policy instruments appear to be comparable, however, the incentive of membership in the enlargement process provides the Commission with leverage not at her disposal under the neighbourhood framework.

Under both policies human and minority rights became an integral part of the European and Accession Partnerships and the Association and Partnership Agreements with the corresponding national APs.

However, in either case reference to priorities with regard to the protection of minority rights is made in general terms rather than in a detailed manner mainly focusing on the development of a legislative framework in accordance with minority rights standards[448]. Furthermore, the European Partnerships, appear to keep repeating themselves with regard to the short priorities concerning the protection of the rights of minorities. From this repetition one can draw several conclusions: First, that minority related short term priorities were just not realistic in terms of the timeframe; second, that they have been framed in such a broad way that the wide room of manoeuvre granted to the states impeded an effective implementation; and thirdly that the political climates in the countries concerned just undermined the implementation of the priorities.

The Progress Reports as instruments of monitoring the implementation of the priorities under the European and Accession Partnerships consider human and minority rights under the political criteria and, indeed, minority rights are consistently addressed and statements made concerning progress or deterioration. However, these statements do neither address the whole variety of minority rights issues nor is it clear on which basis they are actually made. Similar conclusions can be drawn for the APs. Again minority issues are addressed under the political criteria section but also in a very broad way. Similar to the enlargement process, the annual progress reports catch up on the issue of minority protection, however it remains unclear till when progress has to be made and against what this progress is actually measured and judged. Due to lacking benchmarks the APs also repeat themselves in addressing minority rights issues leading to the conclusion that the ENP only had marginal impact on the protection of minority rights in the EU's neighbouring countries.

Also in terms of mainstreaming minority rights both policies show the same patterns in the sense that the record of the EU in both policy field is quite modest. As has been stated, minority rights have been dealt with under the political criteria section but hardly in other chapters/sections not dealing specifically with the issue. They eventually sine up in the fields of social policies or employment connected to non-discrimination, and in particular in relation to double discrimination. Still, a pro-active approach towards mainstreaming minority rights in the enlargement and the neighbourhood policy is clearly missing.

When it comes to financial assistance provided during the pre-accession process and under the neighbourhood framework the different structures, functions and objectives of the various financial instruments do not allow for a comparison. Under the IPA minority concerns are integrated as cross-cutting issues in all planned activities and indeed at the strategic planning level minority rights are incorporated and connected to the political criteria related to JHA, legislative matters and public administration reform. The IPA in theory is directly linked with the progress reports made by the Commission and should reflect and in particular address issues that have been highlighted in the reports. However, a comparative analysis did not reveal that the MIPDs and the progress reports reflect and mutually complement each other leaving considerable space for improvement. Even though a direct link between the policy and the financial instrument is missing here, there have been various projects been implemented that can bring considerable structural change improving thereby the conditions of minorities in the enlargement countries.

[448] With the exception of the European Partnership for Kosovo and the AP for Ukraine.

The EIDHR follows a complete different logic since it does not address states but civil society organisations and is therefore not made for leading to structural changes at the policy level but rather at practical changes and factual improvements for minorities in particular at the local level. The protection of minorities constitutes a major objective under the EIDHR and plenty of projects been financed in the Western Balkan states aimed at improving the situation of minorities there. The success of such CSO projects and their impact on minority communities is beyond doubt and it is desirable that funding provided under the EIDHR keep be increased in order to allow for non-state responses to minority issues.

Lastly, under the ENPI's the national Strategy papers do not address the issue of minority rights explicitly. Even though the protection of human rights is considered as strategic objective it is hard to trace to which extent the ENPI actually has impacts on human or minority rights due to the unclear and inaccessible distribution strategies of the ENP countries.

CHAPTER THREE – REGIONAL COOPERATION AND MINORITY RIGHTS

6. THE EU-COE-OSCE ACTION IN THE FIELD OF MINORITY PROTECTION AND POSSIBLE SYNERGIES

As has been examined in Chapter one the regional European minority protection system is characterised by the involvement of various actors, namely the OSCE, the CoE and the EU. When three different players are involved and get engaged in one field, there is always the inherent danger of duplication of work resulting in inefficiency and waste of resources. Cooperation between the three institutions is therefore necessary in order to reach common objectives and, importantly in times of financial crisis and limited financial resources available in the participating states, to promote efficiency in the allocation of financial resources. Whereas the need for cooperation is thus uncontested there is still the question where cooperation could tie in with.

Mandates

The mandates of the three institutions with regard to the protection of minorities are not only not identical but diverge considerably in particular with regard to their focus. The CoE's mandate is exclusively devoted to the protection of human rights, democracy and the rule of law. The protection of human and therefore minority rights for the CoE are ends in themselves. The OSCE on the contrary considers the protection of human and minority rights from a security related point of view considering human and minority rights as necessary to maintain security and stability in the OSCE area. With regard to the EU it is difficult to establish an explicit mandate with regard to the protection of minority rights. At the internal dimension the EU till the entry of force of the Treaty of Lisbon in 2009 and the Fundamental Rights Charter becoming legally binding struggled to bind itself by minority rights standards considering its well-developed anti-discrimination framework as sufficient to address the issue. Nevertheless, at the external level, the EU was very active in promoting the protection of minority rights making them as human rights an inherent part of the Copenhagen criteria by referring to the CoE's FCNM. Similar to the OSCE the EU as well followed a rather security centred approach towards minority rights considering them as crucial for maintaining peace and stability. The different approaches towards the protection of minorities in practice will not make much difference, however the focus changes indeed[449].

Membership

Further potential for cooperation results from the partly overlapping membership in the three organisations. The 27 Member states of the EU are all members to the CoE and the OSCE. The 47 members of the CoE are again all participating states in the OSCE that with the inclusion of the Unites States and Canada has the widest geographical scope. Although one might argue that the overlapping membership might provoke tensions and lead to different standards as it is for instance the case with the death penalty[450], due to the overlapping membership standards are less likely to differ.

Functions and Structures

The different functions and structures of the three organisations are likely to complement each other. Whereas the OSCE's HCNM intervenes silently but efficiently behind the diplomatic scene, the CoE plays a crucial role in

[449] See CoE, *The Council of Europe and the OSCE: Enhancing Co-operation and Complementarity through Greater Coherence*, study author Ulfstein, G., Strasbourg, 23 March 2012, p. 3, available at http://www.coe.int/t/policy-planning/Other_activities/CoE_OSCE_Study_en.pdf.
[450] Whereas both the EU and the CoE clearly oppose the death penalty, the OSCE has not required participating states to refrain from capital punishment. Three OSCE countries - Kazakhstan, the Russian Federation and Tajikistan - retain the death penalty in law but with moratoria on executions, and two of them – Belarus and the US – still carry out executions. See OSCE, *The Death Penalty in the OSCE Area*, Background Paper 2012, available at http://www.osce.org/odihr/94219.

standard setting, and the EU can use its lever of conditionality to influence the performance of applying states for membership[451].

The subsequent section is aimed to provide an overview of cooperation between the three organisations and to highlight gaps in order to allow for recommendations on how to ensure better coherence and complementarity in the actions of the three organisations with regard to the protection of minorities. Importantly, the activities of the three organisations in the field of minority protection do not have to be aligned totally and coordinated at every point. Each system has its own strengths and cooperation still has to leave sufficient room for separatist activities. What should be prevented, however, are inconsistencies or even contradictions in adopted standards and/or decisions that otherwise may undermine comprehensive minority protection in Europe.

Cooperation between the three institutions is necessary to achieve common objectives and impede forum shopping. In the past there have been examples were diverging approaches of the three institutions in the field of minority protection resulted in contradictions in the opinions. For instance when the Croatian Constitutional Law on the Rights of National Minorities was drafted the HCNM and the CoE Venice Commission were involved in the process. The draft law included a definition on the term minorities tying in with the criterion of citizenship. The HCNM tried to intervene and to convince the Croatian authorities to expand the definition including as well non-citizens. The Venice Commission on the contrary accepted the limitation to citizenship[452].

Practical cooperation between the CoE and the OSCE has been at the agenda from on the beginnings of the 1990s. Consequently, a series of cooperation agreements between the OSCE and the CoE been adopted with the Common Catalogue of Co-operation Modalities of 2000 at the core[453]. The latter contains sections on consultations, representation, liaisons, and other forms of cooperation and lays down the modalities for cooperation. In 2004 a Co-ordination Group was established consisting of representatives from the different levels of both organisations[454]. With regard to the protection of minorities the Joint Statement with a Declaration on Cooperation between the CoE and the OSCE signed in Warsaw on 17 May 2005 is of further importance. In the Warsaw Declaration the OSCE and the CoE established the mutual desire to strengthen cooperation in order 'to produce synergies and avoid unnecessary duplications, giving the fullest account however to the different nature and membership of the two Organisations, and make best use of their comparative advantages.'[455] In the joint declaration four priority areas for the Co-operation Group have been identified: a) the fight against terrorism; b) the protection of the rights belonging to national minorities; c) combatting trafficking in human beings; d) the promotion of tolerance and non-discrimination[456]. Focal points for each theme have been established within the two organisations participating in the meetings of the Co-operation Group taking place twice a year. In the case of the OSCE the HCNM has been appointed as focal point. In the last three years four Co-operation Group meetings have been dedicated to the protection of the rights of persons belonging to minorities, the last one of them taking place in March 2012 in Vienna. In all of the related meeting reports the well-established cooperation between the two organisations in form of exchange of information, consultation on thematic issues[457], thematic activities for instance in the field of civic

[451] Toggenburg, G., 'A Remaining Share or a New Part? The Union's Role vis-à-vis Minorities after the Enlargement Decade', *EUI Working Papers* 2006/15, p. 2.
[452] Bloed, A., and Letschert, R., 'The OSCE High Comissioner', e-book version.
[453] CoE, *Relations between the Council of Europe and the OSCE: Common Catalogue of Co-operation Modalities*, 26 April 2000, available at http://www.coe.int/t/der/docs/OSCECoECommonCatalogueCoopMod_en.pdf.
[454] Committee of Ministers, Decision CM/865/01122204 and OSCE Permanent Council Decision No. 637, 2 December 2004.
[455] OSCE and CoE, *Declaration on Co-operation between the Council of Europe and the Organisation for Security and Co-operation in Europe,* 17 May 2005, Warsaw, available at http://www.coe.int/t/der/docs/OSCECoEDeclaration2005_en.pdf.
[456] Ibid.
[457] For instance the Report of the 9th meeting in Vienna in March 2009 highlights that the consultations between the OSCE and the CoE contributed to the adoption of the 'Recommendations of the High Commissioner for National Minorities on National Minorities in Inter-State Relations'. All meeting reports are available at http://www.coe.int/t/der/osce_EN.asp.

and inter-cultural education, joint projects and publications[458], and joint efforts to promote the ratification of the FCNM and the European Charter for Regional or Minority Languages, is highlighted.

The EU and the CoE have as well a long tradition of cooperation based on the common and shared values of human rights, democracy and the rule of law. In 2006 a report by Jean-Claude Junker on the relationship between the CoE and the EU and how cooperation could be fostered was published[459]. Following this report the cooperation between the two organisations was sealed by a Memorandum of Understanding (MoU) signed in May 2007[460] providing the new framework for cooperation. Art. 21 MoU clearly spells out that the cooperation between the CoE and the EU will include the protection of persons belonging to minorities. One part of the cooperation encompasses Joint Programming, with several of the joint projects dealing with minority issues[461].

Similarly, the EU maintains relations with the OSCE through a formal exchange between the OSCE Secretariat in Vienna and the EU-Commission and the General Secretariat of the Council of the EU. With regard to minority protection there is increasing cooperation with the HCNM who in particular collaborates closely with the EU Commissioner for Enlargement and the Directorate-General for Enlargement. This cooperation however concentrates primarily on the funding of projects and joint missions.

The efforts of the three organisations to coordinate their actions, combine their resources and make practical cooperation as efficient as possible by drawing on the expertise of the respective organisation were recently reflected in launch of three joint regional projects to improve the situation of minorities and vulnerable groups in the Western Balkans in June 2012. The three projects that are funded by the EU with co-funding by the OSCE and the CoE concern 'Best Practices for Roma Integration', implemented by ODIHR and OSCE field operations, 'Promoting Human Rights and Minority Protection in South East Europe' and 'Regional Initiative for Inclusive Education', both implemented by the CoE[462].

Alongside practical cooperation, synergies may arise in particular through cross-referencing[463]. Cross-referencing refers to the explicit referencing of standards of one instrument/organisation in for instance the standard setting or reporting/monitoring of another organisation[464]. Examples for cross-referencing include the recognition of the Copenhagen Document of the OSCE in the preamble of the FCNM, or the explicit references the HCNM of the OSCE makes in his recommendations to the provisions of the FCNM. The EU in the absence of specific internal minority standards in particular made use of referring to the CoE and OSCE instruments and used these standards for measuring the progress made with regard to the protection of minorities throughout the enlargement progress. The FCNM in the enlargement process even became the 'primary instrument for translating the minority criterion into practice'[465]. Additionally, during the Eastern enlargement the Commission regularly approached the OSCE HCNM in order to give an opinion on legal developments in the candidate states with regard to minority protection[466]. Interestingly, the HCNM has been

[458] E.g. OSCE and CoE joint study, *Recent Migration of Roma in Europe*, study authors Cahn, C., and Guild, E., 2nd edition October 2010, available at http://www.osce.org/hcnm/78034. An example for another joint publication would be the compilation of national minority standards. See CoE and OSCE, *National Minority Standards – A Compilation of OSCE and CoE Texts*, Council of Europe Publishing, Strasbourg, 2007.
[459] See Report by Jean-Claude Juncker, *Council of Europe - European Union: A Sole Ambition for the European Continent*, 2006, available at http://www.coe.int/t/der/docs/RapJuncker_E.pdf.
[460] The Memorandum of Understanding is available at http://www.coe.int/t/der/docs/MoU_EN.pdf.
[461] For a list of all the JP see http://www.jp.coe.int/CEAD/JP/Default.asp.Currently, there is a joint programme 'Promoting Human Rights and Minority Protection in South East Europe' implemented that is financed under IPA.
[462] For further information see http://www.osce.org/odihr/91869.
[463] For instance see the exploration of the notion synergies in minority protection referring *inter alia* to express cross-referencing, substantive convergences, and the emerging of similar working methods first made by Henrard, K., 'Ever Increasing Synergy towards a Stronger Level of Minority Protection between Minority-specific Instruments', 3 *European Yearbook of Minority Issues* 2003/4, pp. 15-41. See as well Henrad, K., and Dunbar, R, 'Introduction', in: Henrad, K., and Dunbar, R. (eds.), *Synergies in Minority Protection – European and International Law Perspectives*, Cambridge University Press, New York, 2008, e-book version.
[464] Ibid.
[465] Sasse, G., *Democracy Promotion in CEE: The Political Rights of National Minorities* (paper presented at the World Congress of the International Council for Central and East European Studies, Berlin, 25-30 July 2005), p.13.
[466] Toggenburg, G., 'A Remaining Share or a New Part?', p. 22.

critical towards the Union's approach in the enlargement process and its double standards towards member and non-Member states with regard to the protection of minorities[467].

Even though practical cooperation, the interchange of information and expertise, and cross-referencing between the three organisations is increasing there is still room for more. It is important that references to findings made by in particular the monitoring bodies or mechanism are not only made for the mere purpose of making reference to an international partner but it has to be understood that supporting each other in monitoring minority rights compliance activities the implementation of eventual recommendations will increase. In the case of Western Balkans studies of Macedonia and Croatia analysed the recommendations made by the HCNM, the ACFC, the EU Commission, but also by the CoE European Commission against Racism and Intolerance (ECRI) and the UN HRC and highlight the limited cooperation between the various institutions[468]. They found that the reports produced only rarely refer to the activities of other bodies engaged in the same field and their recommendations irrespectively.

7. HUMAN RIGHTS AND MINORITY RIGHTS AS A PRIORITY FOR THE REGIONAL COOPERATION COUNCIL

7.1 Introduction

Due to the outbreak of the wars in the beginning of the 1990s in the Western Balkans and the failure of the EC to develop effective response strategies to halt the violence there was the understanding that in order to stabilise the region a specific, different and coherent approach was needed. This approach added a strong regional component and the prospect of EU membership was not only exploited to push for national developments in line with the EU *acquis* but also to encourage regional interstate cooperation. 'Good neighbourly relations'[469] between the countries in the region became a compulsory element for the association process with the Western Balkan states and an essential part for the gradual consolidation of peace. In order to achieve these objectives a number of different instruments and policies have been developed. Unsurprisingly, these policies and instruments for regional cooperation in the Balkans have been constantly been reshaped, rethought and reformed in order to adapt to new developments and challenges in the region always emphasising the concept of regional ownership.

Besides the SAP and the foreseen gradual approximation of Western Balkan states to the EU within its enlargement strategy it was the Stability Pact (SP) established in 1999 as hasty response to the Kosovo war that was considered as important instrument to foster regional cooperation and stabilise the region. One of the underlying promises of the SP again was EU membership however the SP had a broader perspective than the SAP and was considered as complementary instrument despite overlaps in the aims[470]. More than 40 states and international organisations[471] in the founding document undertook to strengthen the countries of Southeastern Europe 'in their efforts to foster peace, democracy, respect for human rights and economic prosperity in order to achieve stability in the whole region'[472]. And indeed, due to its broad mandate and the strong international support the SP in particular in the first years accomplished to encourage countries of the region to enter in a constant dialogue on democratisation and human rights, economic reconstruction, cooperation and development, and security issues. Even though the international approach towards security and stability in the region might have been fruitful in the beginning, it soon became obvious that it was

[467] OSCE, Ekèus Rolf, Address by the HCNM, *From the Copenhagen Criteria to the Copenhagen Summit: the Protection of National Minorities in an Enlarged European Union*, The Hague 5 November 2002, available at http://www.osce.org/hcnm/54814.
[468] Bloed, A., and Letschert, R., 'The OSCE High Commissioner', e-book version.
[469] European Commission, Common Principles for Future Contractual Relations with certain Countries in South-Eastern Europe, COM(96) 476 final, 2.10.1996, p. 1.
[470] Some argued that it was basically duplication of initiatives. See Friis, L., and Murphy, A., 'Turbo-charged Negotiations': the EU and the Stability Pact for South Eastern Europe', 7(5) *Journal of European Public Policy*, 2000, p. 771.
[471] For a list of all participating partners see http://www.stabilitypact.org/about/default.asp.
[472] See the Founding Document available at http://www.stabilitypact.org/constituent/990610-cologne.asp.

'Europeanisation' and the prospect of membership to the EU the strongest arguments for regional cooperation. From 2001, it was the SAP the leading strategy and the SP became rather marginalised and even obsolete. Therefore, the Stability Pact for South Eastern Europe was transformed into the Regional Cooperation Council (RCC) in February 2008[473], in order to 'safeguard the significant achievements of the Stability Pact for South Eastern Europe'[474]. The transformation should lead to a 'more regionally owned and led cooperation framework'[475], replacing the international leadership, which the newly formed RCC should be a part of. It has been even said that the additional regional ownership is what the RCC 'is all about'[476].

7.2 The RCC's framework

In order to analyse the role human rights and minority protection are playing in the RCC, the RCC's framework must be analysed at three different levels. First, the RCC's general functions must be considered together with the limits of its measures and actions regarding these fields; secondly, the RCC's priority areas are an important indicator for the importance of human rights and minority protection within the RCC's framework; and thirdly the RCC's current work programme has to be examined with a view to a possible inclusion or even focus on these topics.

7.2.1 The RCC's general functions

The RCC exercises a number of general (or 'horizontal') functions, which it carries out in accordance with its mandate. Those horizontal functions encompass: Representing the region; assisting the SEECP; monitoring regional activities; exerting strategic leadership in regional cooperation; providing a regional perspective in donor assistance[477] and supporting increased involvement of civil society in regional activities[478]. Although none of those general functions explicitly relates to the promotion or protection of human rights or to minority protection, plenty of room is given to the RCC to take into account concerns regarding human rights or minority protection, by exercising its mandate in a way that harmonizes with these two concepts. Especially functions like the monitoring of regional activities and the support of increased involvement of the civil society in regional activities are predestined to be carried out in accordance with the principles of human rights and minority protection.

7.2.2 The RCC's priority areas

Within its framework, the RCC has been assigned so called 'priority areas for cooperation'. These areas are Economic and Social Development, Infrastructure, Justice and Home Affairs, Security Co-operation, Building Human Capital and Parliamentary Co-operation[479]. As can be seen, human rights and minority protection are not a priority area within the RCC's mandate. Nevertheless, the RCC's statute determines and lists so called 'important factors' within the context of the RCC's priority areas. Those factors are gender mainstreaming, social cohesion and the involvement of civil society actors.[480] Human rights and minority protection, however, are not important factors in terms of the RCC statute.

Furthermore, the RCC's statute allows for an adaptation of the priority areas, 'depending on developments in the region'[481], which offers a possibility for the inclusion of human rights and minority protection as a priority area of their own, if desired by the RCC's stakeholders.

[473] Kentrotis, K., 'The European Union's Balkan Policy', 4 *Zeitschrift für Außen- und Sicherheitspolitik*, 2011, p. 50.
[474] Statute of the RCC, Consolidated version, 15 March 2012, Introduction, para 1.
[475] Ibid.
[476] Delevic, M., 'Regional Cooperation in the Western Balkans', 104 *Chaillot Paper*, July 2007, European Union Institute for Security Studies, p. 76.
[477] Notably in EU assistance under the IPA.
[478] RCC, Strategy and Work Programme 2011 – 2013, Sarajevo, 17 June 2010, p. 8f.
[479] Statute of the RCC, Consolidated version, 15 March 2012, Introduction, para 5.
[480] Ibid., para. 6.
[481] Ibid., para. 7.

7.2.3 The RCC's current work programme

The RCC's current work programme 2011-2013 determines the regional priorities in each of the RCC's priority areas for cooperation during the aforementioned timeframe. Based on the regional priorities, the RCC shapes its work programme and focuses on 'a limited number of targeted actions'[482]. However, there is only one action dealing with human rights aiming *inter alia* at 'exchange [of] information and share [of] best practices at the regional level regarding the protection of fundamental rights within the agreed RCC priority areas'[483]. One of the actions expected results is a 'strengthened protection of fundamental rights, minorities and vulnerable groups'[484], which proofs that also the field of minority protection is at least touched by the RCC's work.

7.2.4 The role of human rights in the RCC framework

Although human rights are neither mentioned in the RCC's statute, nor explicitly part of the RCC's current work programme, the RCC seems to be aware of the fact that some of its work touches the issue. In its first annual report, the Council states that 'strengthening the rule of law through improved integrity and capacity of justice systems has also been considered as an essential prerequisite for effective protection of human rights and economic development'[485].

The RCC's partial awareness of human rights can also be detected in further annual reports of the Council, for instance when it declares that 'it is in the best interest of the people of the region that the judicial dimension of the protection of fundamental human rights, minorities and vulnerable groups become a part of enhanced regional cooperation' and that the RCC 'has to be active in political advocacy, networking and supporting the implementation of the legal framework on human rights issues connected with justice and judicial reforms'[486]. Notably, the RCC treats human rights not as an integral part of its work, but engages the topic almost exclusively within the limits of its priority area 'Justice and Home Affairs'.

7.2.5 The role of minority protection in the RCC framework

The statements made regarding the role of human rights in the RCC framework do also apply on the role of minority rights within the framework. Minority protection is treated exclusively under the umbrella of 'Justice and Home Affairs' by the RCC and is not considered and mainstreamed in other priority areas within the RCC's framework. Under the JHA section the RCC supports, promotes and coordinates the work of regional initiatives active. One initiative being from relevance for the protection of minority rights is the Migration, Asylum and Refugee Regional Initiative (MARRI) concerned *inter alia* with the return of displaced persons.

However, it must be stressed that the RCC has not been idle regarding minority protection. For example, the RCC has contributed to the work of the Council of Europe and the European Commission 'within the preparation of the IPA MB Project on the protection of minority rights in the Western Balkans [...] by introducing the rule of law and protection of fundamental human rights dimension of non-discrimination'[487].

[482] RCC, Strategy and Work Programme 2011 – 2013, Sarajevo, 17 June 2010, p. 7.
[483] Ibid., ANNEX I, III. Justice and Home Affairs, para. 5. Initiate regional cooperation in private and civil law matters and in protection of fundamental rights, p. 35.
[484] Ibid.
[485] RCC, Annual Report on Regional Cooperation in South East Europe 2008-2009, Sarajevo, 14 May 2009, p. 34.
[486] RCC, Annual Report on Regional Cooperation in South East Europe 2009-2010, Sarajevo, 28 May 2010, p. 32.
[487] RCC, Annual Report on Regional Cooperation in South East Europe 2010-2011, Sarajevo, 12 May 2011, p. 34.

8. HUMAN RIGHTS AND MINORITY RIGHTS IN BILATERAL COOPERATION OF WESTERN BALKAN COUNTRIES

The protection of minorities through bilateral agreements[488] is not a new invention of the last decades. Such agreements have been used already in the last centuries, originally mainly for the protection of religious minorities and as of the interwar period for the protection of national minorities. They resurfaced as a possible instrument for the protection of minorities in the late 1980s and 1990s, due to the breakup of communist regimes and the enlargement process of the European Union towards the East. In fact, it was the EU who promoted in the early 1990s the policy of concluding bilateral agreements, expressing the 'common, continuing effort to prevent and put an end to threats of tensions and crisis and to create an area of lasting good-neighbourliness and co-operation in Europe'. As a result, the European Council launched a 'Pact on Stability'[489] in 1993, a joint action to promote good neighbourly relations and to consolidate frontiers and settle problems related to national minorities. The initiative focused on the countries of Central and Eastern Europe and the three Baltic states.

The Stability Pact for South Eastern Europe was launched in 1999. One of the Working tables focused on Democratisation and Human Rights with a Task Force on Human Rights and National Minorities and a project focusing on bilateral agreements. The principle of good-neighbourliness, friendly relations and cooperation between states is furthermore enshrined in Art. 2 of the FCNM, and Art. 18 FCNM encourages states to conclude bilateral agreements with other states, 'in particular neighbouring States, in order to ensure the protection of persons belonging to the national minorities concerned.' Finally, the OSCE HCNM has dedicated one set of recommendations to minorities in interstate relations[490]. In these recommendations he underlines that minority protection 'is primarily the responsibility of the State where the minority resides', that '[t]he fact that the State considers a person abroad to be one of its 'kin', does not justify any unilateral intervention' and that states should rather cooperate through bilateral and multilateral treaties and arrangements.

Bilateral treaties on good neighbourly relations usually contain an extensive article dealing with minority rights. The rights included in most treaties are the right to identity, linguistic and educational rights, rights concerning media, freedom of association and the right to participate in decision-making processes. Some countries have concluded agreements focusing on the protection of minorities alone.

Croatia and Slovenia were the first countries of the former Yugoslavia to conclude bilateral treaties with neighbouring countries touching the issue of minority protection. Already in 1992, Croatia concluded a Treaty on Friendly Relations and Co-operation with the Republic of Hungary, containing various provisions for the protection of the ethnic, cultural, linguistic and religious identity of persons belonging to the Croatian minority living in Hungary and of persons belonging to the Hungarian minority living in Croatia. In 1995 followed a specific Agreement on the protection of these minorities, containing detailed provisions for all key areas of minority protection. In 1996, the Treaty between the Republic of Italy and the Republic of Croatia on the Rights of Minorities was concluded, which is remarkable as it does not provide for the usual symmetry. According to the preamble of the treaty, its main aim is the protection of the Italian minority in Croatia. A minimum of symmetry has been tried to preserve by the inclusion of Art. 8, which grants certain protection also to persons belonging to the Croatian minority in Italy, but only those living in the region of Molise 'in the territory of traditional settlement where its presence has been ascertained'.

[488] For detailed analysis on bilateral agreements see Gal, K., 'Bilateral Agreements in Central and Eastern Europe: A New Inter-State Framework for Minority Protection?', 4 *ECMI Working Paper*, 1999; Bloed, A., and van Dijk, P., *Protection of Minority Rights Through Bilateral Treaties. The Case of Central and Eastern Europe*, Kluwer, The Hague/London/Boston, 1999; the contributions of Lantschner, E., in Volumes 1 and 2 of *the European Yearbook of Minority Issues*; Lantschner, E., *Soft jurisprudence im Minderheitenrecht. Standardsetzung und Konfliktbearbeitung durch Kontrollmechanismen bi- und multilateraler Instrumente,* Nomos, Baden-Baden, 2009, 208-307.

[489] Not to be confounded with the 'Stability Pact for South Eastern Europe'. It consists of a Declaration and a list of bilateral agreements which the participating states decided to include.

[490] The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations, June 2008, available at http://www.osce.org/hcnm/33633.

Apart from these exceptions, Western Balkan countries started concluding bilateral agreements only about a decade ago. These agreements focused on the protection of minorities only and have been concluded between Serbia on the one hand, and Romania, Hungary, Macedonia and Croatia on the other, as well as between Croatia on the one hand and Macedonia and Montenegro on the other[491]. In addition to these minority specific agreements, agreements in the fields of cultural and educational cooperation include minority relevant provisions. The minority specific agreements were clearly written using the FCNM as a blueprint. They are, however, a bit more detailed in some fields. In the area of education, the Croatian-Serb agreement established for instance that the special curricula for minority language teaching need to be cleared by associations of the minorities[492]. The Serb agreements with Macedonia, Croatia, Hungary and Romania foresee the right to use the minority language not only in relations with public but also with judicial authorities[493]. According to the same agreements the states commit themselves to support cross-border economic cooperation and/or to promote economic development in regions inhabited by national minorities[494]. An exceptionally broad provision in terms of financial support by the states is contained in Art. 12 of the agreement between Serbia and Macedonia. According to this provision, '[t]he Contracting Parties shall ensure adequate, including financial, support for the fulfilment of the commitments specified in this Agreement.' Similar provisions are contained in Arts. 14 of the agreements between Serbia on the one hand and Croatia and Hungary on the other.

For the monitoring of the implementation of bilateral agreements, Joint Intergovernmental Commissions are established. Joint Commissions are not comparable to a judicial body that supervises the compliance with the law by the citizens of a certain state. It is not a mechanism which assists a person whose rights have been violated. There is no formal procedure foreseen for persons who want to bring to the Commission's attention facts that run contrary to a provision laid down in a bilateral agreement. Its decisions are not directly binding on anybody. Joint Commissions are political bodies, comparable to a governmental advisory organ, evaluating the overall implementation of bilateral agreements and adopting recommendations which are addressed to the respective governments. The destiny of these recommendations depends on the political will of the government. No sanctions can be imposed if the recommendations are not implemented. These are the common features of an implementation mechanism which holds a huge potential but constantly lives with the risk of inefficiency or obstruction[495].

In the framework of the bilateral agreements concluded by Western Balkan countries Joint Commissions have been established between Croatia and Hungary, Serbia and Hungary and between Serbia and Romania. Joint Commissions have not been established or are not fully operational with regard to the other agreements. The Croat-Hungarian Joint Commission has the longest and most consistent track record of meetings, with sessions taking place nearly every year. Recommendations adopted by the Commissions have a focus on issues related to culture and education and are generally very practice related and specific. For instance, it recommended successfully the establishment of a Hungarian Educational Centre in Osijek. Following a

[491] Agreement between the Federal Government of the Federal Republic of Yugoslavia and the Government of Romania on Co-operation in the Field of Protection of National Minorities, signed on 4 November 2002; Agreement between the Republic of Hungary and Serbia and Montenegro on the Protection of Rights of the Hungarian Minority Living in Serbia and Montenegro, and the Serbian Minority Living in the Republic of Hungary, signed on 21 October 2003; Agreement between the Republic of Macedonia and Serbia and Montenegro on the Protection of Macedonian National Minority in Serbia and Montenegro and Serbian and Montenegrin National Minority in the Republic of Macedonia, signed on 6 July 2004; Agreement between the Republic of Croatia and Serbia and Montenegro on the Protection of the Rights of the Croatian Minority in Serbia and Montenegro and of the Rights of the Serbian and Montenegrin Minorities in the Republic of Croatia, signed on 15 November 2004; Agreement on the Protection of the Croatian Minority in the Republic of Macedonia and the Macedonian Minority in the Republic of Croatia, signed on 13 October 2007; Agreement between Montenegro and the Republic of Croatia on the Protection of Montenegrin Minority in the Republic of Croatia and the Croatian Minority in Montenegro, signed on 14 January 2009 (not yet entered into force).

[492] Art. 3(1) of the Serb-Croat agreement.

[493] Art. 3 of the Serb-Macedonian agreeement; Art. 6 of the Serb-Croat agreement; Art. 5 of the Serb-Hungarian agreement; Art. 3 of the Serb-Romanian agreement.

[494] Art. 9 of the Serb-Macedonian agreement; Art. 13 of the Serb-Croat agreement; Art. 11 of the Serb-Hungarian agreement; Art. 10 of the Serb-Romanian agreement.

[495] See Lantschner, E., 'Bilateral Agreements and their Implementation', in Morawa, A. (ed), *Mechanisms for the Implementation of Minority Rights,* Council of Europe Publishing, Strasbourg, 2004, pp. 204-210.

recommendation of the same Commission a Hungarian Language Department has been opened in Zagreb and a Croatian School has been opened in Pécs. Also the Joint Commission between Serbia and Hungary has been meeting regularly.[496] Serbia and Romania have started addressing the issue of protection of minorities in Serbia in the framework of their bilateral joint commission'[497].

As some historical examples[498] and the analysis of the more recent bilateral agreements show, these instruments can play a positive role in the protection of persons belonging to national minorities in a dual sense[499]. First, they can advance the standard of protection of minorities as compared to European or international instruments by tailoring the provisions to the specific needs of the minorities concerned or by regulating areas, which have so far been rather neglected by European mechanisms. However, the standard-setting potential of bilateral agreements has so far not been exhausted, as in many cases the agreements borrow very much from the wording of the FCNM or other international or European documents.

The second function, which bilateral agreements can have, lies in the field of conflict prevention or conflict management and here the Joint Intergovernmental Commissions could play an important role. It is essential, however, that this possible channel of communication among states is used in a timely manner and agreements reached in this way are put into practice. It is thus necessary that JC are really established, that they are given a strong mandate and are composed of high level state representatives as well as minority representatives. It is further important that recommendations of JC are given a serious follow up and can thus contribute not only to a more satisfactory situation for persons belonging to national minorities but also to the reduction of tensions between states.

As Joint Intergovernmental Commissions between countries of the Western Balkans have either not been established yet or do not fulfil the above criteria, their impact is rather limited.

[496] ACFC, (third) opinion on Hungary, 2010, para. 147.
[497] European Commission 2012 Progress Report on Serbia, at 21.
[498] Agreement between Finland and Sweden on the Aland Islands, Agreement between Austria and Italy on South Tyrol.
[499] These conclusions are based on Lantschner, E., 'Bilateral Instruments and Mechanisms to Protect 'Kin-minorities' Abroad: The Case of Hungary's Bilateral Agreements with its Neighbours and their Monitoring through Joint Intergovernmental Commissions', in: Kemp, W., Popoyski, V., and Thakur, R. (eds.), *Blood and Borders: The Responsibility to Protect and the Problem of the Kin-State*, UNU Press, New York, 2011, pp. 112-113.

CHAPTER FOUR - MAINSTREAMING HUMAN RIGHTS AND MINORITY RIGHTS IN THE EU ENLARGEMENT POLICIES: CONCLUSIONS AND RECOMMENDATIONS

9. OVERALL CONCLUSIONS

The legal framework for the protection of minorities in the Western Balkan states is fairly well established, its implementation however follows uneven patterns and often remains modest and unsatisfactory. The reasons for the discrepancy between the legislation in place and its implementation are various. As shown by the case studies, there is insufficient commitment to the legislation by the governments for a number of reasons. Most of minority relevant laws are a result of foreign intervention without a sufficient level of commitment to the implementation at the national level. Furthermore, minority laws adopted are sometimes too ambitious and cannot be implemented properly due to a lack of capacities. Combined with insufficient monitoring, the generally well developed minority legislation remains often toothless.

In the EU enlargement process, in particular in the progress reports, the protection of minority rights is addressed indeed. However, emphasis in the enlargement strategy is put mostly on the development of legislative frameworks and not on their actual implementation. The Commission in fact has been so far very reluctant to give guidance on how to improve the practical implementation of legislation in force. The lack of a structured and transparent approach in the monitoring of minority rights runs like a red thread through the EU's enlargement and neighbourhood policies including the respective financial instruments.

In the context of the enlargement process the incentive for membership has been a sufficiently strong incentive for countries in the Western Balkans to adopt at least well elaborated legal frameworks for the protection of minorities. Under the ENP the success of the EU in this regard has been more modest. Neighbouring countries are often unwilling to make minority protection a criterion for increased cooperation with the EU. In addition, the EU does not place particular emphasis on the issue of minorities but rather follows economic and security interests, in the relations with neighbouring countries.

Similarly, regional financial instruments have so far not contributed to the fullest extent possible to the improvement of the situation of minorities. While the protection of human and minority rights are a strategic objective and cross-cutting issue in all planned activities, their actual impact is diminished by insufficient monitoring and a lack of human and minority rights assessment mechanisms.

Minority protection in Europe is characterised by the engagement of various actors following different approaches towards minority protection. The OSCE's HCNM as a prevention mechanism intervenes behind the scenes; the CoE with the only legally binding minority rights protection instrument – the FCNM – available plays a crucial role in standard setting and monitoring; and the EU uses its leverage of conditionality to influence and improve the minority protection of states applying for membership. The three organisations already cooperate at the functional and practical level. Still, in the past, there have been cases of diverging approaches of the three organisations towards minority issues in EU accession states that might undermine effective minority protection in Europe.

The RCC as the successor of the Stability Pact is aimed at increasing regionally owned and led cooperation between the countries of the Western Balkan states. Minority rights have so far not been an explicit priority for the RCC and have not been addressed in a systematic way but only as side issues, for instance in the MARRI initiative.

Based on these key observations and the analysis made in the Chapters above in the subsequent section will propose recommendations on EU action in general and actions of the European Parliament in particular.

10. IMPROVING THE METHODOLOGY OF ANNUAL PROGRESS REPORTS

With the aim to improve the methodology in assessing progress (or decline) in the annual progress reports, the Commission should:

- *focus on the implementation of legislation on the protection of persons belonging to national minorities by the identification and promotion of best practices.* This study has shown that the legal framework on minority protection in the Western Balkan countries is mostly in line with the standards foreseen in the FCNM. Their implementation is, however, uneven between and within the various countries. Whereas some minorities are particularly disadvantaged, others enjoy a high level of legal protection which also translates into practice, as for instance is the case with the Italian minority in Istria/Croatia. Such examples of best practice should be identified and promoted to support the overall development and promotion of minority rights in the region.
- *put more effort to mainstreaming minority issues into all policy fields.* So far, minority issues have been taken into account by Progress Reports nearly exclusively in the context of the fulfilment of the political conditionality criterion and in the Chapter dealing with fundamental rights. There are, however, other fields which are relevant in the context of minority protection, most importantly the areas of social policy and employment as well as research and education, but also the freedom of movement of workers, information society and media, regional policy and structural instruments, as well as consumer and health protection. The Treaty of Lisbon introduced a mainstreaming obligation for the EU in the field of non-discrimination, based on Art. 19 of the TFEU. Even if this was interpreted as not including discrimination based on language and the belonging to a national minority it certainly includes discrimination based on religion and ethnic origin. For the sake of sustainability of legal transformation in Western Balkan countries, this mainstreaming obligation impact also on the enlargement process.
- *align and coordinate minority rights mainstreaming with similar efforts taking place in the realms of notably gender, LGBT and children's rights*. With regard to the enlargement policy it is important that minority rights and e.g. gender mainstreaming efforts are effectively aligned in order to capture the multidimensional nature of human rights issues. In particular gender mainstreaming is a prominent feature in the EU enlargement process and experiences made in this regard could serve as best or worst practices for mainstreaming minority rights, while the rights of sexual minorities are still confronted with hostilities which need to be addressed by the states concerned with the support of the EU.
- *give special attention to the needs of the Roma community in its mainstreaming efforts.* All Progress Reports of the European Commission and opinions of the ACFC share a common concern for the socio-economic situation of persons belonging to the Roma minority. The most pressing needs of this group, however, cannot be tackled with a minority rights approach alone. It is therefore all the more important to consider their situation throughout the monitoring of various policy areas in order to not only identify policies which perpetuate their discrimination but also to recognise tools to improve the situation of Roma.
- *improve benchmarking to make it concrete, systematic and transparent.* This includes a clear understanding of minority rights concepts and of the key features they comprise, the definition of (quantitative and/or qualitative) indicators, decisions with regard to measurement methods and the preferred data collection method as well as transparent time tables. All this does not seem to currently exist. To set up such a systematic benchmarking strategy, the Commission could rely on existing work (e.g. of ACFC and HCNM when it comes to standard setting) and request support by other bodies (e.g. the Fundamental Rights Agency). For the sake of transparency, future benchmarks as well as their implementation by states should be made accessible for the interested public.
- *develop quantitative and/or qualitative indicators to measure minority rights in the enlargement process.* Effective benchmarking requires the development of performance or impact indicators. Minority rights indicators are a tool to strengthen systematic assessment of progress made over time in the

implementation of minority rights. Such assessment is necessary to make planning and further implementation processes more efficient and transparent. They make it easier to hold governments accountable for potential violations of minority rights. And finally they help clarifying the concrete content of minority rights. Considering that the FCNM is the main instrument in terms of standard setting, the 'Indicators for Assessing the Impact of the FCNM in its State Parties' could be used as starting point (see Annex 1). State authorities and civil society/minority organisations should be involved in the development of indicators to make sure they duly reflect the specific situation in the country.

- *collect data to substantiate indicators.* Indicators can be substantiated by using socio-economic data, events based data, household perceptions and expert judgments. The Commission's delegations as well as FRA could be given a role in supporting the Commission in collecting these data. More importantly, however, states should be encouraged to regularly collect data on the situation of persons belonging to national minorities, making sure that such collections are made in accordance with international and European standards on personal data protection.
- *propose to the Council to invite all countries with which an SAA has been concluded to participate in the Agency as an observer*. This way, the Commission could benefit in its monitoring activities from country or thematic studies to be produced by the Agency as well as from its elaborate methodology in collecting and analysing data. Until the various Western Balkan countries are granted observer status, the Commission could make use of the examples of good practice and the indicators to measure fundamental rights in the EU, both elaborated by the FRA, in its dialogue with these countries.
- *link various instruments in a transparent manner*. Progress Reports should better reflect the priorities set in European or Accession Partnerships as well as the benchmarks set for the opening and closing of negotiation chapters. This could be done by dedicating a separate chapter in Progress Reports to the assessment of Partnership priorities (as has been done in the 2005 Progress Reports) and benchmarks or by explicitly mentioning priorities and benchmarks in the individual chapters.
- *provide clearer guidance to states as to what kind of action is expected*. The Commission is very reluctant in giving concrete recommendations as to how a situation evaluated negatively can be improved. Setting clearer targets would have several advantages. Firstly, States would have a clearer understanding as to what to do concretely and how to reach priorities and benchmarks. Secondly, they would have the backing by the Commission when adopting unpopular reforms. Thirdly, it would make it easier for the Commission to assess progress or decline. Reference to ACFC and CM recommendations could be made (see recommendation below).

11. RECOMMENDATIONS FOR EU ACTION ON HUMAN AND MINORITY RIGHTS

With the aim to improve the mainstreaming of minority rights into the enlargement and neighbourhood policy the Commission should

11.1 Policy instruments

- *improve European and Accession Partnerships in terms of mainstreaming minority rights and formulation of priorities.* Where relevant, minority related priorities should be included in all fields. Priorities, especially the short term ones, should be formulated more concretely and time frames for the fulfilment of priorities set more realistically.
- *make human and minority rights a priority in the APs of the ENP*. This includes that partnering countries are required to make commitments with regard to the protection of the rights of minorities. These commitments have to be formulated in a concrete and precise way. Furthermore, clear time frames have to be developed for the implementation of the commitments made. The measuring of the implementation of these commitments has to be carried out in a systematic and coherent way against clear benchmarks. The Commission shall ensure that the incentives for neighbouring countries are

directly linked with the fulfilment of minority rights commitments. Importantly, minority rights should be mainstreamed in a policy areas and not only form part of the commitments related to political conditions.

– *strengthen its efforts* to make minority rights an integral part of the work of the RCC. The EU *should* encourage the RCC to adapt its priority areas in accordance with the RCC statute, by either expanding the priority area of 'Justice and Home Affairs' to 'Justice, Home Affairs, Human Rights and Minority Protection' or by creating a new priority area, dealing with human rights and minority protection. Those measures would integrate human rights and minority protection into the RCC's legal framework and would thereby ensure attention for those important concepts amongst the RCC itself, as well as other stakeholders within the important field of regional cooperation.

11.2 Financial instruments

In order to improve the impact the EU's financial instruments can have on the protection of minorities the Commission should

11.2.1 IPA

– *improve and enforce the mainstreaming of minority rights* as recognised cross-cutting issues into the five components of the IPA and subsequently into the multi-annual indicative financial framework and the national MIPDs. Even though minority rights might not play an equal role in all of the components they still have to be taken into consideration at all stages
– of the planning for funding. The new sectoral approach of the IPA can be used to enhance protection of human and minority rights by creating a specific category on the latter and integrate it in the individual MIPDs.
– *ensure that projects with IPA support* do not adversely affect minority groups or interethnic relations. Furthermore, projects should have a long-term perspective in order to improve the situation of minorities sustainably.
– *make more efforts to align and link the MIPDs with the progress reports*. This will include a more concrete formulation of the objectives and choices and of the expected results the funding under the IPA shall have. It requires the development of *ex ante* and *ex post* minority rights impact assessments as well as of standardised monitoring and reporting procedures. Funding under the IPA shall be made conditional on progress made in fields that have been of concern in the previous progress report.
– *explore and enforce linkages and complementarity between the IPA and the EIDHR*. Initiatives taken under the IPA in the field of minority protection can benefit from parallel actions taken by CSOs funded under the EIDHR and vice-versa.

11.2.2 EIDHR

– *ensure* that in all projects funded under the EIDHR minority issues are a matter of concern.
– *take into consideration that projects supported by the EIDHR* can contribute to the realisation and reinforcement of the minority dimension of projects and policies implemented through other regional financial instruments and can thereby contribute to a general minority rights mainstreaming.

11.2.3 ENPI

– *ensure that the CSPs seek to define, establish and reinforce human and minority rights-based approaches to programming*. Subsequently the NIPs that so far only make general reference to the protection of human and fundamental rights should explicitly include minority rights to be considered throughout all activities funded.
– *improve monitoring of funding provided under the ENPI*. So far the ENPI does not provide for sufficient monitoring mechanisms. Therefore, the supervision of ENPI funding shall entail *ex ante* and *ex post*

human and minority rights impact assessments as well as standardised monitoring and reporting procedures.

12. STRENGTHENING COOPERATION WITH THE COE AND THE OSCE

In order to avoid duplication of work and maximise protection of minority rights the Commission should

- *strengthen practical* cooperation with the CoE and the OSCE through the institutionalisation of joint meetings. The cooperation in the field of minority rights should not only involve the OSCE head office and its field missions, but also the HCNM. This institution has an extensive and longstanding expertise in the field of minority protection. This expertise should be increasingly used for instance with regard to the implementation of EU-funded projects in the field of minority protection.
- *strengthen the synergies with the ACFC:* The ACFC has a widely acknowledged role in monitoring minority rights, contributing thereby also to the concretisation of the FCNM. More systematic reference not only to FCNM in general but to ACFC country-specific findings in particular should be made in Progress Reports. These findings constitute an important source when determining whether progress has been made in the field of minority protection or a situation has deteriorated. Thematic commentaries constitute another possible yardstick in this assessment, as they highlight the interpretation given by the ACFC to particular provisions of the FCNM.

13. RECOMMENDATION FOR ACTION BY THE EUROPEAN PARLIAMENT

The European Parliament as one of the driving actors for EU action on human rights at the EU level should

13.1 Action on mainstreaming human rights in general

– *initiate the development of* indicators and benchmarks for EU human rights and democratisation policies that can be operationalised.
– *insist on a careful, systematic and balanced assessment* of the degree to which individual countries meet relevant criteria with regard to the protection of minority rights. To support its efforts the Parliament should establish a specific monitoring mechanism that could enable it to liaise closely and cooperate effectively with the relevant Commission and Council institutions.
– *request the presentation of the results of these mainstreaming efforts* in the Annual Report on Human Rights and Democracy in the World. This report can also be used as a means for an annual evaluation of the EU's efforts to mainstream human rights in the enlargement and neighbourhood policies.

13.2 Action on strengthening of minority rights in particular

– *call on the Commission and the Council* to develop, in cooperation with the states concerned and relevant civil society actors, clear and transparent minority rights indicators and benchmarks and apply them consistently throughout the enlargement process and the neighbourhood policy.
– *call on COHOM and the EEAS* to include high standards on minority rights in the individual country strategies on human rights for Western Balkan countries.
– *use its budgetary powers to ensure that the follow-up reports on the ENPI* entail detailed information on the reforms and the results made through the funding and to guarantee that they include measurable outcomes.
– *increase cooperation with the CoE and the OSCE* through the regular exchange of information on the issue of minority protection in the context of meetings of the Subcommittee on Human Rights (DROI) and other levels.
– *encourage states through available channels to establish Joint Intergovernmental Commissions* as foreseen in the existing bilateral agreements on the protection of minorities and to equip them with the necessary powers and support to allow them to deploy their potential of advancing the situation of persons belonging to minorities on a very practical level and of functioning as a channel of communication in case tensions related to minority issues should arise between states.

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Agreement between Montenegro and the Republic of Croatia on the Protection of Montenegrin Minority in the Republic of Croatia and the Croatian Minority in Montenegro, signed on 14 January 2009 (not yet entered into force).

Judgements of International Courts

ECtHR, Oršuš and Others v. Croatia, Application No. 15766/03, Judgment (Grand Chamber) of 16 March 2010.

ECtHR, Sejdic and Finci v. Bosnia and Herzegovina, Application No. 15766/03, Judgement of 22 December 2009.

Judgements of National Courts

Ruling of the Constitutional Court of the Republic of Montenegro, No. 53/06 of 11 July 2006.

ANNEX I

FCNM Indicators

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For the full study entitled "Indicators for Assessing the Impact of the FCNM in its Member States" see
http://www.coe.int/t/dghl/monitoring/minorities/6_resources/PDF_IAConf_Report_Bolzano_en_12nov08.pdf

Political Discourse Indicators

Domain	Indicator	Index	Data Sources
		Government action and practices	
	Improved support for institutionalized inter-cultural dialogue	- Number of follow-up meetings to monitoring cycles - Creation of new permanent consultation mechanisms - Creation of new departments within government agencies to deal with national minorities - Establishment of new government agencies to deal specifically with minorities, including national minorities - Establishment of Ombudsperson function - Appointment of National Minority Commissioner - Decrees and executive orders/letters pertaining to any provision in the FCNM - Adopting development plans - Adopting new or improved monitoring practices, including efficiency control	- Ministry of Justice - Ministry of Interior - Ministry of Culture - Parliament - Office of Head of Government - National minority institutions websites - NGOs - Research Institutions
	Increased and improved dissemination efforts	- Establishing entities/appointing officer(s) dealing specifically with dissemination of issues related to the FCNM and/or national minorities - Introducing new procedures/reforming information sections to include dissemination of issues related to the FCNM and/or national minorities - Retaining or designating public servants with language skills to translate information material to and from national minority languages	- Government information office - Ministry of Justice - Ministry of Interior - Ministry of Culture - Parliament - National minority institutions websites - Government recruitment offices - Government tender offices

		- Appointing translation agencies as official purveyors of translation services with regard to national minority information materials - Number of conferences pertaining directly to dissemination of the FCNM and national minority issues - Number of conferences pertaining to related issues, such as human rights, inter-cultural dialogue, etc. - Number of roundtables addressing specific provisions as well as general issues - Number of seminars and workshops dealing with improving dissemination - Establishing of sub-committees specifically addressing dissemination - Establishing of ad hoc committees to addressed particular issues - Establishing of newsletter functions - Number of awareness campaigns - Number of press releases addressing the FCNM as well as national minority or related issues - Number of new government publications, pamphlets, posters and other info material issued - Number of direct references to the FCNM in official documents - Number of new government web-sites about national minority rights or related issues established - Number of new web links or information boxes on existing government web-sites about the FCNM	- NGOs
	Increased funding for implementation programmes	- Number of new/additional budget lines pertaining to FCNM provisions or national minority claims, including direct funding to national minority institutions and organizations - Number of special allocations of time limited funds - Number of new programmes with budget lines adopted - Number of new projects with budget descriptions approved - Number of new project applications with budget proposals received compared to approved - Number of new personnel allocated to dealing with issues of implementation of the FCNM - Number of new initiatives not enshrined in policies or programmes but nonetheless requiring funding - Adoption of guidelines for financial distribution, including	- Ministry of Justice's budget office and personnel offices - Ministry of Interior's budget office and personnel offices - Ministry of Culture's budget office and personnel offices - Parliament's budget office - National Minorities' accountants

		information regarding inflation adjustment	
	Improved mainstreaming efforts	- Improved data collection by proxy or pilot project and funding for same - Innovative positive action measures even if unofficial in character - Improved membership numbers through removed barriers or excessive legislation - Establishment of periodic review of membership - Decreeing permanent membership in relevant commissions and boards, especially media and school boards - Increased incentives to private companies and organizations - Number of outreach campaigns to public service providers - Number of directives related to mainstreaming, including directive to prohibit gerrymandering in connection with redrawing of districting legislation - Number of letters from cabinet ministers to public service providers - Adoption of monitoring practices	- Government statistical offices - Ministry of Justice - Ministry of Interior - Ministry of Culture - Parliament - Office of Head of Government - National minority institutions websites - NGOs - Public Media - Research reports
		Public debates	
	Increased attention to Framework Convention provisions in parliamentary politics	- Number of ratification hearings/debates, including debates on the purpose of the FCNM and its application in domestic law - Number of debates with regard to possible constitutional amendments/changes to achieve recognition of national minorities - Votes taken in parliaments with regard to recognition of certain groups - Number of debates on the floor about the unity of the nation versus cultural diversity and multiculturalism - Number of debates in committees with regard to recognition of specific minority groups - Lack of debates or non-debates on recognition of specific minorities known to exist within territory of the state - Number of debates with regard to the concept of 'national minority' - Number of debates on adopting Declarations to the FCNM, including Declarations excluding specific minorities living within	- Parliament Information and Budget Offices - Public Media - Minority Media - Minority Party Information

		the territory of the state - Votes taken on Declarations to the FCNM - Number of parliamentary expert and other hearings pertaining to the Framework Convention and/or national minority issues - Number of speeches given by majority MPs on national minority issues in parliament - Number of speeches given by national minorities MPs in parliament - Creation of sub-committees to standing parliamentary commissions to address and investigate minority rights issues - Creation of public commissioners to address minority rights and issues - Number of questions to cabinet ministers pertaining to the Framework Convention or national minority issues asked by majority MPs, in both writing and speech - Number of special inquiries with regard to the Framework Convention or national minority issues - Number of projects and studies initiated and funded by parliamentary budgets - Number of study visits to national minority regions by majority MPs - Number of speeches on national minority issues given by majority MPs outside parliament - Number of official apologies by MPs - Number of official apologies delivered by cabinet officials - Establishing of minority Ombudsperson institution - Number of new minority MPs	
	Increased attention to Framework Convention provisions in local politics	- Number of activities of permanent consultation mechanisms at the local level - Number of activities of ad hoc consultation mechanisms - Number of representatives of national minorities involved in local government (sub-national, district, municipal) - Number of representatives of national minorities in local commissions/committees (trade and economic development, environment, INTERREG) - Number of representatives of national minorities on local boards (schools, media, church affairs, etc.) - Number of public events addressing the FCNM and national	- Local Parliament Information offices - Local ministries of Justice, Interior, Culture, Education, Environment, Trade, Economic Affairs - Local Media - NGOs - Minority Institutions website

		minority rights	
	Increased attention to combating racism and xenophobia	- New initiatives on data collection on racist incidents, including ethnic prison population - Expanded monitoring of 'stop and search' incidents - New ethnicity sensitive initiatives on criminal data collection, including initiatives to protect all types of ethnicity and nationality - Discourse analysis of racial slur in media reports - New initiatives to monitor Internet racism	- Ombudsperson's Office - Ministry of Justice - Agency of Ethnic Relations - Public Media - Research Reports on Public Media
	Improved non-institutionalized inter-cultural dialogue efforts	- Number of events and activities pertaining specifically to inter-cultural dialogue - Establishment of new inter-cultural commissions - Joint minority-majority participation in local and national festivals - Joint minority-majority celebrations of historic (reconciliatory) commemorations - Number of honorary titles awarded to members of national minorities - Number of medals awarded to members of national minorities for special voluntary contributions - Increased minority participation in planning of visits by kin-state dignitaries - Number of official visits by dignitaries to national minority regions - Increased inclusion of members of national minorities in delegations and high-level meetings - Invitations to representatives of national minorities to join public programming on national elections - Inclusion of subjects on cultural diversity in school curriculum	- Government Information Offices - Public Media - Minority Media - Government Protocol offices - Ministry of Foreign Affairs - Minority Institutions websites - Ministry of Education
	Increased attention to Framework Convention provisions in public space	- The number of new national minority cultural centres - The number of new national minority libraries - The number of new national minority museums - The number of TV and radio stations owned/run by national minorities, - The number of minority newspapers in national minority languages, - Restrictions on distribution of national minority newspapers - The number of hours in public TV and radio dedicated to	- National Minority Institutions websites and information offices - Minority Media - Public Media - Research reports on public media - Public education material - Websites of ministries relevant to FCNM

		national minority programmes, - The number of hours within public programming dedicated to national minorities' own programmes, - The time of the day that programmes about national minorities are broadcast, - The number of national minority articles in prominent spaces in mainstream press, - The number of editorials pertaining to the FCNM or national minority issues - The number of bilingual TV and radio stations, - The number of bilingual newspapers, - The number of new entrants of national minority media, - Reference to national minorities in public narratives (books, pamphlets, etc.) - Reference to national minority history in educational material - Reference to national minorities in public campaigns (branding, regional development, etc.) - Number of public signs in national minority languages - Number of bilingual and multilingual signs - Number of public signs indicating in several languages location of national minority heritage sights - Number of public airings of national minority kin-state flags	- Ministry of Transportation - Ministry of Interior

Legislative Indicators

Domain	Indicator	Index	Data Sources
		Right to Existence and Recognition of Minorities	
	Status of FCNM in the domestic legal system	- Assessing the rank – superior or equal in respect of constitutional and statutory laws - of the FCNM within the domestic legal order - Verifying whether in case of non-conformity between the FCNM and domestic law, the FC overrides national legislation, be it antecedent or posterior - Checking whether the State provides for the *automatic standing incorporation* or the *legislative ad hoc incorporation* (see *Rationale* for more details) for incorporating the provisions of the FCNM in the domestic legal system - Verifying whether minority protection in the domestic legal system is included in a comprehensive act or is scattered across various legal instruments	- Texts of the national legislation available through: - *Direct source* : - Official Gazettes - National/Local Parliaments´ - Official web portals - *Indirect sources* : - Data bases collected by - Private and public research institutes (e.g. MIRIS/EURAC) - International organisations (e.g. OSCE/ODIHR) - FCNM´s monitoring mechanism: - States´ Reports - ACFC Opinions - Government Comments - CoM Resolutions - Shadow Reports
	Scope of application FCNM and definition of minorities	- Verifying whether a declaration and/or reservation has been introduced upon the ratification of the FCNM - Checking whether a declaration made with respect to the FCNM has a territorial, personal or other basis - Verifying the basis - language, religion, ethnicity, culture, citizenship, residence, ´long lasting ties` with the territory or other factors – upon which a declaration limiting the personal scope of application of the FCNM has been introduced - Verifying whether there is a difference between the definition of ´national minorities` provided by the state concerned for the application of the FCNM and the definition of minorities existing in the national legislation for other purposes - Establishing which legal source – Constitution, statutory law, other - the state concerned uses as a reference to define a	- Texts of the national legislation available through: *see above* - Implementing documents : - Administrative measures - Regulations - Governmental policies - Framework Convention´s monitoring mechanism: *see above* - States´declarations/reservations with respect to the FCNM

		´national minority` and whether this implies the exclusion of certain groups and, if so, on which grounds - Assessing whether a registration procedure is necessary in order to be officially recognised as a ´national minority` in the country concerned - Checking whether some level of ´substantiation` as to the membership to a ´national minority` is required in order to be officially recognised - Verifying whether a system of redress is foreseen in the national legislation to challenge the non-recognition of a group as a ´national minority` - Checking whether small groups have to be affiliated with larger groups in order to be recognised as ´national minorities`	
	Data collection	- Verifying the existence and methodology used for data collection - general nationwide census, specific data collection, ad hoc studies - Checking whether data on minorities are disaggregated on the basis of gender, age, rural/urban environment and/or other criteria - Assessing whether confidentiality and voluntary nature of the statements is ensured - Verifying whether representatives of minorities are involved in the process of data collection, including the training for officials on data collection, and in the design of methods of collection of such data - Checking whether forms and questions pertaining to data collection are also available in the minority language(s)	- Texts of the national legislation pertaining to data collection/census available through : *see above* - Administrative instruments required to carry out the collection and processing of data: - explanatory materials - forms - Framework Convention´s monitoring mechanism: *see above*
	Right to Equality and Non-Discrimination		
	Anti-discrimination legislation	- Checking whether a comprehensive anti-discrimination legislation on grounds of belonging to a minority exist within the domestic legal system or is provided in scattered legislative instruments - Checking which grounds other than belonging to a minority, such as ethnicity, race, colour, language, religion or belief, national origin, are included in the anti-discrimination legislation - Checking whether positive actions or special measures for	- Texts of the national legislation in particular domestic criminal laws, special measures or exemptions from general laws, especially their timing and location, available through: *see above* - Framework Convention´s

		minorities are foreseen in the national legislation - Verifying whether the prohibition of indirect forms of discrimination are foreseen in domestic legislation - Checking whether specific crimes and sanctions are foreseen against acts of discrimination - Verifying whether domestic legislation foresees penalties for racial, ethnic or religious motivated crimes and/or incitement to racial, ethnic or religious hatred - Verifying whether a specific monitoring system on discrimination and on the implementation of the relevant legal provisions is foreseen in addition to the traditional judicial systems - Checking whether a specific mechanism of redress and compensation for cases of discrimination, in addition to the traditional judicial system, is provided for in the domestic legal system - Checking whether the systems of redress provided by law for case of discrimination are not unattainable by ordinary citizens for exceedingly high costs, short deadlines or complex procedures - Verifying whether national legislation defines and prohibits racial/ethnic profiling, i.e. the use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities	monitoring mechanism: *see above* - Implementing documents: *see above*
	Linguistic Rights	- Checking whether the use of minority language(s) in contacts with administrative authorities is provided in a comprehensive and clear legal framework - Verifying whether the availability of information, advice and language translation in minority language(s) is foreseen to facilitate the access to public service - Determining whether a quota or other numerical limitations (i.e. contingents) are in place for the use of minority language(s) with administrative authorities - Assessing whether attestations, civil documents and certificates can be acquired in the language(s) of minorities	- Texts of the national legislation where reference to linguistic rights is made and the precise territorial and personal scope of application of these documents: *see above* - Framework Convention´s monitoring mechanism: *see above* - *Implementing* documents: *see above*

		- Checking whether a legal provison on the use of the language(s) of minorities (in accordance with the language system) for personal names and/or topographical indications is foreseen, and, if so, whether it is based on a quota or other numerical limitations (i.e. contingents) - Verifying whether domestic legislation provides for those arrested or detained the right to be informed in the minority language(s) of the reasons of his/her arrest/detention and of the nature and cause of the charges against him/her - Checking whether the national legal system provides for the right to defence in minority language(s), and if so, under which conditions - Assessing whether, and under which conditions, domestic legislation provides for the possibility to conduct judicial proceedings in the minority language(s)	
	Educational Rights	- Verifying whether a comprehensive legal framework establishing, *inter alia*, clear responsibilities among the authorities concerned, is foreseen within the domestic legal system - Determining the number of hours and types of schools - pre-school and kindergarten, primary and secondary schools, Sunday schools/Summer camps, tertiary education – where it is possible to learn the minority language(s) - Determining the number of hours, typology of school disciplines and types of schools where instruction is provided through the medium of the minority language(s) - Checking the geographical extension - country-wide or minority territories - of the provision regarding the learning of the minority language(s) and receiving instruction through the medium of minority languages(s) - Assessing on which basis - expressed desire for it by minorities, evidence need for it, numerical strength that justifies it – the provision of teaching ´in` and ´of` minority language(s) is foreseen in the domestic legal system - Checking whether specific measures are foreseen to counteract the absenteeism among children of minorities, in particularly among girls and Roma, Sinti and Travellers	- Texts of the national legislation available through: *see above* - Implementing documents : *see above* - Framework Convention´s monitoring mechanism: *see above*

		- Verifying whether the conditions for individuals belonging to minority groups to establish private minority educational institutions are the same as for the majority - Checking whether private educational institutions with different cultural, religious or linguistic background can obtain equal status as public schools - Assessing whether there is a provision facilitating the establishment of centres for minority language and educational curriculum development and assessment - Checking whether representatives of minorities are involved in the development and implementation of programming related to minority education/policy formulation of curriculum development as it relates to minorities - Assessing whether 'positive actions' such as specific financial support for minority schools, are foreseen to encourage private minority educational institutions - Verifying whether public subsidies or tax exemptions for private minority educational institutions are foreseen on equal basis with private educational institutions of members of the majority - Checking whether private minority educational institutions are entitled to seek their own sources of funding or other support such as textbooks and training for teachers - from various domestic and international sources, in particular from kin-states - Assessing whether legal rules provide for the promotion of awareness raising of cultural and/or religious diversity in the national (general compulsory) curriculum for all children belonging to the majority and minority, and if so, whether it is extended to the national territory or limited to the minority territories - Checking whether the use of cultural or religious minority symbols is allowed for teachers and/or pupils, and in which type of schools - pre-school and kindergarten, primary and secondary schools, Sunday schools/Summer camps, tertiary education - Verifying whether specific measures such as reserved places or quota systems are provided to promote vocational education for members of minorities	
	Freedom of Religion	- Checking whether a comprehensive legal framework addressing concerns expressed by religious minorities is provided for in the	- Texts of the national legislation available through: *see above*

		domestic legal system - Assessing whether the conclusion of agreements between the government and churches and/or religious communities is foreseen in the domestic legislation - Checking whether the appointment/election of the clergy within religious communities is decided by the minority group itself or by the public authorities - Checking what are the competences – types and scope (territorial and/or personal) - of the clergy belonging to religious communities - Verifying whether religious communities can be recognised as national minorities - Checking whether public subsidies or tax exemptions are provided on equal basis among all religious bodies and churches - Verifying whether the use of minority language(s) is allowed in public worship and liturgical ceremonies - Checking whether the national legislation provides for legal protection in case of destruction and/or confiscation of the institutions, sites and properties belonging to religious communities or possessing a religious character	- Implementing documents : *see above* - Framework Convention´s monitoring mechanism: *see above* - Specific agreements concluded with different religious communities or churches
	Media Rights	- Checking whether domestic legislation provides for the allocation of frequencies for TV/Radio programmes - including those available through digital modes of distribution - run by/for minorities - Verifying whether the allocation of frequencies and time slots allotted to minority language programming concern public and/or private media, and is extended country-wide or only to minority territories - Assessing on which basis - expressed desire for it by minorities, evidence need for it, numerical strength that justifies it - frequencies and time slots as well as funding are allocated to minority language programming - Checking whether domestic legislation include provisions encouraging the media either to employ members belonging to national of minorities or to specialise in reporting on minority issues - Determining whether participation of persons belonging to minorities in supervisory boards of public service broadcasts is	- Texts of the national legislation on traditional printed media, radio/TV broadcasting and new technological means, available through: *see above* - Implementing documents : *see above* - Framework Convention´s monitoring mechanism: *see above*

		prescribed by law - Verifying whether access to transfrontier media i.e. originating from abroad is subject to legal restrictions - Checking whether codes of conduct for media professionals regarding the reporting on minority issues, for instance on the use of derogatory or pejorative names and terms and negative stereotypes is provided for in the domestic legal system	
		Effective Participation in Public Life	
	- Effective participation in cultural, social and economic life	- Checking whether a specific complaints body providing assistance to members of minorities who have been discriminated against in the labour market is foreseen in the domestic legislation in addition to the traditional judicial system and the trade unions - Verifying whether a specific monitoring-system checking possible discrimination against members of minorities in the labour market is provided for in domestic legislation - Assessing whether national labour law provides for cultural and religious diversity among workers, including members of minorities (e.g. flexible holidays, times for prayer, respect for dietary and clothing requirements) - Determining whether national law imposes residency and/or citizenship requirements to be recruited for a job in the public and/or private sector - Checking whether domestic law allows for positive action to promote the employment of minorities in the public administration, and whether this is extended to the national territory or is limited to minority territories - Verifying whether state language proficiency requirements are placed on public administration personnel - Checking whether national legislation allows for the use of cultural and/or religious minority symbols in the public administration - Verifying whether domestic law provides for any specific incentives for employers to invest in training and language skills for workers belonging to minorities - Assessing whether, and under which conditions, the national legal system provides for vocational training in the minority	- Texts of the national legislation, in particular labour law and legislation on the public administration, social assistance, health and cultural associations, available through: *see above* - Implementing documents : *see above* - Framework Convention´s monitoring mechanism: *see above*

		language - Checking whether and which conditions, domestic law allows for the use of the minority language for business enterprises in addition to the use of official language - Verifying whether residency requirements are necessary to register and/or run a private business - Checking whether national legislation provides that minority interests are taken into account in the context of privatisation and property restitution processes - Verifying whether the requirements to obtain public housing and/or housing benefits for persons belonging to a national minority are the same as the members of the majority - If a limited number of persons belonging to a national minority is allowed to public housing and/or housing benefits, assessing the conditions for determining this number - fixed by law or defined either by percentage or by absolute figure - Verifying whether domestic legislation takes into account cultural, religious and/or linguistic diversity of patients in the -medical sector - Verifying whether citizenship and/or residency requirements are necessary to obtain health services and/or social assistance - Checking whether social members of minorities have access to all social assistance payments on equal footing as members of the majority - Assessing whether the conditions for individuals belonging to minority groups to form cultural associations are the same as for the rest of the population - If public subsidies or tax exemptions are foreseen, checking whether they are provided on equal basis with the cultural associations of members of the majority - Verifying whether domestic legislation encourages cultural associations of minorities by introducing a 'positive action' approach, such as specific financial support for associations - Checking whether national law provides for a right to adopt the name of a cultural association in the minority language(s), and whether such corporate name is recognised and used by public authorities in accordance with given community's language system	

	- Effective participation in public affairs	- Checking whether national legislation provides for active and/or passive voting rights – namely, the right to vote and the right to be elected - independently on the national citizenship and/or residency requirements and at which level (national, regional/provincial, municipal, referenda/petitions) - Verifying whether language proficiency requirements are imposed by law on candidates for parliamentary and/or local elections - Checking whether national law provides for bodies, within appropriate institutions at the national and/or local level, for dialogue between governmental authorities and minority groups - Verifying the authority of these bodies (consultative/advisory power or decision making power), the status (standing body, ad hoc, part of or attached to legislative or executive branch, independent), the composition (in particular, whether the body is composed of members of minorities and not only for them), mechanism to choose the members of the body (election by members of minorities, delegation from associations of minorities, appointment by public authorities) - Checking whether the use of minority language(s) by elected members of regional/local governmental bodies during the activities related to these bodies is guaranteed by law - Verifying whether the legal requirements to form a political party formed on/by minorities are the same as for any other political party - Checking whether domestic legislation provides for the use of minority language(s) in public service television and radio programmes during election campaigns - Checking whether special representation of minority groups is guaranteed in the legislative process, at which level, on which subjects and how is it arranged (reserved number of seats, quota, qualified majority, dual voting, veto right, exemption from threshold requirements, guarantees against redrawing of administrative boundaries, ´gerrymandering`) - Checking whether the participation in public affairs of small groups is conditioned by law to the affiliation into larger groups - Checking whether domestic legislation or customary	- Texts of the national legislation available through: *see above* - Implementing documents : *see above* - Framework Convention´s monitoring mechanism: *see above*

		practice/informal understanding allocates to minorities cabinet positions, seats in the supreme or constitutional court or other high-level organs at the national, regional/provincial o local - Checking whether participation of minorities in public affairs is prescribed as participation in the governance of the State or self-governance over certain local or internal affairs - Verifying whether legal provisions on forms of self-governance arrangements are foreseen on a non-territorial basis (e.g. local and autonomous administration) or territorial basis (e.g. autonomy on a territorial basis including existence of consultative, legislative and executive bodies chosen through free and periodic elections), a combination thereof, the provision of financial, technical or other forms of assistance or self-administration of certain subjects - If self-administration of certain subjects is prescribed, verifying which subjects and functions are exercised by central authorities and which by forms of self-governance - If territorial self-governance arrangements are foreseen, checking which subjects and functions are devolved to the central authorities and which to the local authorities - Checking how self-governance arrangements can be modified (constitutional law or ordinary law; by qualified minority, qualified majority or simple majority) - Verifying whether domestic law provides for a special mechanism, committee or body such as judicial review, courts, national or local commissions, ombudsperson, inter-ethnic boards, for the resolution of grievance about governance issues - Checking whether national law provides for the consultation or other forms of involvement of minorities when considering legislative and administrative reforms that may have an impact on them - Verifying whether domestic legislation guarantees the participation of persons belonging to minorities in the monitoring process of the FCNM, for instance, in drafting State Reports and/or other written communications required by the FCNM	

Judiciary Indicators

Domain	Indicator	Index	Data Sources
Courts' structure and organisation			
	Awareness raising about minority issues and training on the FCNM	- Number of trainings/seminars and publications dedicated to inform and sensitize legal practitioners, judges and prosecutors, judicial police and civil servants in judicial administration about minorities and their situation in the respective country - Number of trainings on the FCNM (and other international instruments) organized for legal practitioners, judges and prosecutors, judicial police and civil servants in judicial administration - Number of trainings on national legislation targeting minorities organized for legal practitioners, judges and prosecutors, judicial police and civil servants in judicial administration - Organization of such trainings throughout the country - Quality of the above training activities (duration and language of trainings, who delivered the training - Production of leaflets, short guides to the FCNM - Translation and circulation amongst the above professional groups of the FCNM, the explanatory report, the state reports, the opinions of the Advisory Committee and the resolutions of the Committee of Ministers - Meetings of the above professional groups with the working group of the Advisory Committee on its country visit - Number of follow-up seminars for this target group to inform about the results of the monitoring process Newsletters informing about minority issues - Establishment of offices specialized on the dissemination and awareness raising efforts	- Local/regional/national bar association - Judges and prosecutors' associations - Dept. of courts' administrations responsible for continuing education - Law faculties - Ombudspersons' reports and other relevant material of their offices - Programmes of trainings on FCNM/monitoring results/minority and HR issues - Material used and distributed during such trainings - Lists of participants
	Minority representation in legal professions	- Legal provisions that provide for a certain representation of persons belonging to national minorities within the judiciary - Collection of data on numbers of persons belonging to national minorities within the judiciary - Action plans to increase the recruitment of persons belonging to national minorities in the judiciary	- National legislation and governmental programmes - Statistical data collected by courts, statistical offices - Ombudspersons' reports and other relevant material of their

		- Training programmes with the aim to increase the recruitment of persons belonging to national minorities in the judiciary - Other incentives to encourage persons belonging to national minorities to apply for a position within the judiciary - Collection of data on the hierarchical level at which persons belonging to national minorities are employed within the judiciary - Disaggregation of data by sex, age and geographical distribution	offices
	Accessibility to the judiciary	- Legal provisions concerning the use of a minority language in contacts with judicial authorities - Legal provisions concerning the use of a minority language as language of the process or language in the process - If there are such provisions, number of cases disputed in a minority language or bilingually - Number of translators and interpreters employed at a court - Provision of translation/interpretation free of charge - Number of minority language courses offered to persons working within the judiciary - Number of persons participating in minority language courses - Use of sings in offices and court buildings in minority language - Information on the website of the courts available in minority language - Legal aid provided free of charge - Number of mobile teams in order to ensure the outreach of legal aid - Measures to alleviate the negative consequences with regard to the access to the judiciary for persons affected by a limited freedom of movement or living in peripheral areas (e.g. establishment court liaison offices where court hearings can be organized, number of such offices, frequency of court hearings)	- National legislation and governmental programmes - Statistical data collected by courts / human resources department of the authority recruiting judges, prosecutors and civil servants in the court administration - Ombudspersons' reports and other relevant material of their offices
	Coordinated efforts in dealing with discriminations or ethnically motivated incidents	- Definition of the concepts of inter-ethnic violence, ethnically motivated incident and the like - Collection of comprehensive data on the status of investigation and prosecution of ethnically based incidents - Drafting of monthly reports about ethnically, religiously or racially motivated incidents by law-enforcement bodies, prosecutors offices, courts	- If existing, statistical data collected by courts, prosecutors' offices, police stations - (Monthly/yearly) reports courts, prosecutors' offices, police stations

		- Exchange of such reports among these offices - Establishment of an ombudsperson - Monitoring of implementation of judicial decision related to ethnically, religiously or racially motivated incidents - Training and sensitization of police to react to ethnically, religiously or racially motivated incidents - Recruitment of persons belonging to national minorities into law-enforcement bodies and judicial structures - Campaigns against inter-ethnic violence - Information provided to citizens, in particular persons belonging to national minorities on which remedies exist in case they are confronted with discrimination or inter-ethnic violence or everyday manifestations of intolerance - Media coverage on ethnically, religiously or racially motivated incidents - Acknowledgment of ethnically motivated violence at the top of the state authorities and political forces	- Public relations offices of courts - Ombudspersons' reports and other relevant material of their offices - Newspapers, radio and TV broadcasts - Speeches of politicians
Judgments			
	Direct applicability of the FCNM within the national systems	- Theory followed by the Constitution: monism – dualism - Primacy of the FCNM (and other international treaties) over the Constitution - Primacy of international treaties over national laws - Same hierarchical position as national laws - Check by constitutional court	- Constitution - Constitutional courts cases - Other courts cases
	Number of cases and fields covered	- Number of cases with direct reference to the FCNM - Number of cases with a minority subject - Number of cases with a minority subject resolved to the advantage of a minority claimant - Which fields were covered by cases that made reference to the FCNM - FCNM used by national or European courts in the context of human rights related litigation	- Constitutional courts cases - Other courts cases - Ombudspersons' reports and other relevant material of their offices
	"Constructive" use of the FCNM	- FCNM as source of interpretative inspiration, influence on the definition and interpretation of certain concepts - FCNM as parameter for adjudication - FCNM interpreted as European standard	- Constitutional courts cases - Other courts cases - Ombudspersons' reports and other relevant material of their

		- FCNM used in human rights related litigation	offices
	"Disruptive" use of the FCNM	- Used as justification for reducing minority rights - Used as argument for restrictive interpretations - Used to show that no common European standard exists in a certain field of minority rights - Used in human rights related litigation	- Constitutional courts cases - Other courts cases - Ombudspersons' reports and other relevant material of their offices
	Implementation of court rulings	- Has the judgment influenced the political discourse? - Has there been any public debate about the ruling? - Has it been reported on the media? - Has it been discussed in the government? - Has it been discussed in the parliament? - Has any concrete governmental action or programme resulted from these discussions? - Have more funds been allocated to address the problem? - Has there been any legislative change?	- Speeches of political leaders - Newspapers, radio and TV broadcasts - Protocols of governmental/parliamentary discussions - Legislation and governmental programmes - Ombudspersons' reports and other relevant material of their offices

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