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Indicators for Assessing the Impact of the FCNM in its State Parties

Draft Study prepared by

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A. Introduction

The aim of this study is to identify indicators that help assess the impact of the FCNM. Impact is understood in this study in the positive sense of improvements in the legislative and political environment that furthers the implementation of protection of persons belonging to national minorities. Any negative impact visible in countries parties to the FCNM may also be referenced.

The use of the term indicator is therefore modest in this study. The material available on FCNM implementation does not allow for assessing the performance of the FCNM in terms of policy-to-outcome, i.e. the direct impact on the improvement of the lives of persons belonging to national minorities.¹ The performance of the FCNM may, however, be assessed in terms of its impact on domestic legislation and policies as well as its ability to inform the domestic political discourses.² Legislative impact is measurable through policy indicators, i.e. the direct impact of the FCNM on the adoption of new domestic legislation or harmonization thereof as well as on case law, on new formal policies as well as on formal and informal strategies in various domains. Discourse impact is measurable through performance indicators, i.e. the impact of the FCNM on domestic parliamentary politics, on public media and public narratives, on activities in the public space, the inter-cultural dialogue between the minorities and the majority as well as on informal government policies and strategies. As such, this study attends primarily to the performance of the FCNM as a process. A process evaluation of a legal instrument can assess how effectively the instrument is being implemented by focusing on aspects, such as who is participating, what activities are being offered, what actions have been taken, and what practices are put in place. A process evaluation may be conducted when problems, such as delays in implementation are happening, or when beneficiary dissatisfaction has been detected by the monitoring system. Process evaluation tends to rely on less formal evaluation designs and modes of inquiry, such as self-evaluation and expert judgments.³

In this study policy indicators will be piloted in the legal domain in terms of legislative developments, public policies and jurisprudence and in the political domain in terms of government actions and practices. Performance indicators will furthermore be piloted in the political domain in terms of political discourses. Other domains, such as the cultural, social and economic spheres will be addressed only in relation to the two domains in focus and will not be the objective of indicator piloting.

The report is divided into three main parts corresponding to the fields of government actions/practices and political discourse (B.), legislative developments and public policies (C) and finally in the field of the judiciary (D).⁴

¹ For policy-to-outcome analysis in the field of language policies, see the report “Support for Minority Languages in Europe (SMILE)” authored by Francois Grin and Tom Moring of 15.02.2002, Chapter 3.

² For a compilation of legal indicators in the law of ‘new’ minorities, see LISI

³ Jeni Klugman (ed.), *A Sourcebook for Poverty Reduction Strategies*, Vol. 1: Core Techniques and Cross-Cutting Issues (Worldbank, Washington, D.C. 2002) available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/08/18/000112742_20040818172234/Rendered/PDF/2980000182131497813.pdf

⁴ Tove Malloy was mainly responsible for part B., Roberta Medda-Windischer for part C. and Emma Lantschner for part D., with Joseph Marko providing important comments to earlier drafts of this study.

It needs to be stressed that in the empirical application of the identified indicators, these three parts cannot be considered separately but need to be seen as a continuum or process and be linked with each other. For instance, in order to establish whether the adoption of minority-related legislation can be considered as an impact of the FCNM it might not be enough to simply state that the legislation has been adopted after the entry into force of the FCNM. Such time coincidence might be purely accidental. It is thus also necessary to look into how parliamentary discourse developed, how much attention is given to FCNM provisions in public spaces and so forth in order to establish a link between the FCNM and the adoption of new legislation.

The indicators developed in this study should be considered as an initial brainstorming and food for thought which should help bring about a methodology for assessing the impact of the FCNM in its state parties. For further improvement of these indicators, the participatory method would enhance the result by including members of national minorities directly in the design of indicators.

B. Political Discourse Indicators

I Theoretical Issues

The political discourse of the Framework Convention in terms of processes of implementation in States parties to the instrument is the focus of this chapter. Moving from legal and policy analysis to discourse analysis requires a shift in theoretical focus. Political discourse is not only a matter of articulations in public debates; it is also a function of institutional behaviour. The notion of discourse cuts across the distinction between thought and reality and includes both semantic and pragmatic aspects.⁵ The relational aspect of the actions, events and debates informed by the Framework Convention thus constitute its political discourse. Indicators measuring the influence of the Framework Convention on actions, events and debates must inform us not about the instrument's normative influence on policies but its normative affect on the behaviour of government agencies and officials as well as on actors in political discourses, especially politicians. This is particularly relevant with an instrument which is not a rights conferring instrument but rather a framework offering norms that States parties to the instrument should implement in domestic law. As the Framework Convention thus allows for a broad margin of appreciation, States parties to the instrument are provided with not only a generous freedom to making changes in the behaviour of their agencies but also opportunities to inform the public debate. It provides government agencies with the opportunity to take action, instigate new practices and inform debates. The indicators are thus technically performance indicators in that they inform us of the performance of actors in the political discourse while being under the influence the normative force of the instrument.

II Thematic domains

The indicators described in this chapter pertain to two thematic domains. With regard to government agencies, indicators must describe not only the type of new and improved actions and practices but also the type of actors as well as pay attention to an increase or decrease in number of actions and describe the objectives of these. Measuring practices, it is necessary to identify a number of the same type of actions in order to assess whether a new practice has been put in place. In addition, it is important that indicators describe government behaviour in terms of individual action, especially the individual action of high level officials, such as cabinet ministers and permanent secretaries. Changes in government behaviour are of course induced primarily by the legal power of the Framework Convention but its normative influence on attitude change must also be taken into account. Attitude change has many sources, one of which is public debates. It is therefore natural to monitor the political debates on national minority rights in States parties to the Framework Convention in conjunction with measuring changes in government actions and practices.

⁵ Jacob Torfing, *New Theories of Discourse*. Laclau, Mouffe and Zizek (Blackwell Publishers, 1999), p. 300.

With regard to political articulations about national minority rights in general and on the Framework Convention in particular, these are usually part of the broader political discourse on democracy and welfare. Indicators measuring the influence of the Framework Convention on the political debate in States parties to the instrument must describe the instrument's ability to influence such debates in terms of normative articulations. A discourse analysis of normative articulations with regard to the Framework Convention must include monitoring vocabulary used to describe ethical norms for national minority protection and empowerment. Technically, this means monitoring for a vocabulary of cultural and value pluralism, of the welfare aspect of national minority rights, of social cohesion, of national minority rights in terms of added value to society, and so forth. In fact, a list of vocabulary pertaining to any of the provisions in the Framework Convention can be drawn up and included in the description of a discourse indicator. Moreover, since there are numerous actors involved in public discourses, discourse indicators must describe the scope of the participants, the type and frequency of interventions. Like the analysis of normative articulations, performance indicators describing actors and interventions are both qualitative and quantitative. Technically, this means not only describing the parties to the debates and the type of interventions but also the frequency and placement of interventions. The indicator must measure all parties to the debate ranging from the highest level of parliamentary politics to the grass root level and including as noted above the national minorities and their organizations. Of importance are also members of the public media since the media is usually able to exert strong influence on opinion making and public and private attitudes. Private media and the national minorities' own media are likewise of relevance here. Other actors of note are individual personalities of political affiliation as well as independent. Actors may also include public fora not enshrined in law or public policies, such as ad hoc commissions, trade commissions and festival committees as well as non-governmental organizations. Indicators must therefore describe the discourse in terms of both normative articulations and actors and interventions.

Finally, the type of intervention must be described in terms of form. Interventions to the political debate can thus range from public hearings in parliaments to insignia in public spaces and implied messages in advertising. The higher in the hierarchy of interventions a message is posted, the more likely that its effect will be noticeable. Nevertheless, since frequency is also a matter, the more frequent intervention at the lower level, such as the flying of the flags of both the national state and the kin-state next to each other during public events may have similar strong effect. Of note are also history books and other public narratives. Books, pamphlets and web-sites are means by which parties to the discourse communicate. It is therefore not adequate to measure the number of direct references to the Framework Convention in any given debate and during any given period.

III Methodological issues

The piloting of indicators in the domain of government action and practices introduces a number of methodological issues. Two of the greatest pitfalls of piloting performance indicators are over-stretch in terms of detail, and reduction in detail to fit available data. Designing indicators that are too detailed prevents clarity, while limiting them to available

data prevents improvement of the entire monitoring process.⁶ Designing indicators to monitor the influence of the Framework Convention on political discourse is, nevertheless, kept detailed in this chapter since the aim of this study is to begin a larger process of continuous reflection on the instrument's impact. Moreover, even though the monitoring material pertaining to the Framework Convention is large and quite rich in detail, data on the tools available to government agencies and political discourse actors is not readily available within the realm of the Council of Europe publications. Ideas for the design of indicators must therefore also be culled from outside materials and studies of national minority issues.⁷

Techniques that would be required in using the indicators offered in this chapter may include questionnaires, surveys and interviews. Detailed questionnaires of appropriate design can provide fairly accurate information about new or improved action and practices initiated since the Framework Convention went into force, and surveys can describe the turn in public debates towards inclusiveness. Such data collection is important not only for its value in terms of assessing normative compliance of States parties to the instrument but also for the exchange of methodology between States as well as for other types of inter-state co-operation and for the design of new national minority rights mechanisms. Finally, for future improvement of these indicators, the participatory method would enhance the result by including members of national minorities directly in the design of indicators.

IV Discourse Indicators

In the following the indicators will be described under the two thematic domain headings, government actions and practices and public debate. Each section discusses the main observations about the domain, i.e. the reasons why it is valuable and feasible to monitor that particular domain and introduces the list of indicators of that domain. Each domain is further divided into sub-sections pertaining to each indicator which describes the indicator, including a definition, the rationale for measuring it, an index of precise measurements with explanatory comments, and a final discussion of the methodological problems of the indicator.

1. Government action and practices

Government agencies are arguably the core actors in implementing the provisions of the Framework Convention. In practice, institutionalized tools available to government agencies to implement international provisions include but are not restricted to establishing new departments or special sections with separate budget lines, and non-institutionalized tools include specific strategies, directives, programmes and projects with special budget lines or ad hoc budgets. Some of these would involve activities that ideally also would include members of national minorities. However, actions and practices in government agencies are usually the outcome of a carefully considered process of decision making and thus may remain confidential until a certain point is reached where the minorities can become involved and the general public informed. Once tools have been selected, government agencies can operationalize these through actions and practices that may or may not have

⁶ Monitoring and Evaluation: Some Tools, Methods and Approaches, 2nd edition (World Bank, 2004)

⁷ HCNM resolutions

targets and objectives. Such actions and practices as well as targets and objectives can be monitored with the help of performance indicators. In addition to and in support of tools selected by government agencies, individual members of agencies, such as members of cabinet, dignitaries and high ranking officials may take individual action which can also be monitored. Finally, ad hoc circumstances can warrant certain actions.

The actions and practices of government agencies that may improve the implementation of the provisions of the Framework Convention are numerous, and it is beyond the scope of this chapter to list all. Below a few⁸ are offered to illustrate this normative force:

- Remove barriers against equal access
- Collect disaggregated data
- Initiate specialized training programmes and ethnic sensitivity training for public servants
- Remove excessive regulations and monitor new regulations
- Ensure transparency and disclosure requirements
- Promote stakeholder participation
- Avoid gerrymandering
- Initiate mainstreaming in public service and governing boards and ensure periodic review of membership
- Provide capacity training for stakeholders
- Conduct outreach activities to public administration institutions
- Initiate regional development initiatives
- Promote cross-border co-operation
- Initiate economic rehabilitation programmes
- Design comprehensive sectoral policies
- Initiate awareness campaigns to inform the general public
- Experiment with alternative models of participation
- Mediate on certain issues (after veto voting)
- Make public the work of consultative bodies
- Provide incentives to private sector, especially the media
- Consult with experts

Government actions and practices will be discussed in terms of the following set of four indicators:

- A. Institutionalized inter-cultural dialogue
- B. Dissemination efforts
- C. Funding behaviour
- D. Mainstreaming efforts

⁸ See Commentary on participation (forthcoming)

Indicator A: Improved support for institutionalized inter-cultural dialogue

Definition: Measuring improved support for institutionalized inter-cultural dialogue requires an index describing the changes in adoption of various specific mechanisms, including innovative models, tools, practices and functions that government agencies can establish to further the joint implementation of the Framework Convention.

Rationale: There is no specific provision in the Framework Convention placing obligations on States parties to create institutionalized support for inter-cultural dialogue. However, there are several references to inter-cultural dialogue in the text of the Framework Convention, and promotion of dialogue is a distinct obligation of States parties to the instrument.⁹ AC opinions continue to stress the need for improved dialogue in States parties to the instrument.¹⁰ Institutionalized inter-cultural dialogue support not only furthers the inter-cultural dialogue, it also sends an important message to the political discourse that governments are prepared to view the governing of society as an inter-cultural affair.

Nevertheless, concerns regarding the composition and the appointment procedures to minority advisory councils, as well as the scope for consultation of advisory councils, continue to be expressed by representatives of national minorities.¹¹ Thus, improvements are necessary with regard to the participation of persons belonging to national minorities in the taking of decisions concerning them. In some States parties to the Framework Convention, authorities have broadened the forms of consultation but planned implementation has been delayed.¹² In other States further consultation structures for representatives of national minorities need to be developed in order to improve their participation in decision-making.¹³ Moreover, some minority organizations remain outside consultative mechanisms. It is difficult for them to be heard and to influence the work of the consultative mechanism.¹⁴ Insufficient participation of national minority representatives in decision making can therefore hinder the action taken by the authorities in the fields concerned.

In some cases authorities' initiatives have not always been sensitive to the minorities' views.¹⁵ In this connection it is important to note that although offices responsible for minority issues have shown clear commitment to their tasks, their effectiveness and capacity in some States parties to the Framework Convention have been negatively affected by frequent shifts and changes in their institutional responsibilities.¹⁶ An important problem in the protection of national minorities thus also pertains to the implementation of the relevant norms in practice, which is at times hampered by the limited cooperation between the relevant authorities and by the lack of clarity as to their relative competences.¹⁷

⁹ Preamble and Art. 6

¹⁰ See discussion in Geoff Gilbert, "Article 6" in Weller (ed.), *The Rights of Minorities* (Oxford University Press, 2005), pp. 177-191.

¹¹ See CM Resolution on Austria, 2nd cycle

¹² See CM Resolution on Armenia, 1st cycle

¹³ See CM Resolution on Azerbaijan, 1st cycle

¹⁴ See CM Resolution on Spain, 2nd cycle

¹⁵ See CM Resolution on Norway, 2nd cycle

¹⁶ See CM Resolution on Sweden, 2nd cycle

¹⁷ See CM Resolution on Serbia, 1st cycle

Other staple processes that are lacking include monitoring and development plans. Ombudspersons should institutionalize systematic periodic monitoring, including monitoring of incidents of discrimination based on ethnic origin.¹⁸ Ombudspersons should also monitor the election process of the minority self-governments, which have regularly led to abuses and made it possible for a number of candidates to be elected in respect of a minority with which they had no link whatsoever, thus affecting the credibility and functioning of the minority self-governments.¹⁹ When drafting development plans, especially for Roma inclusion, it is important to involve Roma representatives in the design, implementation, monitoring and evaluation of such plans aimed at promoting social and economic integration.²⁰

There is furthermore a need to give special attention to the impact that the implementation of administrative reforms may have on persons belonging to national minorities, notably in terms of political representation at the municipal and regional levels.²¹ Any mergers or administrative and territorial changes could neglect the concerns of persons belonging to national minorities.²² In this regard, forced dissolution of a municipality with a national minority identity in order to allow certain economic pursuits to continue is not acceptable. Forced dissolution may make the preservation of the national minority identity more difficult due to the population displacement involved.²³

Index:

- 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 Framework Convention
- Adopting development plans
- Adopting new or improved monitoring practices, including efficiency control

Explanatory comment: In many States parties to the Framework Convention contacts between the relevant agencies and leaders of national minorities already exist. The function of participation in the political and social process of implementing the Framework Convention as well as in other relevant political matters is considered important in democratic societies seeking inclusion of all national and ethnic groups.²⁴ In addition to

¹⁸ See CM Resolution on Armenia, 2nd cycle

¹⁹ See CM Resolution on Hungary, 2nd cycle

²⁰ See CM Resolution on Spain, 2nd cycle

²¹ See CM Resolution on Denmark, 2nd cycle

²² See CM Resolution on Russia, 2nd cycle

²³ See CM Resolution on Germany, 1st cycle

²⁴ See Joseph Marko “Effective participation of national minorities: a comment on conceptual, legal and empirical problems” DH-MIN report 20 October 2006 available at

being a provision of the Framework Convention,²⁵ participation also provides members of national minorities with an opportunity to learn from the process and become democratic actors in mainstream society. Participation is thus considered a democratization tool in that it helps societies overcome deep divisions as it forces all sides to meet and discuss the process.

In the best case scenarios, permanent institutionalized inter-cultural dialogue mechanisms exist to include national minority representatives in the political and social process of implementing the Framework Convention as well as in other political processes. This can be either through various types of autonomy, or political representation at all levels.²⁶ Together with political parties, political bodies thus provide the venues for interfacing with government agencies and parliaments.²⁷ Commendable efforts have been made through the devolution process in Scotland, Wales and Northern Ireland, to create the conditions necessary for persons belonging to national minorities to participate effectively in affairs concerning them. Devolution has brought with it increasing awareness and demand for recognition of the identity and in particular the language of national minorities, for which there remains scope for further protection, notably concerning the use of Irish.²⁸

The German authorities have recently supplemented the mechanisms for consulting minorities at federal level with the creation of the position of Secretariat for Minorities. This is a new step forward in dialogue between minorities and the federal bodies. It helps strengthen the visibility of minorities at federal level and offers greater opportunities for minorities to voice their concerns to the federal executive and legislative.²⁹ Italian authorities are currently studying the possibility of establishing a Permanent Conference of Minorities, which would have an advisory capacity and would also include representatives of the Roma, Sinti and Travellers.³⁰ Norway has established a “Forum for contact between national minorities and the authorities” as well as other existing means of consultation.³¹ In Armenia, a Department for Ethnic Minorities and Religious Issues was set up in the government in 2004, to initiate and co-ordinate policy-making on issues relevant to national minorities.³²

While the creation of permanent institutionalized mechanisms ensures the continuity of the process from one political administration to another, follow-up meetings are important for the immediate implementation issues. The current list of follow-up seminars to the second monitoring cycle stands at ten whereas the first monitoring cycle yielded 24 follow-up.³³ In the Czech Republic an annual assessment of the situation is carried out by the Council for

http://www.coe.int/t/e/human_rights/minorities/4_intergovernmental_co-operation_%28dh-min%29/2_documents/PDF_DH-MIN_EffectiveParticipation_JMarko_en.pdf

²⁵ Article 15

²⁶ See Part I of this report as well as CM Resolution on Poland, 1st cycle

²⁷ See DH-MIN “Handbook on minority consultative mechanisms” 20 October 2006 available at

http://www.coe.int/t/e/human_rights/minorities/4_intergovernmental_co-operation_%28dh-min%29/2_documents/PDF_DH-MIN_Handbook_MinConMecanisms_en.pdf

²⁸ CM Resolution on the United Kingdom, 1st cycle

²⁹ CM Resolution on Germany, 2nd cycle

³⁰ CM Resolution on Italy, 2nd cycle

³¹ CM Resolution on Norway, 2nd cycle

³² CM Resolution on Armenia, 2nd cycle

³³ See http://www.coe.int/t/e/human_rights/minorities/3_co-operation_activities/2_follow-up_activities_connected_to_the_monitoring/1_Follow-up_seminars/index.asp#TopOfPage

National Minorities, with the participation of representatives of national minorities.³⁴ Germany has regularly convened implementation conferences with participation of public administrations and representatives of national minorities to discuss implementation issues.³⁵

The Danish Ministry of the Interior and Health approached local councils in the counties where the German minority lives with a letter including general briefing on/reminder concerning the special circumstances of which the public authorities must be aware in their handling of cases relating to the German minority, including the significance of the Framework Convention as it applies to the German minority. By means of the letter, it was the Ministry of the Interior and Health's intention to help prevent misunderstandings arising to the detriment of relations between the two population groups in South Jutland as a result of inattentiveness.³⁶

Methodological concerns: To populate this indicator would not require considerable extra work beyond the established monitoring system under the Framework Convention. Data is usually provided in the State reports and to the Advisory Committee's monitoring delegations. To improve the inter-state learning process of the Framework Convention, it might be fruitful to produce an overview table of institutionalized support. While such a document would have a shaming effect, it nonetheless facilitates in an easy accessible manner the furthering of inter-State knowledge and learning.

Indicator B: Increased and improved dissemination efforts

Definition: Measuring increased and improved dissemination efforts requires an index describing the various specific tools that government agencies can use to improve the knowledge of the Framework Convention among the general public.

Rationale: There is no specific provision in the Framework Convention placing obligations on States parties to the instrument to disseminate information about the instrument and its implementation. Measuring dissemination efforts exposes the extent to which the States parties to the Framework Convention have become interested, willing and ready to implement the provisions of the instrument in practice. However, awareness among the general public as well as among politicians and the media remains low. The Advisory Committee has pointed out many times that governments need to broaden the awareness and knowledge about the Framework Convention. Dissemination is a vital tool not only in awareness raising but also in the effort to improve minority-majority relations. Finally, dissemination is a core factor in keeping governance transparent and public.

³⁴ CM Resolution on the Czech Republic, 2nd cycle

³⁵ First report submitted by Germany pursuant to article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities, 24 February 2000

³⁶ Second report submitted by Denmark pursuant to article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities, 14 May 2004

Index:

- Establishing entities/appointing officer(s) dealing specifically with dissemination of issues related to the Framework Convention and/or national minorities
- Introducing new procedures/reforming information sections to include dissemination of issues related to the Framework Convention and/or national minorities
- Retaining or designating public servants with language skills to translate information material to and from national minority languages
- 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 Framework Convention 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 address particular issues
- Establishing of newsletter functions
- Number of awareness campaigns
- Number of press releases addressing the Framework Convention as well as national minority or related issues
- Number of new publications, pamphlets, posters and other info material issued
- Number of direct references to the Framework Convention in official documents
- Number of new web-sites about national minority rights or related issues established
- Number of new web links or information boxes on existing web-sites about the Framework Convention

Explanatory comments: As noted above, dissemination indicates a willingness to influence the public knowledge and discourse with a normative and inclusive view of national minority rights. It furthers awareness-raising among the public, politicians and the media regarding national minorities.³⁷ It thus contributes to the improvement of the inter-cultural dialogue while also indicating that the perceived notion of domestic society should allow for a multicultural conception. However, it is unlikely that States parties to the Framework Convention will establish separate sections to deal solely with dissemination efforts. But joint dissemination efforts with other Council of Europe instruments and policies would be feasible. Reforming existing information sections to include functions related to the Framework Convention is also a normative move that is worth monitoring. Improving existing government web-sites to include pages on the Framework Convention is another normative move. Retaining or designating specific public officials as translators may not be feasible, but appointing official external translators need not pose serious problems as long as the process of selection and appointment is transparent. Correct translation is important

³⁷ CM Resolutions on Armenia and Spain, 2nd cycle

not only for the sake of communication but also for the sensitivity to the past histories of national minorities who may have suffered strong assimilation efforts or persecution. Single words translated incorrectly or used inappropriately can cause pain and flare up past experiences.

Conferences, seminars, workshops and other types of gatherings discussing Framework Convention implementation and other national minority issues appears to be the preferred method and have increased in a number of States parties to the instrument. Sub-committees and ad hoc committees can address specific gaps in dissemination or particular events useful for increased dissemination. At the request of national minority rights representatives, the Danish authorities set up a sub-committee under the permanent committee addressing national minority issues to conceptualize new ways of dissemination knowledge about the Framework Convention.³⁸ Ad hoc committees organizing information campaigns about specific events, such as the issuing of state reports or the Framework Convention's first ten years are other feasible improvements to dissemination efforts. Another good practice example is the Schleswig-Holstein government's comprehensive handbook-type publication about the four recognized national minorities living in the sub-federal state. The publication is compiled and updated every five year and introduced on the local parliament floor for discussion.³⁹

Methodological concerns: To populate this indicator would require intensive qualitative and quantitative data collection among several government agencies even if the dissemination efforts are planned and organized from one central agency. Agencies related to individual provisions of the Framework Convention (education, interior, foreign affairs, etc.) would also have to be monitored for any use of the tools and materials available. Reviews of organizational charts and descriptions would be needed to monitor for changes in functions and personnel. Monitoring of public tenders would be required to identify appointment of translators. Conferences, seminars, workshops etc. can usually be identified through a review of press releases and newsletters. Finally, the frequency of dissemination in terms of publications, etc. and comparison to previous years would require a quantitative review of web-sites or information offices. It goes without saying that the information should be collected for any given year and compared to previous years.

Indicator C: Increased funding for implementation programmes

Definition: Measuring increased funding for implementation programmes requires an index describing not only an increase in actual funds allocated to specific programmes but also describing an expansion of budget lines as per the scope of thematic provisions enshrined in the Framework Convention.

³⁸ Interview with government official Danish Ministry of the Interior and Health, 14 May 2007

³⁹ Minderheiten- und Volksgruppenpolitik in der 16. Legislaturperiode (2005 –2010) – Minderheitenbericht 2007 <http://www.schleswig-holstein.de/STK/DE/Schwerpunkte/Minderheitenpolitik/Minderheitenbericht/minderheitenbericht2007.templateId=raw.property=publicationFile.pdf>

Rationale: There is no specific provision in the Framework Convention placing obligations on States parties to the instrument to fund programmes aimed at implementing the various thematic provisions of the instrument.⁴⁰ Moreover, there are no provisions for direct funding of national minority institutions and organizations. However, numerous expressions used in the instrument encourage States parties to the instrument to take adequate measures to ensure the implementation of the provisions of the Framework Convention. It is now a truism that effective implementation of most human rights comes at a price. Moreover, neglect of funding of certain social and cultural rights may render certain civil and political rights invalid.⁴¹ It is thus difficult to argue that normative implementation is taking place without some reference to funding schemes. Measuring the funding behaviour of government agencies is arguably one of the more tangible evidences of willingness and readiness to implement the provisions of the Framework Convention in practice. Of course, direct funding to national minority institutions remains the most normative approach. In a broader perspective it is also evidence that a State is moving toward a higher level of human security and human dignity as well as a developed stage of democracy.

In general, States parties to the Framework Convention have not identified possibilities to increase the support allocated to the activities of national minorities. Even if the legal and institutional framework for the protection of national minorities is developed, the financial difficulties affecting many fields of relevance to the protection of national minorities have an impact on the effective implementation of the measures adopted by the authorities. Without direct consultation with representatives of national minorities it is not easy to provide a balanced response to their specific needs and ensuring their equitable access to the resources available. Not enough is done to redress imbalances in support provided to different national minorities in various fields.⁴² Moreover, numerically smaller minorities and those that are not in a position to enjoy the support of a kin-state do not always receive enough attention.⁴³ For example, the improved normative protection of smaller indigenous peoples has not led to marked progress due to the limited resources.⁴⁴ A process of adoption of guidelines for the distribution of financial support to national minorities is essential.⁴⁵ Finally, if the level of financial support for the activities of the national minority remains static and is not inflation-adjusted, rights are not implemented in earnest.⁴⁶ Greater transparency is therefore needed in the system of distribution of funds.

Of particular concern is the funding of national minority self-governments. Although local minority self-governments receive state funding, they are often also dependent on the support of local authorities in this matter.⁴⁷ Reduction in state funding can be catastrophic to national minorities as this can lead to closure of schools, to reduced teaching in or of minority languages, and to a certain lack of continuity in the support of projects for

⁴⁰ See however Explanatory Report to the Framework Convention, section 73 pertaining to Article 13, paragraph 2.

⁴¹ See discussion in Michael Freeman, *Human Rights* (Polity Press, 2002), pp. 70-71.

⁴² See CM Resolution on Romania, 2nd cycle

⁴³ See CM Resolution on Moldova, 1st cycle and CM Resolution on Armenia, 2nd cycle

⁴⁴ See CM Resolution on Russia, 1st cycle

⁴⁵ CM Resolution on Austria, 2nd cycle

⁴⁶ CM Resolution on Armenia, 2nd cycle

⁴⁷ See CM Resolution on Hungary, 2nd cycle

minorities.⁴⁸ Often eligibility criteria of the related subsidy systems do not take into account the specific concerns of national minorities.⁴⁹ Moreover, States parties to the Framework Convention do not always see the necessity to increase the general national budget for education, to ensure the availability of sufficient and qualified teachers and textbooks for education of or in minority languages, in particular for numerically smaller minorities.⁵⁰

Index:

- Number of new/additional budget lines pertaining to Framework Convention 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 Framework Convention
- Number of new initiatives not enshrined in policies or programmes but nonetheless requiring funding
- Adoption of guidelines for financial distribution, including information regarding inflation adjustment

Explanatory comments: States parties to the Framework Convention may have information about funding for national minorities broken down by government agencies and/or thematic provisions in the Framework Convention. An extensive welfare model would likely allow the Framework Convention to reach into the budgeting of ministries of education and health whereas a less extensive welfare model would probably confine the reach to the agencies dealing directly with the Council of Europe. Different models exist in States parties to the instrument, and it is thus not adequate to monitor one or two agencies nor is it plausible to draw conclusions from the overall budget of one agency.

Little is known from the monitoring material about funding of the provisions of the Framework Convention but examples such as Moldova developing new curricula and textbooks to strengthen minority language education indicates that funds have been allocated and flow towards these activities from a government agency.⁵¹ In Romania new measures have been taken to accelerate the restitution of church property and possessions of ethnic communities.⁵² Depending on the relation between Church and State in Romania, this could mean that funds would have to be allocated to compensate for the property that is transferred to ethnic minorities. In Italy positive steps have been taken to encourage the visibility of minority languages and agencies have been created for this purpose. There has

⁴⁸ See CM Resolution on Germany, 2nd cycle

⁴⁹ See CM Resolution on Sweden, 2nd cycle

⁵⁰ See CM Resolution on Romania, 2nd cycle

⁵¹ CM Resolution on Moldova, 1st cycle

⁵² CM Resolution on Romania, 1st cycle

been a welcome development of educational projects promoting minority languages and cultures funded by the state budget. The cost of both making minority languages more visible and of creating new agencies is clearly evidence of State funding towards implementation of the Framework Convention. Indeed, many of the activities related to dissemination would be traceable to the budget of government agencies, if not the full expenses at least contributions toward these activities. For instances when Armenia established the Department for Ethnic Minorities and Religious Issues to initiate and coordinate policy-making on issues relevant to national minorities, funds must have been allocated and budget lines created in the government budget. Similarly, when Ireland commissioned a high number of studies, plans and reports designed to address problems faced by Travellers, in fields ranging from accommodation to health and education issues, this would have shown up in budget.⁵³ In Germany where projects and activities against racially motivated crimes and in favour of tolerance and better community relations continue to be supported by the authorities, it should be easy to identify the level of these costs.⁵⁴

Methodological concerns: To populate this indicator would require intensive quantitative data collection among several government agencies even if funding is planned and organized from one central agency. The budgets of agencies related to the individual provisions of the Framework Convention (education, interior, foreign affairs, etc.) would also have to be monitored for any new budget lines or time limited allocations. Data culled from these budgets would ideally have to be compared to previous years in order to expose any improvements or indeed decrease in funding. Thus, budget lines or initiatives would have to be seen in terms of what has been added in any given year. The monitoring of personnel allocated to implementation of the Framework Convention is also evidence of improved commitment to national minority rights but can be very ambiguous given the varied size of States parties to the instrument and the diverse numbers of national minorities protected by the provisions of the instrument.

Indicator D: Improved mainstreaming efforts

Definition: Measuring improved mainstreaming efforts requires an index describing actions and practices related to ensuring equal representation of persons belonging to national minorities in all spheres of life.

Rationale: The Framework Convention imposes several obligations on States parties to the instrument to ensure full and effective equality between persons belonging to national minorities and those belonging to the majority.⁵⁵ Indeed, the ideological spirit of the entire instrument is to obtain full and effective equality for persons belonging to national minorities. There are no obligations in the instrument to require positive measures, but the use of the expression ‘adequate measures’ allows States parties to the instrument a margin of

⁵³ CM Resolution on Ireland, 2nd cycle

⁵⁴ CM Resolution on Germany, 2nd cycle

⁵⁵ Article 4.

appreciation in this regard.⁵⁶ Mainstreaming is nowadays a common tool in the implementation of the principle of equality. It is also a fundamental requirement if governments want all members of society to participate in political discourse. Those States parties to the Framework Convention which are also member states of the European Union are now required to pay greater attention to equality and non-discrimination of members of ethnic and racial groups in the area of employment.⁵⁷ The increased demand of government agencies to restructure practices to include diversity management tools as a result of increased immigration should also include mainstreaming efforts with regard to national minorities. Even with the resistance to collecting census data disaggregated according to cultural characteristics, such as ethnic or national identity, mainstreaming efforts require government agencies to provide for alternative ways of seeking data collection that is minority sensitive. Not enough is done to collect data in co-operation with the groups concerned and in accordance with personal data protection requirements. Initiatives to obtain reliable data on the situation of minorities in various sectors⁵⁸ as well as increased attention to the principle of self-identification in data collection is needed.⁵⁹

Thus, there is little evidence that mainstreaming has become a common practice as a result of States ratifying the Framework Convention. While mainstreaming of representatives of national minorities into political decision-making processes is a major concern,⁶⁰ mainstreaming in other public areas of life are equally of concern. Persons belonging to national minorities, in particular young women, continue to be disproportionately affected by unemployment. The proportion of persons belonging to national minorities employed in public service is relatively low, in particular in higher levels of administration.⁶¹ In the field of education, the persistence of various exclusion and segregation practices at the expense of a high number of Roma pupils by local authorities is a source of deep concern. In several States parties to the instrument the governmental control on local authorities in this field is not efficient enough to discourage the perpetuation of such practices.⁶²

Index:

- 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

⁵⁶ See further Gudmundur Alfredsson, "Article 4" in Weller (ed.), *The Rights of Minorities. A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford University Press, 2005), pp. 141-152.

⁵⁷ EU Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. See also EU Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

⁵⁸ See CM Resolution on Norway, 2nd cycle

⁵⁹ See CM Resolution on Ireland, 2nd cycle

⁶⁰ See CM Resolution BiH, 1st cycle

⁶¹ See CM Resolution on Estonia, 2nd cycle

⁶² See CM Resolution on Hungary, 2nd cycle

- Increased incentives to private companies and organizations
- Number of outreach campaigns to public service providers
- Number of directives related to mainstreaming
- Number of letters from cabinet ministers to public service providers
- Adoption of monitoring practices

Explanatory comments: In lieu of actual legislation, alternative methods to pursuing mainstreaming can be used by States parties to the Framework Convention. Directives and letters from cabinet ministers to public service providers can contribute to the instigation of mainstreaming efforts. Similarly can outreach campaigns provide impetus. Traditional immigration States, such as the United Kingdom have been on the forefront of adopting measures with regard to integrating minority groups into mainstream society and thus have more experience and political backing for mainstreaming. Ireland has stepped up data collection related to minorities in a number of fields, including in connection with the census taking. The authorities have planned new data collection activities, which are likely to facilitate efforts to identify and address Travellers' concerns.⁶³ In Moldova, the population census of October 2004 represents a positive development, and should make it easier to monitor the situation of persons belonging to national minorities, and to promote more effective policies in this area.⁶⁴

Methodological concerns: To populate this indicator, a number of obstacles will have to be overcome. Ethnic data collection is arguably one of the most important tools in mainstreaming efforts but at the same time also one of the most problematic issues in the implementation of the provisions of the Framework Convention. The legal and ethical ramifications of collecting data can be serious, and data protection measures are of increasing concern and importance in most countries in Europe. Proxy methods and pilot projects may have to be used. Large scale questionnaires elaborated and distributed in co-operation with representatives of the national minorities may be used. Participatory methods are encouraged as the ethical aspects may thus be overcome.

2. Public debates

Public debates play a significant role in the political discourse and are an important factor in States seeking to implement the Framework Convention. The pre-implementation debates should also be monitored especially in terms of issues of recognition, meaning discussions pertaining to specific minority groups and their potential inclusion or exclusion from the protection scope of the instrument. In general the public, meaning the majority is not monitored in terms of political discourse. However, piloting indicators from public opinion and public awareness could be seen as a part of the future endeavours to monitor the implementation of the Framework Convention. Especially important could be monitoring the general public's improved awareness and acceptance of cultural pluralism as well as its improved understanding of and appreciation for national minority cultures. Also, important is to monitor for respect for national minority languages. Most important for taking the

⁶³ Second report submitted by Ireland pursuant to article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities, 3 January 2006

⁶⁴ CM Resolution on Moldova, 2nd cycle

temperature of a political discourse with regard to minority integration is to measure racism and xenophobia. Finally, it could be informative to monitor the general public's knowledge of the importance of accepting difference and for taking co-responsibility for a common culture.⁶⁵

In practice, debates on human and minority rights are likely to involve first and foremost central and local politicians but also major NGOs and other interest organizations. International actors may also play a role in the domestic debate, especially in the ratification stage but also in the efforts to implement the Framework Convention.⁶⁶ Spaces for such public debates include the floor of parliaments, the public media, public narratives and public spaces. Depending on the degree of knowledge of the Framework Convention among these actors, the attention to national minority rights will vary in public debates. This is why the dissemination efforts of government agencies are also of importance in assessing the overall political discourse. The stronger the knowledge of the Framework Convention is among actors, the more likely that they will refer to the instrument and to minority rights in public debates.

The nature of the articulations is also very important. The normative force of the instrument is likely to inform debates in a positive sense, whereas a perceived interference with domestic affairs is likely to inform the debates in a negative sense. In addition, a prevailing environment of prejudice and xenophobia is likely to result in the Framework Convention being portrayed negatively. Other than the direct reference to the Framework Convention, the political discourse can be monitored for references to a number of normative phrases and concepts, including but not restricted to:

- recognition
- group rights
- definition of minorities
- cultural pluralism
- value pluralism
- ethical pluralism
- inter-cultural dialogue,
- diversity,
- identity and difference,
- tolerance and respect,
- effective participation
- full and effective equality
- good governance
- genuine public policy

⁶⁵ See further Malloy and Gazzola, *The Aspect of Culture in the Social Inclusion of Ethnic Minorities – a report undertaken for the European Commission to evaluate the impact of inclusion policies under the Open Method of Co-ordination in six Member States of the European Union* (ECMI Report No. 60, 2006)

⁶⁶ For the role of the office of the HCNM in Ireland, see Christopher McCrudden, "Consociationalism, Equality and Minorities in the Northern Ireland Bill of Rights Debate: The Inglorious Role of the OSCE High Commissioner for National Minorities." Working Paper NO. 6/2006 Legal Studies Research Paper Series, Faculty of Law (Oxford University)

- transparency
- gender equality,
- social inclusion,
- flexibility and inclusiveness
- citizenship and citizens rights
- threshold exception
- social cohesion,
- good neighbourly relations,
- cross border co-operation
- European values
- added value to society,
- the Lisbon Strategy,
- the European Social Model

In addition to monitoring for the nature and frequency of normative articulations, actions and activities of public figures may be monitored through the following five performance indicators:

- E. Parliamentary politics
- F. Local politics
- G. Racism and xenophobia
- H. Non-institutionalized inter-cultural dialogue
- I. Public spaces

Indicator E: Increased attention to Framework Convention provisions in parliamentary politics

Definition: Measuring increased attention to Framework Convention provisions in national and sub-national level parliamentary politics requires an index of activities and actions initiated directly by members of parliament (MPs) as well as institutions attached to parliaments.

Rationale: Debates on the floor of national or local parliaments are arguably the most representative activity of the state of affairs and the health of a democracy. The ratification of the Framework Convention is usually enacted by votes in the Council of Europe's member states parliaments. With a few exceptions, the Framework Convention has thus been the topic of parliamentary discussions at one point in the last decade. Members of parliaments therefore have little excuse for not knowing about the existence of the instrument and the normative standards that it represents. However, normative debates about more inclusiveness seldom happen.⁶⁷ Expansion of citizenship⁶⁸ as well as of the personal scope of the Framework Convention are topics seldom debated in parliaments.

⁶⁷ See CM Resolution on Sweden, 2nd cycle

⁶⁸ See CM Resolution on Lithuania, 1st cycle

Similarly, restrictions on registration of names,⁶⁹ processes of naturalization⁷⁰ as well as residence registration⁷¹ appear little discussed. Instead, attempts to exploit inter-ethnic tensions for political purposes, be it locally, nationally or internationally, appear to happen more often in some countries.⁷² Essentially, there is no evidence in the Advisory Committee's monitoring that normative activities of parliaments are increasing. This is of great concern since parliamentarians are the custodians of democracy and thus should be the first to sound the alarm when provisions of the Framework Convention are not implemented.

Index:

- Number of ratification hearings/debates
- Votes taken in parliaments with regard to recognition of certain groups
- Number of debates in committees with regard to recognition of specific minority groups
- 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
- Number of questions to cabinet ministers pertaining to the Framework Convention or national minority issues asked by majority MPs
- 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

Explanatory comments: Good practice examples are far and few, partially because heretofore the monitoring of the implementation of the Framework Convention has focused on government actions and practices. However, one of the major powers that parliaments have other than to debate issues, is to create alternative functions and mechanisms to those of governments. Thus, the creation of a minority ombudsperson function or similar function attached to parliament is a first normative initiative that shows willingness of the popularly

⁶⁹ See CM Resolution on Denmark, 1st cycle

⁷⁰ See CM Resolution on Estonia, 1st cycle

⁷¹ See CM Resolution on Russia, 1st cycle

⁷² See CM Resolution on Serbia, 1st cycle

elected officials to put pressure on governments. Several States parties to the Framework Convention have established Minority Ombudsperson functions or reformed existing Ombudsperson functions to include hearing and monitoring national minority rights implementation. Establishing inter-cultural committees is another form of recognition of the diversity of society. Of course, the rhetoric used on the parliament floor as well as outside is a major catalyst to improving toleration and respect. Parliamentarians can combat displays of intolerance and xenophobia, including on the political scene, and foster a sense of respect for diversity and multiculturalism among the public, as well as encourage and support the media to play a more active role in this regard.⁷³ Finally, monitoring pre-ratification debates on the floor of the parliament is also necessary. Issues of recognition of minority groups and whether there should be adopted text for Declarations to the instrument specifically including or excluding specific minorities are relevant.

Apologies whether offered by parliamentarians or high level government officials can have seismic impact. Thus, the Norwegian government has taken further steps to improve the mechanisms and procedures established to compensate for the damage caused by past “norwegianisation” policies.⁷⁴ Likewise, the Danish Minister for Education extended an apology for inhumane treatment sustained by members of the German minority in the months immediately after World War II.⁷⁵

With regard to local and regional development, the Schleswig-Holstein parliament recently commissioned a study to assess the added value of national minority presence in the region.⁷⁶ The study was subsequently presented both at the local parliamentarians in the Schleswig-Holstein *Landtag* and to national parliamentarians in the *Bundestag*.

Methodological concerns: To populate this indicator it is first necessary to assess at which levels it must be monitored, central and/or local levels. Most of the elements of the index are straight forward quantitative. Normative articulations should be assessed in terms of the discourse indicators described above. Ideally the frequency of new initiatives and debates should be measured in any given parliamentary session in order to be measured against activities in previous sessions.

Indicator F: Increased attention to Framework Convention provisions in local politics

Definition: Measuring increased attention to Framework Convention provisions in local politics requires an index of activities and events of various institutions addressing national minority issues as well as national minority representation in local government and institutions.

⁷³ See CM Resolution on Slovenia, 2nd cycle

⁷⁴ CM Resolution on Norway, 2nd cycle

⁷⁵ Der Nordschleswiger, 13 June 2006

⁷⁶ See “Working with each other, for each other – Competence Analysis: National Minorities as *Standortfaktor* in the German-Danish Border Region”, European Academy report prepared for the Schleswig-Holstein *Landtag*, January 2007

Rationale: The level where members of national minorities require the most protection is arguably the local level. Most national minorities reside in peripheral areas and border regions, and conditions in these regions are often inferior to those of the capital regions. The high degree of decentralisation on many key issues pertaining to the implementation of the Framework Convention means that the local authorities have a central responsibility in monitoring and addressing problems in this respect.⁷⁷

The reach of the provisions of the Framework Convention to ensure minority rights at the local level is therefore of particular importance if full and effective equality is to be achieved. Specifically with regard to regional and local issues and where applicable border region issues, the Framework Convention puts obligations on States parties to the instrument to allow national minorities to participate in the preparation, implementation and assessment of regional development plans⁷⁸ as well as to networking with kin across the border.⁷⁹ However, little appears to be done in terms of improving implementation at the local level. Sometimes normative actions at the central level and directives issued to local municipalities are not implemented and simply ignored at the local level.⁸⁰ Local politics is often less normative and more practical. Issues that the regions face are many times of urgent nature and the need to include minorities in the processes to resolve such issues may be overlooked. The participation of members of national minorities in these processes is nevertheless very important.

Index:

- 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 Framework Convention and national minority rights

Explanatory comments: Especially, with regard to cross-border co-operation, members of minorities can be of value since most are bilingual and thus can contribute directly where language barriers exist. In Austria, valuable initiatives regarding cross-border co-operation on issues related to national minorities continue to be developed within the Alpe-Adria regional co-operation.⁸¹ In Denmark, the German minority has obtained observer status in a Growth Forum committee attached to the local authorities, and both the Danish minority in Germany and the German minority in Denmark have seats in the current INTERREG Commission (2007-2013). Both these minorities are also members of the regional assembly

⁷⁷ See CM Resolution on Sweden, 1st cycle

⁷⁸ Article 15 and Explanatory Report to the Framework Convention

⁷⁹ Article 17

⁸⁰ Interviews with representatives of the Polish minority in the Czech Republic.

⁸¹ CM Resolution on Austria, 2nd cycle

of the local Euro-region.⁸² In some regions, national minorities and leisure tourism have become partners and thus minorities actually contribute to the local economy. Other areas where national minorities become involved are the environment and heritage tourism. Participation is thus the more important at the local level of politics. National minorities can be seen as contributors rather than as burdens to society.

Methodological concerns: To populate this indicator a general survey of local government is needed. Screening of membership lists and activity lists as well as local media describing public events, public initiatives and regional development issues must be monitored. Interviews, questionnaires etc. may be helpful.

Indicator G: Increased attention to combating racism and xenophobia

Definition: Measuring increased attention to combating racism and xenophobia requires an index of tools that record acts of racism as well as monitor hate speech.

Rationale: The Framework Convention calls several times in the text upon States parties to the instrument to create a climate of tolerance.⁸³ Xenophobic rhetoric is still used by politicians and is also at times fuelled by media reports disseminating negative stereotypes about persons belonging to minorities and immigrants.⁸⁴ In particular problems persist with regard to attitudes of rejection or hostility towards persons belonging to the Roma/Sinti minority.⁸⁵ Intolerance within society including in the political arena as well as in the media thus contribute to a climate of hostility towards different ethnic and religious groups. Legislation, such as reforming immigration acts to limit immigration also invite intolerance and xenophobia, including in the political arena.⁸⁶ During the monitoring the Advisory Committee has remarked numerous times that efforts to improve tolerance and dialogue need to be expanded.

Institutional racism is a major concern, in particular in the area of policing.⁸⁷ Not only the recording of racist incidents but also a fair use of “stop and search”.⁸⁸ The collection of criminal data is thus of particular concern. Collecting criminal data of an ethnic nature must be pursued in full compliance with the principles laid down in the Framework Convention.⁸⁹ The gathering of personal data by the police must not entail or lead to any discrimination against or stigmatisation of persons belonging to certain groups based on their ethnic origin.⁹⁰ Hostile police attitudes towards Roma have proven a major problem in many States parties to the instrument. News items that touch upon the life of Roma tend to perpetuate negative stereotypes.⁹¹ It is therefore essential to ensure more effective, impartial,

⁸² See “Working with each other, for each other”

⁸³ Preamble, Article 2, Article 6, and Article 9. See also Article 12 and Article 18

⁸⁴ See CM Resolution on Austria, 2nd cycle

⁸⁵ See CM Resolution on Germany, 1st cycle

⁸⁶ See CM Resolution on Denmark, 2nd cycle

⁸⁷ See HCNM Recommendations on policing

⁸⁸ See CM Resolution on UK, 1st cycle

⁸⁹ Article 3. See CM Resolution on Germany, 1st cycle, see also CM Resolution on Spain, 2nd cycle

⁹⁰ See CM Resolution on Germany, 2nd cycle

⁹¹ See CM Resolution on Spain, 2nd cycle

independent monitoring of police activities⁹² as well as recruitment and retention of persons from ethnic minorities within police forces.

As noted above, xenophobic rhetoric is still used by some politicians and is also at times fuelled by some media reports disseminating negative stereotypes about persons belonging to minorities and immigrants.⁹³ In some States parties to the Framework Convention, inter-ethnic relations are still affected by the difficult legacy of the past regime and the deteriorating social conditions. Despite marked progress, manifestations of inter-ethnic tension are still reported and raise concern. Efforts to build tolerance and trust do not reach far enough in some societies.⁹⁴ Not enough efforts are made aimed at promoting inter-ethnic dialogue and combating aggressive nationalism and attempts to incite inter-ethnic discord.⁹⁵ Persons whose citizenship status has not been clarified are particularly vulnerable to discrimination and face obstacles in the realisation of their rights, including in the economic, social and cultural ones.⁹⁶ Public perception of persons belonging to vulnerable groups, such as the Roma, therefore remains problematic.

The awareness-raising measures taken to enhance intercultural dialogue, including in the media, have had a limited impact, and instances of discrimination, intolerance and even violence against such persons are still reported. Sometimes representatives of the public authorities, including law enforcement officers, are responsible for such behaviour.⁹⁷ The situation of the Roma/Sinti remains an issue of deep concern. They are frequently victims of discrimination and stigmatisation in the media, and occasionally the target of racist acts or insults.⁹⁸ Negative social perception exist due to significant differences in socio-economic and living conditions between some of the Roma and the majority population.⁹⁹ States parties to the Framework Convention need to encourage media self-regulation to combat stereotypes of Roma in the media.¹⁰⁰

Even where a range of initiatives has been launched to improve inter-ethnic dialogue, there are still signs of negative attitudes amongst segments of populations towards minorities, including disconcerting reports about manifestations of intolerance in schools as well as on the Internet.¹⁰¹ Instances of racially motivated incidents and intolerance against persons belonging to some minorities and immigrants continue to be reported in a number of States parties to the Framework Convention.¹⁰² Thus, the implementation of the guarantees provided by legislation on the protection of national minorities remains a problem. The

⁹² See CM Resolution on the Czech Republic, 2nd cycle

⁹³ See CM Resolution on Austria, 2nd cycle

⁹⁴ See CM Resolution on Serbia, 1st cycle

⁹⁵ See CM Resolution on Russia, 1st cycle

⁹⁶ See CM Resolution on Croatia, 2nd cycle

⁹⁷ See CM Resolution on the Czech Republic, 2nd cycle

⁹⁸ See CM Resolution on Germany, 2nd cycle

⁹⁹ See CM Resolution on Hungary, 2nd cycle

¹⁰⁰ See CM Resolution on Spain, 2nd cycle

¹⁰¹ See CM Resolution on Finland, 2nd cycle

¹⁰² See CM Resolution on Austria, 2nd cycle

difficulties are due to insufficient monitoring of the situation by the authorities, inadequate resources and, in some cases, a lack of political will, particularly at local level.¹⁰³

The fostering of mutual understanding and intercultural dialogue remains vital to the future of social cohesion. The prevention of interethnic tensions and the elimination of the significant barriers between the different communities need constant attention. The interaction between different components of societies need to be further encouraged, particularly in the sphere of education, where individuals' knowledge of the languages spoken in their region could be promoted.¹⁰⁴

Index:

- New initiatives on data collection on racist incidents
- Expanded monitoring of 'stop and search' incidents
- New ethnicity sensitive initiatives on criminal data collection
- Discourse analysis of media reports
- New initiatives to monitor Internet racism
-

Explanatory comments: States parties to the Framework Convention have in general stepped up efforts to combat racism and xenophobia in society. In Croatia, improvements in the statements and attitudes of officials *vis-à-vis* the protection of national minorities have been noted recently, and these have resulted in certain positive developments in the legislative sphere.¹⁰⁵ Croatia has furthermore adopted a comprehensive National Programme for the Roma, which was drafted through an inclusive process. It contains a range of commendable initiatives aimed at preventing ethnically motivated hostility and improving the protection of the rights of Roma in education, employment, health and other key sectors where they face considerable problems.¹⁰⁶ Also in the Czech Republic, the situation of the Roma has continued to be a priority of the government, and renewed impetus was recently given to governmental action in this area following the revision of the integration policy concept for the Roma. Numerous measures have been adopted to reduce the gap between Roma and the rest of the population in most fields, improve the public image of the Roma and to combat their marginalization and social exclusion.¹⁰⁷ In Norway, the authorities have also continued to develop and support projects and activities aimed at combating racism and intolerance, in particular through the National Action Plan against Racism and Discrimination for 2002-2006, which is currently being evaluated. In recent years targeted measures have been taken to facilitate the integration of persons of immigrant background, and a Social Inclusion Plan is being devised.¹⁰⁸ In Slovakia, commendable measures have been taken to train police officers to deal with such cases in full respect of human rights and raise their awareness

¹⁰³ See CM Resolution on Moldova, 2nd cycle

¹⁰⁴ See CM Resolution on FYROM, 1st cycle. See also Moldova, 2nd cycle

¹⁰⁵ See CM Resolution on Croatia, 1st cycle

¹⁰⁶ CM Resolution on Croatia, 2nd cycle

¹⁰⁷ CM Resolution on the Czech Republic, 2nd cycle

¹⁰⁸ CM Resolution on Norway, 2nd cycle

about the importance of the problem.¹⁰⁹ In Russia, high-level representatives of the federal administration have publicly endorsed the fight against racism and intolerance and a number of programmes have been adopted to implement these objectives. This has been accompanied by an increase in the number of convictions under the relevant criminal law provisions sanctioning violent actions aimed at inciting national, racial or religious hatred.¹¹⁰ In Germany projects and activities against racially motivated crimes and in favour of tolerance and better community relations continue to be supported by the authorities.¹¹¹ In Slovenia, public institutions such as the Ombudsman and the Constitutional Court have pursued an inclusive and active approach and made continuous efforts to promote respect for human rights and diversity.¹¹² In Armenia, the first Ombudsperson paid specific attention to discrimination issues, including discrimination based on ethnic origin.¹¹³

Methodological concerns: To populate this indicator requires extensive sensitive data collection. The most common tools to combating racism and xenophobia other than legislation are monitoring through data collection and discourse analysis. In many States parties to the Framework Convention collecting data disaggregated according to culture and ethnicity is still not possible. This makes it particularly difficult to monitor racist incidents and police profiling of ethnic minorities.

Indicator H: Improved non-institutionalized inter-cultural dialogue efforts

Definition: Measuring improved non-institutionalized inter-cultural dialogue requires an index describing ad hoc and unofficial efforts to promote dialogue.

Rationale: As noted above, the Framework Convention calls several times in the text upon States parties to the instrument to create a climate of tolerance and inter-cultural dialogue.¹¹⁴ During the monitoring the Advisory Committee has remarked numerous times that efforts to improve tolerance and dialogue need to be expanded. The difference between institutionalized and non-institutionalized inter-cultural dialogue is essentially the extent to which the ideology of the Framework Convention is able to reach into areas of the political discourse where established practices do not exist. While institutionalized mechanisms do contribute to promoting inter-cultural dialogue, non-institutionalized and informal efforts are likely to evidence the true improvement of the inter-cultural environment. Public discourse applying the phrases and concepts noted above will also evidence improved inter-cultural environment. But actions are equally as important.

However, there is not much evidence as yet to the effect that inter-cultural dialogue has reached such proportions in States parties to the Framework Convention. Inter-cultural dialogue starts in the early years of formative learning. Thus, more needs to be done to take measures to facilitate contacts between pupils from different communities.¹¹⁵ Not enough

¹⁰⁹ CM Resolution on Slovakia, 2nd cycle

¹¹⁰ CM Resolution on Russia, 2nd cycle

¹¹¹ CM Resolution on Germany, 2nd cycle

¹¹² CM Resolution on Slovenia, 2nd cycle

¹¹³ CM Resolution on Armenia, 2nd cycle

¹¹⁴ Preamble, Article 2, Article 6, and Article 9. See also Article 12 and Article 18

¹¹⁵ See CM Resolution on Estonia, 2nd cycle

subjects on cultural diversity exist in school curricula. Reinforcing the inter-cultural and multi-cultural dimension of education is arguably one of the most normative actions governments can take.¹¹⁶ Bilingualism or multilingualism is a way to show both respect for minority languages and intent of creating multi-dimensional societies. Not enough is done by States parties to the Framework Convention to reinforce the intercultural dimension of education and, with regard to the teaching of, and in, minority languages, ensure that the concrete situation of persons belonging to national minorities, their real needs and their demands are duly taken into account when implementing the new legislation on education.¹¹⁷

Index:

- 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

Explanatory comments: Inter-cultural dialogue can take place at all levels of society, whether on the floor of a senate assembly or in a pub. The key is that there is a feasible environment for dialogue. For instance, in the area of political participation, the degree to which the representatives of national minority parties submit requests and deliver speeches may be signs of good practices of inter-cultural dialogue. Similarly, the example of members of national minorities who are rewarded medals or awards for good voluntary services to the community represents both the contribution of the national minorities to society and the appreciation of the majority of such contribution, thus an example of non-institutionalized inter-cultural dialogue. Similarly honorary or ad hoc commissions, such as assignments to mediate with kin-states or represent national governments in international fora show a political will to inter-cultural dialogue. In the early 1990s, the Danish government assigned a representative from the German minority to chair a CSCE inter-parliamentary conference on national minority issues. The German federal government has likewise appointed representatives of the Danish minorities to participate in OSCE meetings. The state government of Schleswig-Holstein has recently entered into co-operation with the North Frisian minority regarding the North Sea Co-operation programme.¹¹⁸

¹¹⁶ See CM Resolution on Moldova, 2nd cycle

¹¹⁷ See CM Resolution on the Czech Republic, 2nd cycle

¹¹⁸ See discussion in “Working with each other, for each other”

With regard to bilingualism Austria has taken measures to improve further the operation of the unique system of bilingual education in Carinthia and Burgenland, which attracts an increasing number of pupils from the majority population.¹¹⁹ Further efforts have also been made to improve community relations, promote the integration of immigrants and expand inter-cultural dialogue in society, notably in the city of Vienna.¹²⁰

Methodological concerns: To populate this indicator requires surveying sources outside official channels, such as public media, minority media, annual reports, activity reports and websites. Most of the elements of the index are ad hoc type activities and thus qualitative data needs to be collected.

Indicator I: Increased attention to Framework Convention provisions in public spaces

Definition: Measuring increased attention to Framework Convention provisions in public spaces requires an index describing actions, events, and practices applied when representing national minority presence and issues to the general public.

Rationale: There are a number of provisions of the Framework Convention which suggest that infringement of the freedom of expression, peaceful assembly and association of national minorities must be prohibited.¹²¹ In particular national minority representation in public spaces is considered a requirement where a sizeable proportion of the population belongs to a national minority.¹²² However, the visibility of national minority cultures in public spaces is limited in many States parties to the Framework Convention. Especially in the sound media information about national minorities is refined to late night viewing or hearing, and in the printed media national minorities are often absent from prominent spaces.¹²³ Programme slots for television broadcasts intended for national minorities have raised objections and in some States parties to the instrument change in programming is of concern as it could render national minorities less favourable.¹²⁴ In general, the amount of broadcasting time allocated to minority languages in the public audiovisual services, particularly on television, is inadequate, and support for the establishment of private media, both electronic and print, by persons belonging to national minorities is wanting.¹²⁵ In many States parties to the Framework Convention there remain legislative restrictions on the use of minority languages in public radio and television.¹²⁶ Further measures are therefore needed to improve access of persons belonging to national minorities to various media and

¹¹⁹ See CM Resolution on Austria, 2nd cycle

¹²⁰ CM Resolution on Austria, 2nd cycle

¹²¹ Article 7, Article 8, Article 9, Article 10

¹²² Article 11

¹²³ On monitoring the media, see Malloy and Gazzola, *The Aspect of Culture in the Social Inclusion of Ethnic Minorities*⁷

¹²⁴ See CM Resolution on Hungary, 2nd cycle

¹²⁵ See CM Resolution on Armenia, 1st cycle

¹²⁶ See CM Resolution on Armenia, 2nd cycle. See also HCNM Guidelines on Guidelines on the use of Minority Languages in the Broadcast Media

their portrayal therein.¹²⁷ Finally, there are concerns regarding the geographical cover of broadcasting for dispersed national minorities,¹²⁸ and the fact that few Roma have the necessary training and resources to participate in the production of radio, television and print media is of great concern.¹²⁹

Bilingual topographical signs in public spaces is another important issue in areas where large number of persons belonging to national minorities live. There remain unresolved conflicts pertaining to bilingual signs in a number of States parties to the Framework Convention which create an atmosphere that is not conducive to harmonious relations and may hamper the effective implementation of other rights of persons belonging to national minorities.¹³⁰ Despite some improvements in related administrative practices, language acts still contain elements that are problematic from the point of view of the Framework Convention, including as regards private signs.¹³¹ Where legal requirements to display topographical indications in minority languages exist, the rate of changing monolingual to bilingual signs often progresses slowly.¹³² It would appear that States parties to the Framework Convention are not ensuring proper implementation of the legal provisions with regard to the use of minority languages in the public sphere and in bilingual signs.¹³³ There needs to be initiatives to generate more local commitment to posting minority language signs and street names.¹³⁴

Other public spaces of great importance to members of national minorities are cultural heritage monuments and cemeteries. Such issues need to be resolved in a spirit of tolerance and inter-cultural dialogue and in consultation with those concerned.¹³⁵ Likewise, cultural centres, museums and libraries established by national minorities constitute an important communal service value to members of national minorities. However, demands by many national minorities for support for such are not always heard.¹³⁶ Similarly, the reference to national minority cultures in public narratives, such as history books remains a concern in many States parties to the Framework Convention. Especially, references to Roma culture, history and traditions continue to be virtually absent in school curricula and teaching materials.¹³⁷ The culture, history, language and religion of national minorities and other ethnic and religious groups need to be better reflected in the curriculum and in the textbooks used in schools.¹³⁸

Index:

- The number of new national minority cultural centres

¹²⁷ See CM Resolution on Croatia, 1st cycle, CM Resolution on Austria, 1st cycle, CM Resolution on Romania, 2nd cycle and CM Resolution on Denmark, 2nd cycle

¹²⁸ See CM Resolution on Poland, 1st cycle

¹²⁹ See CM Resolution on Spain, 2nd cycle

¹³⁰ See CM Resolution on Austria, 1st cycle and 2nd cycle

¹³¹ See CM Resolution on Estonia, 2nd cycle

¹³² See CM Resolution on Germany, 1st cycle, CM Resolution on Austria, 2nd cycle

¹³³ See CM Resolution on Germany, 2nd cycle

¹³⁴ See Cm Resolution on Sweden, 2nd cycle

¹³⁵ See CM Resolution on Poland, 1st cycle

¹³⁶ See CM Resolution on Armenia, 1st cycle and CM Resolution on Poland, 1st cycle

¹³⁷ See CM Resolution on Spain, 2nd cycle

¹³⁸ See CM Resolution on Denmark, 2nd cycle

- 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 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 Framework Convention 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

Explanatory comments: The public space is the space where many discourses operate side by side. In terms of the political discourse, the public space is arguably one of the first ways to measure inter-cultural dialogue. Regulating public space is not a simple matter, however. The extent to which national minorities have freedom to use the public space is often dependent on the nature and state of the democracy in which the minorities live. Since the transition to strong democracy often happens parallel with the transition from mono-culturalism to multi-culturalism, there is no automatic harmony between the two. Although globalizing forces are challenging the nature of public spaces, political discourses often do not follow suit immediately. Efforts to improve the participation and appearances of national minorities in public spaces have been made in many States parties to the Framework Convention. The new Austrian broadcasting Corporation Act (ORF) has widened possibilities for broadcasting in the national minority languages, and radio broadcasting in various minority languages has increased in Austria.¹³⁹ Radio programmes in minority languages, while limited in their scope, have also become important tools in the promotion and protection of minority cultures in Finland.¹⁴⁰ In Estonia, obstacles to the posting of minority language private signs have been reduced through changes in the practice of the Language

¹³⁹ CM Resolution on Austria, 2nd cycle

¹⁴⁰ CM Resolution on Finland, 2nd cycle

Inspectorate,¹⁴¹ whereas Sweden has developed promising web-based educational tools to advance minority language education and to address the shortage of educational materials in this sphere.¹⁴²

Methodological concerns: To populate this indicator it may be necessary to separate public spaces into confined areas, such as media, narratives, signage etc. General surveys are necessary in order to measure improvements in the public media.

¹⁴¹ CM Resolution on Estonia, 2nd cycle

¹⁴² CM Resolution on Sweden, 2nd cycle

C. Legislative Indicators

I. Theoretical Issues

The programme-type provisions of the Framework Convention leave to States Members a broad margin of discretion as to the way the norms of the FCNM are to be implemented in their domestic legal orders, and this to enable them to take particular circumstances into account.¹⁴³ The word 'framework' indicates in fact that the principles contained in this international instrument are not directly applicable in national legal systems of the States Parties, but need to be implemented "through national legislation and appropriate governmental policies".¹⁴⁴

The non-self executing character of the provisions and the broad margin of appreciation enjoyed by Member States leave the correct compliance of the Framework Convention entirely to the states. According to Letschert "Although it is clear that minority situations differ from country to country and consequently require different approaches, there is a danger that the vague objectives and principles incorporated in the FCNM will be implemented restrictively by the States Parties".¹⁴⁵ The possibility of exercising the rights contained in the Framework Convention is indeed dependant upon national legislation and governmental measures. Obviously, states may opt to ensure the direct applicability of the substantive provisions of the FCNM before administrative and judicial bodies in order to add to their compliance with the obligations flowing from the FCNM, but they are not under the obligation to do so.

From the foregoing, it is clear that the proper transposition of the provisions contained in the Framework Convention in the domestic legal orders of the Member States is crucial for determining whether and to what extent public authorities shall respect the FCNM and persons belonging to national minorities can rely on these provisions in dealing with administrative or judicial authorities.

The task of assessing how and to what extent the Framework Convention's system has an impact on the domestic legislation of the Member States¹⁴⁶ - the so-called 'vertical interpenetration' of the international and national systems,¹⁴⁷ is thus of primary importance.

¹⁴³ Doc. CAHMIN(94) 5, Strasbourg, 1 February 1994, First meeting report, 25-28 January 1994, para.14, 4.

¹⁴⁴ See, Preamble of the FCNM and the Explanatory Report of the FCNM, para.11.

¹⁴⁵ Rianne M. Letscher, *The Impact of Minority Rights Mechanisms* (TMC Asser Press, The Hague, 2005), 26. The same author, considering the programme-type nature of the FCNM's norms, "wonders whether the Framework Convention is really a legally binding instrument, or rather a mixture of law and politics." *Ibid.*, 24. For a similar note of caution, see also Bruno De Witte, "Introduction: Exploring a Central Pillar of the European Minority Rights System", in A. Verstichel, A. Alen, B. De Witte, P. Lemmens (eds.), "*The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?*" (Intersentia, Antwerp, 2008), 1-2.

¹⁴⁶ The Framework Convention played an identifiable and significant role in the drafting process of many national laws on the protection of minorities that repeat in some cases, almost *verbatim* the provisions of the FCNM. See, for instance, the 2002 Croatian Constitutional Law on the Rights of National Minorities or the 1999 Law on the Protection of Linguistic and Historical Minorities. See, Antonija Petričušić, "Constitutional Law on the Rights of National Minorities in the Republic of Croatia", 2 *European Yearbook of Minority Issues* (2002/03), 607-629; Francesco Palermo and Jens Woelk, *Diritto Costituzionale Comparato dei Gruppi e delle Minoranze* (CEDAM, Padova, 2008), 248.

II. Thematic domains

The Legislative Indicators are divided into four main categories of minority issues, which correspond to the historical development of international minority protection.¹⁴⁸ During the initial stage of this development, legal protection was principally focused on the protection from destruction (*'Right to existence'*). In many parts of the world, minority groups live under the shadow of extinction: some have suffered or are suffering from physical destruction, genocide or 'ethnic cleansing', and so fought or are fighting for the basic right of their existence. For these groups, issues such as language rights, regional autonomy or group representation may seem like utopian ideals or, at best, 'luxury' rights. The existence of a community relies also on the legal framework existing in the domestic legal order of the country in which they live that guarantees minority protection and regulates the recognition of national minorities and the collection of basic data concerning their existence, needs and concerns.

As a result of their ethnic, cultural, linguistic or religious characteristics, minorities can be singled out from others in the society in which they live for differential and unequal treatment and therefore regard themselves as the subject of discrimination (*'Equal treatment and non-discrimination'*). The discrimination they experience can be of many kinds: ranging from threats to personal security to discrimination in employment, housing and access to property.¹⁴⁹ When minorities are subjected to serious inequalities in the enjoyment of economic, social or cultural rights, they tend to lose their belief in the legitimacy and responsiveness of the state. As a result of various forms of discrimination, the ensuing unease can easily facilitate the mobilisation of conflict by ethnic entrepreneurs, and escalate into ethnic or religious conflict that may quickly become unmanageable. It is therefore of pivotal importance not only to protect the identity and diversity of minority groups but also to afford and guarantee equal treatment and protection against forms of discrimination. One of the main questions concerning minorities and the principle of equality is how can exceptions to the principle of non-discrimination be justified. Particular concern is given to how a balance can be struck between the concept of non-discrimination and special norms necessary to guarantee equality for minorities, the so-called 'special measures' or 'positive discrimination'.

Minorities must also be given the space to maintain and develop their linguistic, ethnic and religious identity within a diverse society (*'Right to identity and diversity'*). This third set of claims refers to the fact that minorities are often prevented from (or do not have the necessary pre-conditions for) preservation of identity, particularly in terms of language,

¹⁴⁷ See, H. J. Steiner, P. Alston and R. Goodman, *International Human Rights in Context* (Oxford University Press, Oxford, 2008), 1087.

¹⁴⁸ See, for a slight different categorization, Asbjørn Eide, *Prevention of Discrimination and Protection of Minorities*, Report submitted to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Fifty-fifth session, 17 June 2003, UN Doc. E/CN.4/Sub.2/2003/21; Marc Weller, "Creating the Condition necessary for the Effective Participation of Persons belonging to National Minorities – A critical evaluation of the first results of the monitoring of the FCNM 1998-2003", in *Filling the Frame, 5th Anniversary of the entry into force of the FCNM, 30-31 October 2003* (Council of Europe, Strasbourg, 2003), 3.

¹⁴⁹ See Art. 6(2) of the FCNM: "The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity."

religion, cultural practices.¹⁵⁰ These claims can be a matter of high priority for some minority groups but of lower importance for others until they have received proper equal protection of their basic human rights. Protection of identity entails, at the very least, the right to use one's own language in non-official contexts; the freedom of opinion and its expression, including the right to publish in any language without restrictions and the freedom to practice one's religion in any way not infringing the rights of others. States shall not only abstain from policies which have the purpose or effect of assimilating the minorities into the dominant culture (negative action), but they shall also protect them against activities by third parties which have an assimilatory effect (positive action).

Language and educational policies are therefore crucial in this respect. Denying minorities the possibility to learn their own language, or the transmission of the knowledge of their own culture, history and tradition would be a violation of the obligation to protect their identity.¹⁵¹ At the same time, although persons belonging to minorities are not under a legal obligation to integrate, they are aware that if they want to participate in the wider national society they have to acquire, for instance a proper knowledge of the official language. In this respect, international norms set out two general parameters: on the one hand, preserving identity, and on the other hand, integrating into the overall national society while keeping one's identity.¹⁵²

In some cases, claims related to identity rights go beyond mere *protection*, the members of the group demanding the *promotion* of their identity. The conditions for the development and promotion of identity require often special measures intended to facilitate maintenance, reproduction and further development of the culture of minorities. The main issues arising here are to what extent states are under an obligation to protect and promote specific traditions and cultures of minority groups and in particular, when states are under the obligation to support financially or otherwise such activities.

Full and effective participation in cultural, social and economic life and in public affairs is at times considered to be a so-called 'fourth generation' minority entitlement (*Participation in cultural, social and economic life and in public affairs*). Whilst a minority group needs to be able to preserve its own culture and promote its own identity, it also needs to be able to participate in the public life of the state, particularly with regard to matters affecting its culture, identity and institutions. The way this right can be organised and exercised depends, to a large extent, on the kind of minority group concerned such as for example large and closely knit minorities having a special interest in participation in the affairs of the country as a whole

¹⁵⁰ See Art.5 FCNM; Art. 1 of the UN Declaration on Minorities. The right to be different is proclaimed by Art. 1(2) of the 1978 UNESCO Declaration on Race and Racial Prejudice. See also, the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

¹⁵¹ See, Article 14 FCNM; ACFC, *Commentary on Education under the Framework Convention for the Protection of National Minorities*, 2 March 2006, ACFC/25DOC(2006)002; Article 29 CRC; Article 13 ICESCR.

¹⁵² See, Art. 6 FCNM. According to the Explanatory Report of the FCNM on this Article : "In order to strengthen social cohesion, the aim of this paragraph is, *inter alia*, to promote tolerance and intercultural dialogue, by eliminating barriers between persons belonging to ethnic, cultural, linguistic and religious groups through the encouragement of intercultural organisations and movements which seek to promote mutual respect and understanding and *to integrate these persons into society whilst preserving their identity.*" (para. 49) Emphasis added. See, also, Art. 12 FCNM that according to the Explanatory Report: "...seeks to promote knowledge of the culture, history, language and religion of both national minorities and the majority population in an intercultural perspective."

and in matters affecting the group and, at the same time, smaller or more dispersed groups being mainly concerned with effective participation in decisions on matters concerning them. In addition, autochthonous minorities have in some cases a legitimate claim for, though not a right, to territorial autonomy and new minorities stemming from migration who, generally, do not claim such forms of autonomy but other forms of representation.¹⁵³ In these contexts, the form of settlement in which the minority group live is also relevant: in the case of historical minorities living compactly, forms of territorial autonomy can be the best solution to be negotiated, whereas, where minorities live dispersed among the majority, not forming a majority in any substantial area, other forms of institutionalisation of these rights are required, which may well include non-territorial, functional variants of autonomy.¹⁵⁴ Obviously, effective participation in public life includes not only participation in political life and how an adequate representation should be devised, but also participation in cultural, social and economic life.

III. Methodological issues

Implementing the Legislative Indicators might appear at the first sight fairly straightforward. There are however a number of hindrances that must be taken into account in order to collect all relevant data and have a clear picture of the influence exerted by the Framework Convention on the domestic legal systems of its Member States.

The main sources for collecting data would be obviously the texts of the national legislation pertaining to minorities as well as those having, if only indirectly, an impact on them. To consult the integral version of these legal documents the direct source would be the Official Gazettes of the state concerned that, if available, would also be accessible via internet from the official web portals of the national and local parliaments. In this case, the first obstacle might be the limited availability of the national legal texts in languages different from the official one(s). This might be a hindrance for those who are not familiar with the official language(s) of the state concerned. Translations from the original languages would be thus necessary to overcome this problem.

Other indirect sources are represented by data bases of legal documents pertaining to minorities collected, in the official language(s) and in English, by private and public research institutes such as MIRIS (Minority Rights Information System), a legal data-base

¹⁵³ See, Article 15 FCNM; Article 5 ICERD; Article 25 ICCPR. See, ACFC, *Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs*, 5 May 2008, ACFC/31DOC(2008)001; Joseph Marko, *Effective Participation of National Minorities. A Comment on Conceptual, Legal and Empirical Problems*, Report prepared for the Fourth Meeting of the Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), 19-20 October 2006, Strasbourg, DH-MIN (2006)014; Alan Phillips, "Creating the Conditions necessary for the Effective Participation of Persons belonging to National Minorities – Commentary focusing on the Economic Participation of National Minorities", in *Filling the Frame, 5th Anniversary of the entry into force of the FCNM, 30-31 October 2003* (Council of Europe, Strasbourg, 2003).

¹⁵⁴ See, Asbjørn Eide, "Prevention of Discrimination ...". See also the article-by-article approach favoured by the ACFC, among others, ACFC, (First) Opinion on Austria, 16 May 2001, ACFC/INF/OP/I/009, paras. 19-20, at 34; ACFC, (First) Opinion on Germany, 1 March 2002, ACFC/INF/OP/I/008, paras. 17-18, at 40; ACFC, (First) Opinion on Ukraine, 1 March 2002, ACFC/INF/OP/I/010, para. 18.

implemented by EURAC, or by international organisations such as the data-base of legislative developments set up by OSCE ODIHR.

Clearly, references to the domestic legislation adopted by Member States to the Framework Convention can also be traced in the documents generated through the monitoring mechanism of the Framework Convention: States' Reports, Opinions of the Advisory Committee, Government Comments, Resolutions of the Committee of Ministers. Each document provides an invaluable source of data from which it is possible to identify domestic legislative developments prompted by the ratification of the Framework Convention and the criticisms by the Advisory Committee. All documents related to the FCNM must be read in conjunction with each other to investigate the casual link between the Framework Convention system and the national legislation.

Finally, it is relevant to note that the data collected through the legislative indicators must be complemented with data from non-legal indicators related to administrative measures, regulations and governmental policies pertaining to the implementation of the normative instruments. This will provide a more detailed and complete understating of the domestic 'internalisation' of the Framework Convention.

IV. Legislative Indicators

In the following sections the indicators will be presented following four thematic domain headings: Right to existence and recognition of minority groups, Equal treatment and non-discrimination, Right to identity and diversity, Participation in cultural, social and economic life and public affairs. Under each domain headings a list of indicators are identified and then analysed by giving a definition, the reasons for measuring, an index of detailed measuring instruments coupled with explanatory comments and final remarks on the methodological problems that the implementation of the indicator may raise.

1. Right to Existence and Recognition of Minorities

The first and basic claim of minorities is the right to their existence. The historical and contemporary evidence is that many minority groups are at risk of genocide or 'ethnic cleansing' because of religious, linguistic or ethnic association or affiliation.

Since the Second World War, a number of developments have featured prominently in relation to the right to physical existence. Although the focus of attention has been on the individual and not on minorities, international and national laws have progressed sufficiently to afford minority groups the fundamental right of physical existence. In this respect the role of the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide is of primary importance. The Genocide Convention, which defines genocide as the commission of certain acts "with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such" (Article 2), has provided the inspiration for most states to - at least in theoretical terms - criminalise genocide and accord the guarantee of right to existence to minority groups.

Specific aspects of the right to existence are linked to policies of demographic change or territorial reorganisation that may be used to deny minority rights. Such policies may include: forced population transfers with the intention or effect of moving members of minorities away from the territory in which they live,¹⁵⁵ evictions and expulsion, expropriation and the redrawing of administrative boundaries (gerrymandering).¹⁵⁶

The concept of existence of minorities goes beyond the physical existence and may also be employed in connection with basic subsistence rights. Depriving a group of the basic economic resources necessary to sustain its existence would violate international standards, for instance, the UN Declaration on Minorities that goes beyond the prohibition of fundamental attacks on group life and obligates the state to a programme of 'active protection'.¹⁵⁷ Accordingly, minorities shall neither be physically excluded from the territory nor be excluded from access to the resources required for their livelihood.¹⁵⁸ For instance, the Committee on Economic, Social and Cultural Rights has recalled that states parties are under the obligation to give special attention to those individuals and groups who have traditionally faced difficulties in exercising the right to water, including minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons and migrant workers.¹⁵⁹

The right to existence includes also the right of recognition, and the accompanying legal capacities by governmental institutions and authorities.¹⁶⁰ The question of whether a state 'recognises' or does not 'recognise' minorities in its internal law cannot be decisive for international law. Article 27 ICCPR guarantees certain rights "In those States in which ... minorities exist". The Human Rights Committee has insisted that the existence of minorities within the sense of Article 27 ICCPR is a factual matter, and that such minorities may indeed exist in States Parties committed, in law and in fact, to the full equality of all persons within their jurisdiction.¹⁶¹ The factual existence criterion for minorities has been recognised by

¹⁵⁵ See, Article 7(d) of the Statute of the International Criminal Court that in its definition of crimes against humanity includes deportation or forcible transfer of population.

¹⁵⁶ Art. 16 FCNM.

¹⁵⁷ Art. 1(1) UN Declaration on Minorities. See, Asbjørn Eide, "Prevention of Discrimination ...", 5.

¹⁵⁸ Asbjørn Eide, *ibid.*

¹⁵⁹ See, Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), *Right to Water* (Arts. 11 and 12 ICESCR), E/C.12/2002/11, 20 January 2003, para. 16. The same approach can be found in, Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), *The Right to Adequate Food* (Art. 11 ICESCR), E/C.12/1999.5, 12 May 1999, paras.18-19.

¹⁶⁰ John Packer, "On the Content of Minority Rights", in Juha Rääkkä (ed.), *Do We Need Minority Rights? Conceptual Issues* (Martinus Nijhoff, The Hague, Boston, London, 1996), 150-153.

¹⁶¹ See, the Declaration made by France to the ICCPR: "In the light of Article 2 of the Constitution of the French Republic, the French Government declares that Article 27 is not applicable so far as the Republic is concerned.", UN Treaty Collection, Declarations and Reservations, ICCPR, at <<http://untreaty.un.org>>, para. 8. While the Human Rights Committee has declared that it will not entertain communications from individuals against France under Article 27 because of the French declaration with respect thereto (see, for instance, HRC, *T.K. v France*, Communication No. 220/1987, decision of 8 December 1989, para. 8.6.) in dealing with the French periodic reports it demands constantly that France addresses minority issues: "The Committee takes note of the declaration made by France ... however [is] unable to agree that France is a country in which there are no ethnic, religious or linguistic minorities. The Committee wishes to recall in this respect that the mere fact that equal rights are granted to all individuals and that all individuals are equal before the law does not preclude the existence in fact of minorities in a country.", Concluding Observations of the Human Rights Committee, CCPR/C/79/Add.80, 4 August 1997, para.24.

international law at least since the *Greco-Bulgarian Communities* case in which the International Court of Justice stated: “The existence of communities is a question of fact; it is not a question of law.”¹⁶²

While the existence of minorities may be a question of fact, there is however nothing to prevent a state requiring registration.¹⁶³ Nevertheless, there is long-standing ECHR’s jurisprudence providing that even where registration is refused, the group or organisation is not prevented from freely associating and having *locus standi* to bring a claim to the Strasbourg Court.¹⁶⁴ Despite the margin of appreciation left to states on the ‘form’ of the recognition of a minority group, what certainly is implicit in the Strasbourg case-law is that states ought to recognise national minorities, subject only to restrictions necessary in a democratic society. The corollary of the obligation to protect minorities under international instruments is in fact a duty to recognise them. To deny that there are minorities on the territory of the state is partly to question their existence.¹⁶⁵

Unfortunately, apart from indirect recourse to international provisions, such as freedom of assembly and association or freedom of religion, there is no international mechanism that can reverse a state’s refusal to recognise the existence of a minority group. Indeed, this has been identified as one major lacuna both in international law and conflict-resolution mechanisms.¹⁶⁶

Minority protection as a whole and the right to existence as a minority group, in particular, rely significantly on the national legislation applicable in the domestic legal order. Aspects pertaining to the status and rank of the Framework Convention in the national legal systems, the mechanisms whereby the provisions of the Convention are binding on state agencies, the reservations and declarations whereby states limit the scope of application of the Framework Convention are among the most salient issues in this respect.

The right to existence and the recognition of minority groups will be analysed along three set of indicators:

- A. Status of FCNM in the domestic legal system
- B. Scope of application FCNM and definition of minorities
- C. Data collection

¹⁶² PCIJ, *Advisory opinion regarding Greco-Bulgarian communities*, 31 July 1930, PCJ Reports, Series B No. 17, at 22.

¹⁶³ See, among others, ECtHR, *Görzelik v. Poland*, Appl. No. 44158/98, judgment (Grand Chamber) of 17 February 2004.

¹⁶⁴ See, ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Appl. Nos. 29221/95 and 29225/95, judgment of 2 October 2001.

¹⁶⁵ Geoff Gilbert, “Individuals, Collectivities and Rights”, in Nazila Ghanea and Alexandra Xanthaki (eds.), *Minorities, Peoples and Self-Determination* (Martinus Nijhoff, Leiden, Boston, 2005), 139-161, at 159-161.

¹⁶⁶ At the ninth session of the (then) Working Group on Minorities, in which existing international and national minority protection systems have been examined, in analysing protection gaps, the Working Group has focused specifically on the absence of mechanisms to deal with cases where minority identity is not recognised by a state. See, Working Group on Minorities, *Prevention of Discrimination and Protection of Minorities*, Report by Asbjørn Eide, E/CN.4/Sub.2/2003/19, 10 July 2003, para.43.

Indicator A: Status of the FCNM in the domestic legal system

Definition: Assessing the status of the Framework Convention in the domestic legal system requires an index describing the status and rank to be assigned to this instrument in the hierarchy of national sources of law, the modalities through which the provisions of the Framework convention are incorporated in the domestic legal system and the typology of national legislation implementing the provisions of the Framework Convention.

Rationale: Despite the fact that the FCNM is a Convention and thus legally binding on the contracting states, the framework nature of the FCNM, containing mostly programme-type provisions, leaves considerable discretion to the states.¹⁶⁷ The last recital of the Preamble of the FCNM clearly proclaims that contracting states are "... determined to implement the principles set out in this framework Convention through national legislation and appropriate governmental policies"¹⁶⁸ indicating with this formulation that the provisions of the Framework Convention are not directly applicable and that the ratification of this international instrument does not impact on the law and practice of the Parties in regard to the reception of international treaties in their internal legal order.¹⁶⁹

The implementation of international rules within national systems, or the so-called "vertical interpenetration"¹⁷⁰ can operate through three main theoretical approaches : first, the so-called monistic theory advocating the supremacy of municipal law, then the dualistic doctrine, implying the existence of two distinct sets of legal orders (international and national systems), and finally the monistic conception maintaining the unity of the various legal systems and the primacy of international law. As seen earlier, the Framework Convention does not contain any regulation of implementation: it leaves each country complete freedom with regard to how it fulfils, nationally, its provisions. As a consequence each contracting state decides, on its own, how to make the provisions of the Framework Convention binding on State agencies and individuals and what status and rank to assign to it in the hierarchy of municipal sources of law.

The most common mechanisms for incorporating international rules in domestic legal systems are two: *automatic standing incorporation* and *legislative ad hoc incorporation*.¹⁷¹ The first modality occurs whenever an internal norm – the national constitution or a law – provides in a permanent way for the automatic incorporation into national law of any relevant provisions of international law without there being any need for the passing of an ad hoc national statute but being sufficient, upon the ratification of a treaty, its publication in the state's Official Gazette. According to the second mechanism, international rules become applicable within the state legal system only if and when the relevant parliamentary authorities pass special implementing legislation that either translate the various treaty provisions into national legislation or confine itself to request the automatic applicability without reformulating the international rule. Clearly, this second modality works in a similar way to

¹⁶⁷ Explanatory Report of the FCNM, para. 11.

¹⁶⁸ Preamble of the FCNM.

¹⁶⁹ Explanatory Report to the FCNM, para. 29.

¹⁷⁰ See, for this definition, H. J. Steiner, P. Alston and R. Goodman, "*International Human Rights...*", at 1087.

¹⁷¹ For a comprehensive analysis on this subject, see Antonio Cassese, *International Law* (Oxford University Press, Oxford, 2005).

the automatic standing incorporation mechanism earlier described. As Cassese puts it: “For the purpose of ensuring a more complete and effective implementation of international law, preference should always be given to the legislative incorporation of international rules whenever they turn out to be non self-executing. Conversely, whenever international rules are self-executing, it would be preferable to resort to the automatic (whether permanent or ad hoc) incorporation of international rules ... because... it enables the national legal system to adjust itself fully to international rules as they are constructed and applied in the international sphere”.¹⁷²

Index:

- Assessing the rank – superior or equal in respect of constitutional and statutory laws - of the Framework Convention within the domestic legal order
- Verifying whether in case of non-conformity between the Framework Convention 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 Framework Convention 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

Explanatory comments: As seen earlier, the provisions of the Framework Convention are not directly applicable within the national legal system – they are so-called “non-self-executing provisions” – and thus they need to be supplemented by additional national legislation for them to be implemented. According to Cassese: “Whenever treaties contain such provisions, even in those national legal systems where the mere publication of international treaties is sufficient for them to produce effects domestically, the passing of implementing legislation proves necessary”.¹⁷³ States consider that the incorporation of international rules into domestic legal systems is part of their sovereignty and usually are reluctant to surrender it to international control. As discussed earlier, the Framework Convention follows this approach and leaves contracting parties to decide how to proceed with the domestic incorporation of its provisions in their national legal systems. Clearly, the modalities of domestic incorporation, whether automatically absorbed into a state legal system or reproduced in state legislation, have a significant impact on the influence exerted by international treaties within states.

The most striking example in this regard is the UNMIK-administered Kosovo where the Constitutional Framework provides for the direct applicability of a number of international human rights instruments pertaining to national minorities, including the Framework Convention.¹⁷⁴ Although, the international monitoring mechanisms of these treaties was not effectively operating in respect of UNMIK-administered Kosovo, and this raised among the Advisory Committee legitimate questions about the accountability of the authorities in place in Kosovo.

¹⁷² *Ibid.*, 221-2.

¹⁷³ *Ibid.*, 227.

¹⁷⁴ ACFC, (First) Opinion on Kosovo, 2 March 2006, ACFC/OP/I(2005)004, para. 23.

Indicator A seeks also to verify the potential, indirect 'negative' impact that the FCNM may have on national legislation if not interpreted in good faith as required by Article 2 of the Framework Convention and thus in breach of Article 22 FCNM (on the prohibition to construct the FCNM as limiting or derogating from human rights and fundamental freedoms). For example, in Lithuania there is an ongoing discussion on the introduction of a new legislation concerning ethnic minorities that, by merely reproducing the text of the FCNM, in particular art. 10(2) (use of the minority language in relations with the administrative authorities) and 11(3) (display of topographical indications in the minority language), may have the effect of limiting the protection afforded to minorities by the existing domestic law.¹⁷⁵

Methodological concerns : Implementing this indicator might appear a rather clear-cut process. Often, however, the availability of domestic legal texts in languages different from the official one(s) might be limited and this might be a hindrance for consulting national legislation by those who are not familiar with the official language (s) of the state concerned. Other sources might be consulted as the database of domestic legislation collected by private or public research institutes or by international organisations.

Indicator B : Scope of application of the FCNM and definition of minorities

Definition: Assessing the scope of application of the Framework Convention and the extension of the national definition of minorities requires an index assessing the limitations introduced by states to the scope of application of the FCNM and the definition of minorities provided by the contracting parties either through the declarations introduced upon ratification of the FCNM or by making reference to other domestic legislative sources.

Rationale: On the whole, drafters of international instruments have been unsuccessful in efforts to define the term 'minorities'. In international law there is no generally recognised legally binding definition of the term 'minority', not to mention ethnic, religious or linguistic minorities, despite several attempts in the past decades to elaborate such concepts. A significant amount of energy and time has been spent over the past five decades by various international organisations in the quest for a generally acceptable definition of the term minority, mainly for codification purposes, yet no conclusive results can be reported.

In the case of the Framework Convention, drafters expressly avoided a definition of the term 'minorities', leaving this to the courts, parliaments, governments or other bodies involved in the interpretation of this instrument. The lack of a common, legally binding definition of minority makes it more difficult to establish, among others, whether individuals with a migration background ought or ought not to be considered as being covered by the provisions of the Framework Convention. States interpret the Framework Convention differently on this point as they enjoy a certain margin of appreciation in determining the groups to which the Convention shall apply. They may legitimately do so in order to take the specific circumstances prevailing in their country into account, howsoever inconsistent the resulting situation may be.

¹⁷⁵ Artt. 4 and 5 of the Lithuanian Law on Ethnic Minorities no. XI-3412 23, November 1989.

Clearly, this margin of appreciation must be exercised in accordance with the general principles of international law, the fundamental principles set out in Article 3 of the Framework Convention (on the right to freely choose to be treated or not to be treated as a person belonging to a national minority) as well as the international practice in this field because the Framework Convention should not be “a source of arbitrary or unjustified distinctions.”¹⁷⁶ With a view to preventing any such distinctions from being made, the Committee of Ministers, with the assistance of the Advisory Committee, exercises a supervisory role on the personal scope given by each country to the implementation of the Framework Convention.¹⁷⁷

Most member states of the Framework Convention that have limited the personal scope of application of this instrument with respect to new minorities stemming from migration have done so by requiring that members of the group concerned must be *citizens* of the state in order to constitute a national minority. In many cases, it is also required that the group has long-established or historical ties with the country. The latter requirement means that even those who have obtained the citizenship of the country concerned through naturalisation remain out of the scope of the FCNM. Germany, for instance, has declared that the Framework Convention apply to Sinti and Roma if they *reside traditionally* in Germany and have also *German citizenship*.¹⁷⁸ Likewise, Austria has decided that the Framework Convention applies to minority groups “which live and *traditionally* have had their home in parts of the territory of the Republic of Austria and which are composed of *Austrian citizens* with non-German mother tongues and with their own ethnic cultures.”¹⁷⁹

As for the reservations that a state ratifying the Framework Convention may introduce, the Convention does not include any provision in this regard. The Explanatory Report only affirms that reservations are allowed in as far as they are permitted by international law.¹⁸⁰ Article 19 of the Vienna Convention on the Law of Treaties provides that a state ratifying a treaty may make a reservation unless it is “prohibited by the treaty” or “is incompatible with the object and purpose of the treaty”. As seen earlier, in addition to a reservation, when signing or ratifying an international treaty, a state may make also a unilateral declaration that does not purport to be a reservation but an ‘understanding’, an interpretation of the treaty in a particular respect, as in the case of the declarations made by several contracting parties to the Framework Convention. However, a state’s unilateral declaration constitutes reservation if it purports to exclude, limit, or modify the state’s legal obligation.¹⁸¹

¹⁷⁶ See, CoE PACE Recommendation 1623 (2003), *Rights of National Minorities*, para.6.

¹⁷⁷ See Art. 26 FCNM.

¹⁷⁸ In its declaration made with respect to the FCNM, Germany has declared that ‘national minorities’ are only the Danes and the members of the Sorbian people with German citizenship. It is important to note that with regard to Sinti and Roma as well as the Frisians with German citizenship, Germany has only declared that the FCNM will also apply to them without implying any legal recognition of these groups as *national minorities*, at FCNM, List of Declarations, Declaration by Germany, dated 11 May 1995, at <<http://conventions.coe.int>>.

¹⁷⁹ FCNM, List of Declarations, Declaration by Austria, dated 31 March 1998, at <<http://conventions.coe.int>>.

¹⁸⁰ Explanatory Comments of the FCNM, para. 98.

¹⁸¹ See, H.J. Steiner, P. Alston and R. Goodman, “*International Human Rights...*”, 1124.

Index:

- 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 'national minority`
- 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

Explanatory comments: Several states have formulated declarations regarding the notion of *national minorities* upon ratification of the Framework Convention.¹⁸² Austria, Estonia, Luxembourg, Poland, Switzerland and the “former Yugoslav Republic of Macedonia” have made declarations giving their interpretation of the notion of *national minorities*.¹⁸³ Other states, such as Denmark,¹⁸⁴ Germany, Slovenia, Sweden and the Netherlands,¹⁸⁵ have made declarations listing the groups of people to which the Framework Convention applies within their territory.

In most of the states which explicitly recognize the presence of minorities, the regime of minority protection finds its foundation in the Constitution: Austria, the Czech Republic, Estonia, Hungary, Italy,¹⁸⁶ Latvia, Lithuania, Poland, Slovenia, and Slovakia, all have constitutional provision(s) referring to the protection of minorities although, in some of these States, the Constitution does not use the term 'minority', but another expression such as 'national community' or 'ethnic group'.

¹⁸² For full reference, see the website of the Council of Europe's Legal Affairs/Treaty Office, at: <<http://conventions.coe.int>>.

¹⁸³ For instance, the declaration of Switzerland, dated 21 October 1998, clarifies that 'national minorities` are “groups of individuals numerically inferior to the rest of the population of the country or of a canton, whose members are Swiss nationals, have long-standing, firm and lasting ties with Switzerland and are guided by the will to safeguard together what constitutes their common identity, in particular their culture, their traditions, their religion or their language.”

¹⁸⁴ According to the Declaration, dated 22 September 1997, made by Denmark the German-speaking minority located in the Southern part of Jutland (close to the Danish-German border) is the only existing minority in Denmark. Its protection is based on the Copenhagen-Bonn Declarations of 1955, which concern the rights of the minorities on both sides of the Danish-German border.

¹⁸⁵ When accepting the Framework Convention, on 16 February 2005, the Netherlands only referred to the Frisians, a minority that has traditionally lived in the north of the country, as falling within the scope of the Convention.

¹⁸⁶ In Italy, for instance, the Constitution states, in Article 6, that “[t]he Republic protects linguistic minorities with special laws.”

Only five Member States of the Council of Europe – France, Turkey, Luxembourg, Malta and Liechtenstein – declare that there are no minorities on their territory, although for very different reasons: while in France and Turkey this position appears dictated by the constitutional principle of the indivisibility of the state and the principle of equality of all citizens,¹⁸⁷ in Luxembourg and Malta, this position is based, rather, on an understanding that there exist on the national territory of those countries no ‘minorities’ in the meaning of the Framework Convention.¹⁸⁸ In Belgium finally, no position has been definitively adopted, despite the fact that the Belgian government stated, when signing the Framework Convention, that the minorities to whom the Convention would apply would be defined by an inter-ministerial conference, which is yet to be convened.¹⁸⁹

Despite the number of states that have restricted the personal scope of application of the Framework Convention by introducing the citizenship requirement, it must be emphasized that, in practice, a growing number of states, in their report on the implementation of the FCNM, do not restrict the information provided to people who are citizens and this, in many instances, has been the result of a constructive dialogue between the state concerned and the Advisory Committee: Estonia,¹⁹⁰ Sweden,¹⁹¹ Ireland,¹⁹² the United Kingdom,¹⁹³ Finland,¹⁹⁴ Croatia,¹⁹⁵ Armenia¹⁹⁶ or Czech Republic,¹⁹⁷ provide information on certain groups, regardless of whether their members are citizens or not and this sometimes include information on groups of recently arrived immigrants. This inclusive approach cannot however be interpreted as a recognition that the concept of ‘minorities’, as benefiting the rights stipulated under the Framework Convention, is automatically extended to non-nationals, whether or not they have strong links to the national territory.

Methodological concerns: To implement this indicator, it would be necessary to consult not only the declarations introduced by states with respect to the Framework Convention, but also the national legislation to which, often, the declaration makes reference. Consequently, the same methodological concerns described for the implementation of Indicator A apply in this respect.

¹⁸⁷ France, Turkey, Andorra and Monaco are the only CoE Member States that have neither signed nor ratified yet the Framework Convention. Belgium, Greece, Iceland and Luxembourg have at least signed the FCNM, at <<http://conventions.coe.int>>.

¹⁸⁸ Luxembourg, Malta, and Liechtenstein while declaring that no national minorities in the sense of the Framework Convention exist on their territories, have stated that their signature or ratification is an act of solidarity in the view of the objectives of the Convention.

¹⁸⁹ In its declaration of 31 July 2001 Belgium declared that “... the notion of national minority will be defined by the inter-ministerial conference of foreign policy.”

¹⁹⁰ ACFC, Opinion on Estonia, 14 September 2001, ACFC/INF/OP/I(2002)005, para. 17; ACFC, Second Opinion on Estonia, 22 July 2005, ACFC/INF/OP/II(2005)001, paras.24-27.

¹⁹¹ ACFC, (First) Opinion on Sweden, 20 February 2003, ACFC/INF/OP/I(2003)006, para. 16.

¹⁹² ACFC, (First) Opinion on Ireland, 22 May 2003, ACFC/INF/OP/I(2004)003, para. 24.

¹⁹³ ACFC, (First) Opinion on the United Kingdom, 30 November 2001, ACFC/INF/OP/I(2002)006, para.14.

¹⁹⁴ ACFC, (Second) Report submitted by Finland, 10 December 2004, ACFC/SR/II(2004) 012 E.

¹⁹⁵ ACFC, (Second) Opinion on Croatia, 13 April 2005, ACFC/INF/OP/II(2004)002, para.27.

¹⁹⁶ ACFC, (Second) Opinion on Armenia, 24 October 2006, ACFC/OP/II(2006)005, para.22.

¹⁹⁷ ACFC, (Second) Opinion on the Czech Republic, 26 October 2005, ACFC/INF/OP/II(2005)002, para.28.

Indicator C : Data collection

Definition: Measuring the legal developments concerning the availability and quality of statistical data requires an index describing the methodologies employed to collect and process data on minorities, the level of disaggregation, the principles of confidentiality, minority consultation and the voluntary nature of the statements collected.

Rationale: Since the first cycle of monitoring, the Advisory Committee has emphasised that the existence of basic statistical data on minorities is a precondition to implement successfully any policy, programme and legislation pertaining to minorities as well as to allow persons belonging to minorities to express their identity freely.¹⁹⁸ Such data are necessary, for example, in order to design and carry out effective and appropriate measures to ensure the effective participation of persons belonging to national minorities in public bodies or to ensure the proper allocation of support for minority languages and cultures in education and other fields. Data revealing the numerical size and the geographical distribution of national minorities, possibly disaggregated by gender are recognised as being particularly relevant to enhance minority protection and their existence.

The mechanisms used to collect data can range from censuses to estimates based on ad hoc studies: the latter can be of particular significance in case the persons belonging to the national minorities are reluctant to identify themselves as belonging to a specific minority.¹⁹⁹ In conducting data collection three principles must be always respected : confidentiality to express one's belonging to a given minority,²⁰⁰ the consultation with representatives of national minorities in designing the method of data collection, and the voluntary nature of the statements included in the census, whereby answers to any question regarding a person's ethnic affiliation must not be made obligatory.²⁰¹

Index:

- 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 and in the design of methods of collection of such data

¹⁹⁸ See, for instance, ACFC, (First) Opinion on Kosovo, 2 March 2006, ACFC/OP/I(2005)004, para. 29. See also, Rainer Hofmann, "The Framework Convention for the Protection of National Minorities: An Introduction", in Marc Weller (ed.), *The Rights of Minorities. A Commentary on the European Framework for the Protection of National Minorities* (Oxford University Press, Oxford, 2005), 22

¹⁹⁹ See, among others, ACFC, (First) Opinion on Armenia, ACFC/INF/OP/I(2003)001, 2002, para. 31; ACFC, (First) Opinion on Norway, ACFC/INF/OP/I(2003)003, 2002, para. 27; ACFC, (First) Opinion on Azerbaijan, ACFC/INF/OP/I(2004)001, 2003, para. 27.

²⁰⁰ See, Committee of Ministers, Recommendation (97) 18 *Concerning the Protection of Personal Data Collected and Processed for Statistical Purposes*.

²⁰¹ See, Art. 3 FCNM. See, among others, ACFC, (First) Opinion on Estonia, ACFC/INF/OP/I(2002)005, 2001, para. 19; ACFC, (First) Opinion on Russia, ACFC/INF/OP/I(2003)005, 2002, para. 30; ACFC, (First) Opinion on Ukraine, ACFC/INF/OP/I(2002)010, 2002, para. 22

- Checking whether forms and questions pertaining to data collection are also available in the minority language(s)

Explanatory comments: A combination of quantitative and qualitative statistical information on minorities, their numerical size and geographical distribution – to check whether members of a minority live compactly together in a part of the state territory or are dispersed or live in scattered clusters – are essential tools to improve minority protection and the right to existence in a broad sense. In this regard, following criticisms of the Advisory Committee about the scope and accuracy of data concerning persons belonging to national minorities, Ireland has improved the data collection related to minorities in a number of fields, ranging from education to health service.²⁰² Furthermore, in the census of 2006, Ireland has included for the first time a census question on “ethnic or cultural” background, whereas in the previous census only persons’ possible affiliation with Travellers was queried.²⁰³ In this connection, the Advisory Committee welcomed the information received by Ireland indicating that the census forms were translated into several minority languages, which undoubtedly increased the accessibility of the process amongst the groups concerned. The census has resulted in comprehensive new data on the ethnic make-up of the population.

As discussed earlier, the Advisory Committee considers the right, enshrined in Art. 3 of the Framework Convention, to be treated or not to be treated as a person belonging to a national minority, as one of the key element of any data collection. For instance, the forms for the Kosovo Population and Housing Census designed prior to the test census clearly state that individuals do not have an obligation to reply to the questions as regards their nationality/ethnicity or to the question on their religious affiliation in line with the principle contained in Article 3 of the Framework Convention.²⁰⁴ Similarly, during the All-Russian Population Census conducted in 2002, measures were taken to ensure that data concerning “ethnic origin” were collected in accordance with the principle reflected in Article 3: the optional nature of the question on “ethnic origin” was emphasised in both the training received by the census-takers and in the explanatory manual produced on the procedure for filling in the census questionnaire.²⁰⁵ Croatia has also improved guarantees pertaining to data collection, notably by adopting the Law on the Protection of Personal Data in 2003. The authorities expressed a strong commitment to following the principles of Article 3 in the ongoing process of setting up a central registry of civil servants, which will contain confidential information on the civil servants’ affiliation with a national minority only if the individuals concerned so wish.²⁰⁶

Consultation is also an important factor for improving data collection related to minorities. For instance, in the Czech Republic the national minority representatives were consulted in advance on the formulation of the questions relating to ethnic affiliation and persons belonging to minorities, including the Roma, were directly involved in carrying out the census. Moreover, mother tongue was included in the census forms, and both the forms and the accompanying explanatory material were published in several minority languages

²⁰² ACFC, (Second) Opinion on Ireland, ACFC/OP/II(2006)007, 30 October 2006, paras. 32-3.

²⁰³ *Ibid.*

²⁰⁴ See, among others, ACFC, (First) Opinion on Kosovo, 2 March 2006, ACFC/OP/I(2005)004, para. 30.

²⁰⁵ ACFC, (Second) Opinion on the Russian Federation, 2 May 2007, ACFC/OP/II(2006)004, para. 35.

²⁰⁶ ACFC, (Second) Opinion on Croatia, 13 April 2005, ACFC/INF/OP/II(2004)002, para. 33.

(German, Polish, Romany, Russian, Ukrainian), as well as English, French, Vietnamese, Arabic and Chinese.²⁰⁷

Methodological concerns: In addition to consult the national legislation pertaining to the data collection and censuses, in order to implement this indicator it would be necessary to have access to the explanatory materials, forms, and other administrative instruments required to carry out the collection and processing of data pertaining to minorities. This might thus raise difficulties related to the availability of non-legislative documents and the accessibility in languages different from the official one(s). The implementation of this indicator may be also hindered by the fact that in many countries the collection of *ethnic* data is prohibited in the Constitution or supporting legislation. The issue of collecting data on minorities is indeed highly sensitive due to the potential abuse of such data and the consequent violation of the right to privacy.²⁰⁸

2. Right to Equality and Non-Discrimination

The non-discrimination and equality principles are closely linked.²⁰⁹ The principle of equality – in law and in fact²¹⁰ – requires that equal situations are treated equally and unequal situations differently. Failure to do so will amount to discrimination unless an objective and reasonable justification exists. In other words, the principle of non-discrimination is violated not only when states treat differently persons in analogous situations, but also when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.²¹¹

The difference between the *prevention of discrimination* and the concept of *minority protection* was clarified by the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, at its very first session, in 1947.²¹² In that occasion it was indicated that there was a fundamental difference between them. *Discrimination* implied any act or conduct that denied

²⁰⁷ ACFC, (Second) Opinion on the Czech Republic, 26 October 2005, ACFC/INF/OP/II(2005)002, para. 31.

²⁰⁸ International organisations have elaborated a number of instruments aimed at protecting personal privacy, see among others, UN 1990 Guidelines concerning computerised personal data files; EU Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data; CoE 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data: this instrument permits the collection of information on racial or ethnic origin, but prohibits automated storage, alteration, erasure, retrieval, or dissemination of that data.

²⁰⁹ See, Art. 4 FCNM on the principles of equality and non-discrimination, and 6(2) FCNM on the protection from threats or acts of discrimination, hostility or violence.

²¹⁰ The concept of equality *in law* and *in fact* was introduced by the International Court of Justice in its leading case *Minority Schools in Albania*, in which the Permanent Court affirmed: “Equality in law precludes discrimination of any kind: whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations. ... The equality between members of the majority and of the minority must be an effective, genuine equality.” PCIJ, *Minority Schools in Albania*, Advisory Opinion, 6 April 1935, XXXIV Session, Series A-B, No.64, 19.

²¹¹ See, ECtHR, *Thlimmenos v. Greece*, Appl. No. 34369/97, judgment (Grand Chamber) of 6 April 2000, paras. 44-47.

²¹² See, Marc Bossuyt, *The Concept and Practice of Affirmative Action*, Preliminary Report submitted by the Special Rapporteur to the UN Sub-Commission on the Promotion and Protection of Human Rights Fifty-second session, UN Doc. E/CN.4/Sub.2/2000/11, 19 June 2000.

to individuals or groups of people the equality of treatment they may wish. *Protection of minorities* was described as the protection of non-dominant groups and the individuals belonging to such groups, who while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population. It follows that differential treatment of such groups or individuals belonging to such groups, is justified when it is exercised in the interest of the community as a whole. Prevention of discrimination and the protection of minorities represent therefore different developments of the same idea of equality of treatment for all peoples. One required the elimination of any distinction imposed, whereas the other required safeguards to preserve certain distinctions voluntarily maintained.

This concept of minority protection is based on the assumption that whilst general human rights standards remain an essential part of the platform for the protection of minorities, there are many minority concerns which cannot be fully handled by the application of universal human rights. In this perspective, one of the main questions concerning minorities and the principle of equality is how can variations to the principle of non-discrimination be justified. Particular concern is given to how a balance can be struck between the concept of non-discrimination and special norms necessary to guarantee equality for minorities. In this respect, Article 4 of the Framework Convention on the right to equality, provides that the measures adopted in order to promote full and effective equality between persons belonging to a national minorities and those belonging to the majority shall “not be considered to be an act of discrimination.”²¹³

The right to equality and non-discrimination will be analysed through the following indicator:

D. Anti-discrimination legislation

Indicator D: Anti-discrimination legislation

Definition: Measuring the developments related to the anti-discrimination legislation requires an index describing the nature and the scope of application of anti-discrimination legislation, the grounds of discrimination included in the national legislation and the fields of application, the inclusion of indirect discrimination and the adoption of special measures for minorities as well as the mechanism of redress and the institutional instruments for monitoring and implementing anti-discrimination legislation.

Rationale: As seen earlier, the principle of non-discrimination is not a separate human right, but a corollary to the right of equal protection before the law. Equality is the absence of unequal treatment. Unequal treatment occurs when rights are conferred or duties are imposed on some individuals and not on others and the distinction between the two categories is made on the basis of criteria deemed improper. In order to establish the criteria for deciding which facts should be regarded as conforming to the principle of equality, most national and international legal systems opted for a negative formulation of this principle

²¹³ Art. 4(3) FCNM.

that is the prohibition of discrimination.²¹⁴ The principle of non-discrimination determines the field of application of equality without adding a further human right to the catalogue. This negative formulation has the advantage of providing a higher degree of clarity and certainty in arriving at equality. The non-discrimination clause is not limited to the claim that equality should be reached, but indicates also the notion of what should be equal, and according to what criteria. The abstract notion of equality is thus replaced by a concrete indication of the field of application and of criteria such as association with a national minority, race, colour, religion, political or other opinion, national or social origin, etc.

Article 4 of the Framework Convention contains, in addition to the rights of equality before the law and of equal protection by the law as well as the prohibition of discrimination,²¹⁵ a further element of minority protection: the introduction of *adequate measures* for the promotion of full and effective equal rights between minority and majority.²¹⁶ The last recital of Article 4, paragraph 2, adds that in adopting those measures states must “take due account of the specific conditions of the persons belonging to national minorities”. The ‘adequacy’ of such measures is further clarified by the Explanatory Report that specifies that the adoption of special measures that may be required to achieve the full and effective equality for persons belonging to minorities must be “in conformity with the proportionality principle, in order to avoid violation of the rights of others as well as discrimination against others.”²¹⁷ This means also that such measure “do not extend, in time or in scope, beyond what is necessary in order to achieve the aim of full and effective equality.”²¹⁸

The Advisory Committee has constantly emphasised that Article 4 requires not only the adoption of legislation protecting all persons against discrimination, both by public authorities and private entities, but also *effective remedies*, ranging from specific crimes to sanctions against such acts of discrimination.²¹⁹

Index:

- 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, nationality, are included in the anti-discrimination legislation
- Checking whether positive actions or special measures for minorities are foreseen in the national legislation

²¹⁴ See, also, Art. 14 ECHR; Art. 1 Prot. 12 to the ECHR; Art. 2 ICCPR; Art. 1 ICERD; Art. 21 EU Charter of Fundamental Rights.

²¹⁵ Art.4(1) FCNM.

²¹⁶ Art. 4(2) FCNM.

²¹⁷ Explanatory Report of the FCNM, para. 39.

²¹⁸ *Ibid.*

²¹⁹ See, among others, ACFC, (First) Opinion on Cyprus, 6 April 2001, ACFC/INF/OP/I(2002)004, paras. 23-24; ACFC, (First) Opinion on the Czech Republic, 6 April 2002, ACFC/INF/OP/I(2002)002, para. 25; ACFC, (First) Opinion on Croatia, 6 April 2001, ACFC/INF/OP/I(2002)003, paras. 21-25.

- 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 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

Explanatory comments: In the European context, all EU member states had to transpose into their domestic legal system two important directives: the Racial Equality Directive²²⁰ and the Employment Framework Directive.²²¹ Both Directives require all EU states to introduce national laws and arrangements necessary to forbid discrimination, the former, on grounds of racial or ethnic origin in the fields of employment, education, healthcare, social protection, housing and access to goods and services, and the latter, on a wider range of grounds - religion or belief, age, disability and sexual orientation – but only in the field of employment and vocational training.²²² Within the Council of Europe, in addition to Article 4 of the Framework Convention, a general prohibition of discrimination in the form of an independent free-standing guarantee has been introduced by Protocol 12 to the ECHR that compensate the accessory and limited nature of Article 14 ECHR.²²³ Due to the slow pace of ratification of this instrument,²²⁴ the Advisory Committee has always urged States Parties to the FCNM also to ratify Protocol 12 to the ECHR.²²⁵

Persons belonging to minorities are also exposed to *indirect forms of discrimination*. Indirect discrimination covers situations where ‘an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.’²²⁶ An example of indirect racial discrimination would be a requirement that all applicants for a

²²⁰ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L180/22.

²²¹ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ 2000 L303/16.

²²² The limitations included in the Racial Equality and the Employment Framework Directives, in terms of discriminatory grounds and fields of application, urged on 2 July 2008 the European Commission to publish a Proposal for a Council Directive to implement the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation outside the labour market, in areas including social security, healthcare, education and access to and supply of goods and services (COM/2008/0426 - CNS/2008/0140).

²²³ Protocol No. 12 to the ECHR, which entered into force on 1 April 2005, lists among the discrimination grounds sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status, and has a broad material scope: the Protocol comprehensively forbids discrimination throughout the law and in any activities of public authorities.

²²⁴ As of November 2008, only 17 States had ratified Protocol No. 12, at <<http://conventions.coe.int>>.

²²⁵ Rainer Hofmann, “Implementation of the FCNM: Substantive Challenges”, in A. Verstichel, A. Alen, B. De Witte, P. Lemmens (eds.), “*The Framework Convention ...*”, 165.

²²⁶ Art.2(2)(b) Racial Equality Directive.

street-cleaning job must pass a written language test. Although an apparently neutral requirement, this would place persons belonging to certain minorities at a particular disadvantage if the official national language is not their mother tongue. Moreover, given the nature of the job, such a test would not appear to be proportionate. In the field of employment an example of indirect discrimination would be if a department store introduces a ban on its employees wearing hats when serving customers. The effect of this would be to bar people whose religious beliefs require them to cover their heads, such as Muslim women, from working in the shop. The store would be guilty of indirect discrimination, unless it can demonstrate that there is an objective and justifiable reason for the ban. The Anti-Discrimination Law adopted in 2004 by the Assembly of Kosovo is in line with a broad and comprehensive definition of discrimination providing far-reaching guarantees against both direct and indirect discrimination in both public and private spheres.²²⁷ Similarly, following the recommendations by the Advisory Committee in the first monitoring cycle, in 2003 Croatia has introduced amendments to the Labour Code prohibiting direct and indirect discrimination.²²⁸

As regard the discriminatory ground of citizenship, this applies not only to new minorities stemming from migration because it is evident that not all non-citizens are migrants: there are stateless minorities (as many Roma) or many individuals, as those belonging to the Russian-speaking communities in the Baltic countries, who have become non-citizens as a consequence of state succession or state restoration. For instance, the Advisory Committee has noted that in the Estonian context, where many residents are without the Estonian citizenship, legal safeguards against discrimination on the basis of citizenship – which do not exclude differential treatment with objective and reasonable justifications – would be of direct relevance to a large segment of society.²²⁹ Following criticism from many international bodies, including the Advisory Committee, Estonia has introduced a number of positive measures facilitating the naturalisation process such as streamlining the administrative process between the registration of a citizenship application and the resulting decision or introducing measures to make the process of acquisition of citizenship more accessible to school children as well as raising awareness of the importance of citizenship.²³⁰

Questions concerning positive ‘adequate’ measures for minorities and their compatibility with the principle of equality has been raised, among others, in respect to Slovakia, that, following criticism by the Advisory Committee, has announced the intention to revise pertinent legislation with a view to ensuring the continuation of positive measures in support of national minorities.²³¹

As said earlier, methods of redress and compensation are essential to tackle cases of discrimination. In the United Kingdom the law on racially-aggravated offences has been extended to include religiously-aggravated offences and a new criminal offence of incitement to religious hatred in England and Wales has been also introduced.²³² Moreover, in relation

²²⁷ ACFC, (First) Opinion on Kosovo, 2 March 2006, ACFC/OP/I(2005)004, para. 35.

²²⁸ ACFC, (Second) Opinion on Croatia, 13 April 2005, ACFC/INF/OP/II(2004)002, para. 41.

²²⁹ ACFC, (Second) Opinion on Estonia, 22 July 2005, ACFC/OP/II(2005)001, para. 37.

²³⁰ *Ibid.*, para.46.

²³¹ ACFC, (Second) Opinion on Slovakia, 21 June 2006, ACFC/OP/II(2005)004, para.37.

²³² ACFC, (Second) Opinion on United Kingdom, 26 October 2007, ACFC/OP/II(2007)003, para. 122.

to the protection afforded to persons against hate speech, the maximum penalty for incitement to racial hatred has been increased (from 2 to 7 years).²³³ In Romania, new amendments to the Criminal Code has been presented to the Parliament for approval introducing harsher penalties against racially or ethnically motivated crimes and making incitement to discrimination liable to criminal prosecution.²³⁴ Sanctions imposed for crimes motivated by ethnicity have been increased in Finland following the amendments introduced to the Penal Code in 2004.²³⁵

In addition to the traditional judicial systems, other mechanisms for monitoring and implementing anti-discrimination legislation, are particularly welcomed by the Advisory Committee. For instance, in Kosovo, the Ombudsperson's Office is often the most accessible option for alleged victims of discrimination, and this Office has indeed become an essential and trusted institution for persons belonging to minority communities, not only in respect of discrimination cases, but also as regards the implementation of their rights more generally.²³⁶ The new National Council for the Fight against Discrimination set up in Romania is as a specialist body overseeing the implementation of the principles of equal treatment and equal opportunities and monitoring the application of anti-discrimination legislation.²³⁷ Similarly, the first Human Rights Ombudsperson, appointed in 2003 in Armenia, is appreciated by the Advisory Committee because, despite limited resources, paid particular attention to possible abuses against members of national minorities, including by means of preventive action.²³⁸

Methodological concerns : To implement properly this indicator special attention must be given to the domestic criminal laws to verify whether indirect forms of discrimination and specific offences are foreseen. Moreover, data on special measures or exemptions from general laws, in particular their timing and their location, may require to complement this indicator with non-legal instruments such as administrative acts and regulations.

3. Right to identity and diversity

The right to identity represents in many ways the essence of the case for minorities within the corpus of human rights - the claim to distinctiveness and the contribution of a culture on its own terms to the cultural heritage of mankind. The identity to be protected and promoted may be national, ethnic, cultural, religious or linguistic or all of these altogether. The concept of identity is a broad and important concept for individuals and communities since it concerns their belonging, their way of thinking, feeling and acting. Consequently, respect for and protection of identity can be considered as constitutive elements of respect for human dignity.

The right to identity and diversity has a so-called 'transversal character', because it can overlap with the categories of cultural, economic, social, civil and political rights. Moreover, the

²³³ *Ibid.*

²³⁴ ACFC, (Second) Opinion on Romania, 23 February 2006, ACFC/OP/II(2005)007, para. 85.

²³⁵ ACFC, (Second) Opinion on Finland, 20 April 2006, ACFC/OP/II(2006)003, para. 69.

²³⁶ ACFC, (First) Opinion on Kosovo, 2 March 2006, ACFC/OP/I(2005)004, para. 38.

²³⁷ ACFC, (Second) Opinion on Romania, 23 February 2006, ACFC/OP/II(2005)007, para. 44.

²³⁸ ACFC, (Second) Opinion on Armenia, 24 October 2006, ACFC/OP/II(2006)005, para.38.

transversal character lies in the fact that right to identity can be considered as intermediate between individual rights and collective rights. Right to identity has an individual and a collective dimension because individuals as well as communities can benefit from it. The individual right to participate in cultural life for example makes no sense without a community.²³⁹

The protection of identity is specifically laid down in Article 5 of the Framework Convention, according to which: "...[States Parties] undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and culture heritage." The protection of identity is part of a policy of non-assimilation. Accordingly, the second part of Article 5 FCNM prohibits forced assimilation.²⁴⁰ The protection of identity is furthermore part of Article 6 of the Framework Convention, which prohibits discrimination based on ethnic, cultural, linguistic or religious identity. The link between linguistic rights and the protection of identity of persons belonging to minority groups is particularly relevant because the "use of a minority language represents one of the principle means by which such persons can assert and preserve their identity."²⁴¹

The protection and promotion of identity and diversity have over the last decade become a pivotal issue in a European context. This is reflected in the EU Charter of Fundamental Rights, which includes expressly various references to identity and cultural diversity.²⁴² In line with the increasing attention within the international human rights debate over issues addressing the right to identity and diversity, in 2005 UNESCO adopted a legally binding instrument to preserve and promote cultural diversity: the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The UNESCO Convention, which entered into force in March 2007, constitutes an additional instrument to consolidate certain cultural rights such as participation to cultural rights, freedom to engage in creative activity, right to education. In particular, Article 2 (3) refers to the equal dignity of and respect for all cultures including the cultures of persons belonging to minorities, and Article 7 (1) on the measures to promote cultural expressions affirms that due attention should be given to the special circumstances and needs of various social groups, including persons belonging to minorities.

The right to diversity and identity will be analysed in terms of the following set of indicators:

E. Linguistic Rights

F. Educational Rights

²³⁹ See, Asbjørn Eide, "Cultural Rights and Minorities: On Human Rights and Group Accommodation", in Kirsten Hastrup (ed.), *Legal Cultures and Human Rights* (Kluwer Law International, The Hague, 2001), 25-42.

²⁴⁰ During the negotiations on the draft of the Genocide Convention it was proposed, but not accepted to include *ethnocide* or *cultural genocide* as a crime. It would have implied any form of forced assimilation, the deliberate subordination and eventual destruction of one culture under the dominant culture of the state concerned. There were fears on the part of the majority of the states of converting the legally binding instrument into a mere formula of political rhetoric, of providing a pretext for unnecessary intervention and establishing a grave hurdle in the state-building process on the part of the newly emerging states. See, Javid Rehman, *The Weaknesses in the International Protection of Minority Rights* (Kluwer Law International, The Hague, 2000), 56.

²⁴¹ FCNM, Explanatory Report, para.63.

²⁴² See, for instance, Art. 22 of the EU Charter of Fundamental Rights.

G. Freedom of Religion
H. Media Rights

Indicator E: Linguistic Rights

Definition: Measuring legislative developments concerning linguistic rights requires an index describing the existence of clear and comprehensive legal instruments concerning the use of minority language(s) in contact with administrative and judicial bodies, and the use of one's own name in the form of the minority language as well as the conditions to display in a minority language various topographical indications.

Rationale: An important component of the right to identity and diversity of minorities is centred around language rights. In addition to the specific issues concerning language rights and education, for which reference is made to the Indicator F in the following section, the Framework Convention provides, first, a general right for persons belonging to a national minority to use a minority language in the private and public spheres,²⁴³ and then a series of specific rights, concerning, to some extent, the use of minority language in contacts with administrative and judicial bodies,²⁴⁴ the right to use one's own name in a minority language and the right to official recognition thereof,²⁴⁵ and the right to display, in a minority language, signs of a private nature²⁴⁶ and, under specific conditions, to display topographical signs in a minority language.²⁴⁷

A difficult question concerning language rights relates to the use of minority language with administrative authorities and public services. Here, in accordance with Article 10(2) of the Framework Convention much depends upon a series of conditions and 'appropriate circumstances' such as being a minority 'traditionally or in substantial numbers', if those persons 'so request' and where such request corresponds to a 'real need'.²⁴⁸ Persons belonging to minority groups shall have adequate opportunities to use their language in communications with administrative authorities, in particular in regions and localities in which they have expressed a desire for it and where they are present in significant numbers, and, symmetrically, administrative authorities shall, wherever possible, ensure that public services are provided also in the language of the minority.²⁴⁹ Persons belonging to national minorities shall, for instance, have the right to acquire civil documents and certificates both in the official language(s) of the state and in the language of the minority in question from regional and/or local public institutions.²⁵⁰ This would require the adoption of appropriate recruitment and/or training policies and programmes.

The use of minority languages in assemblies of elected persons, such as municipal or provincial councils or assemblies is also of great significance. In regions and localities where

²⁴³ Art. 10(1) FCNM.

²⁴⁴ Art. 10 (2) (3) FCNM.

²⁴⁵ Art. 11 (1) FCNM.

²⁴⁶ Art. 11(2) FCNM.

²⁴⁷ Art. 11(3) FCNM.

²⁴⁸ Art. 10(2) FCNM; HCNM, *The Oslo Recommendations Regarding the Linguistic Rights of National Minorities*, 1 February 1998, Recommendation 14.

²⁴⁹ *Ibid.*

²⁵⁰ HCNM, *The Oslo Recommendations*, Recommendation 13.

persons belonging to a minority are present in significant numbers, the state should in principle ensure that elected members of regional and local governmental bodies can use also the language of the minority during activities relating to these bodies.²⁵¹

As regards the choice of language before judicial authorities, it is generally acknowledged that the principle of due process requires that all persons, including persons belonging to a national minority, have the right to be informed promptly, in a language they understand, of the reasons for their arrest and/or detention and of the nature and cause of any accusation against them, and to defend themselves in this language, if necessary with the free assistance of an interpreter before trial, during trial and on appeal.²⁵²

Important elements linked to identity and minority language are personal names and names of the environment where the person lives.²⁵³ Along the lines of the Framework Convention, the OSCE Oslo Recommendations affirms that persons belonging to minorities have the right to use their personal names in their own language according to their traditions and linguistic systems.²⁵⁴ These shall be given official recognition and be used by the public authorities. Private entities such as cultural associations and business enterprises established by persons belonging to national minorities shall enjoy the same right with regard to their names. In areas inhabited by significant numbers of persons belonging to a national minority and when there is sufficient demand, public authorities shall make provision for the display, also in the minority language, of local names, street names and other topographical indications intended for the public.²⁵⁵

Index :

- 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
- Checking whether a legal provision 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

²⁵¹ *Ibid.*, Recommendation 15.

²⁵² Art. 10(3) FCNM; Arts.5(2) and 6(3)(a) ECHR; HCNM, *The Oslo Recommendations*, Recommendations 17-19.

²⁵³ The ECJ recognised the linkage between the use of personal names and the right of identity in the case *Garcia Avello v. Belgium*, Case C-148/02, judgment of 2 October 2003.

²⁵⁴ HCNM, *The Oslo Recommendations*, Recommendation 1.

²⁵⁵ Art.11(3) FCNM.

- 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)

Explanatory comments: The right to use minority languages in relation with administrative authorities is perhaps the most challenging and controversial among the provisions of the Framework Convention because it raises the question whether an official language must necessarily be favoured and used by state's apparatus and officials.²⁵⁶ The tension between the use of the state's official language and the minority language is well illustrated by the 2005 Law on the State Language of the Russian Federation establishing that "the mandatory use of the state language of the Russian Federation should not be interpreted as a denial or denigration of the right to use the state languages of the republics of the Russian Federation and the languages of the peoples of the Russian Federation."²⁵⁷

Following criticisms expressed by the Advisory Committee, several countries have adopted or amended legislation aimed at guaranteeing the right to use the minority language in written and oral communication with the administration. This is the case of Armenia, which has introduced a law providing for the right to use minority languages in oral and written dealings with administrative authorities, provided a translation into Armenian, whose cost is to be borne by the authorities.²⁵⁸

A clear legal framework for the use of minority languages in the public sphere, spelling out the operative regulations concerning language use, is pivotal to guarantee effective linguistic rights. In particular, legal uncertainty as to the conditions attached to the use of minority languages in contacts with authorities leaves local authorities with considerable discretionary powers in determining the provisions relating to the use of minority languages which may result in a denial of the right itself.²⁵⁹ In Romania, the passing of Law No. 215/2001 on local public administration provided the country with a clearer legal framework for the use of minority languages in the public sphere at local level, clarifying, *inter alia*, that minority languages may be used orally and in writing in the local administrative units where citizens belonging to a national minority represent over 20% of the population.²⁶⁰ In Finland, new language legislation has been introduced in 2004 extending the possibilities to use minority languages not only in contacts with state and municipal authorities but also with public enterprises and private actors charged with public administrative tasks.²⁶¹

As concerns the use of one's own name in the form of the minority language, crucial are in this regard the legal provisions concerning civil status registers. For instance, in Romania following the first Opinion of the Advisor Committee, the Act on civil status registers, which had already allowed persons belonging to national minorities to enter the female

²⁵⁶ Fernand De Varennes, 'Article 10' in Marc Weller (ed.), "*The Rights of Minorities...*".

²⁵⁷ ACFC, (Second) Opinion on the Russian Federation, 2 May 2007, ACFC/OP/II(2006)004, para. 193.

²⁵⁸ ACFC, (Second) Opinion on Armenia, 24 October 2006, ACFC/OP/II(2006)005, para.77.

²⁵⁹ ACFC, Second Opinion on Estonia, 22 July 2005, ACFC/INF/OP/II(2005)001, para.94; ACFC, (First) Opinion on Kosovo, 2 March 2006, ACFC/OP/I(2005)004, para. 73.

²⁶⁰ ACFC, (Second) Opinion on Romania, 23 February 2006, ACFC/OP/II(2005)007, paras. 122-3.

²⁶¹ ACFC, (Second) Opinion on Finland, 20 April 2006, ACFC/OP/II(2006)003, para. 103.

surnames without adding the suffix required by Czech grammar, has been further amended by specifying that the Act applies also to persons belonging to national minorities when registering marriages or the names of female children.²⁶² Technical requirements for the effective implementation of the legal provisions concerning the use of minority language (and its alphabet), for instance, in identity and travel documents and driving licences, might also be necessary but these cannot be a hindrance for the implementation of Article 10 (2) of the Framework Convention.²⁶³

As regards the use of minority language for topographical indications, different numerical thresholds and other conditions have been introduced by the States Parties to the Framework Convention. In Romania, legislation authorises the use of minority languages for signs indicating the names of localities and local public institutions, in administrative-territorial units in which people belonging to a national minority represent over 20% of the local population.²⁶⁴ While, in the Czech Republic, the use of bilingual signs and place-names in municipalities is authorised by law where national minorities account for at least 10% of the local population, on presentation of a petition signed by at least 40% of adult minority residents.²⁶⁵

Methodological concerns: In addition to the consultation of legal texts and non-legal instruments pertaining to the implementing aspects of these instruments, specific problems may be identified in the considerable amount of national legislation where reference to linguistic rights is made and to the precise territorial and personal scope of application of these documents.

Indicator F: Educational Rights

Definition: Measuring normative developments on educational rights requires an index describing the conditions regarding the teaching 'in' and 'of' minority language(s) in terms of numbers of hours, typology of school disciplines, types of schools, geographical dimension, numerical thresholds, availability of textbooks and educational material in minority language(s) as well as qualified staff in the mother tongue, provision of special measures to tackle specific problems concerning minority education, conditions for setting up private educational institutions, involvement of minorities in curriculum development and implementation of programming, co-operation with kin-states, awareness raising of cultural and/or religious diversity.

Rationale: With regard to the right to education,²⁶⁶ while persons belonging to minorities shall not be discriminated against in their access to education, as clearly stated in Article 12, paragraph 3 of the Framework Convention, a much larger and more complex issue is to

²⁶² ACFC, (Second) Opinion on Romania, 23 February 2006, ACFC/OP/II(2005)007, paras. 121-2.

²⁶³ ACFC, (Second) Opinion on "the former Yugoslav Republic of Macedonia", 9 July 2008, ACFC/OP/II(2007)002, paras.131-3.

²⁶⁴ ACFC, (Second) Opinion on Romania, 23 February 2006, ACFC/OP/II(2005)007, paras.130-1.

²⁶⁵ ACFC, (Second) Opinion on the Czech Republic, 26 October 2005, ACFC/INF/OP/II(2005)002, para. 126.

²⁶⁶ For a comprehensive analysis, see, ACFC, *Commentary on Education under the Framework Convention for the Protection of national Minorities*, 2 March 2006, ACFC/25DOC(2006)002; HCNM, *The Hague Recommendations on the Education Rights of National Minorities*, 1 October 1996.

what extent they can demand that their identity and culture be taken into account in the educational process. The process of education has a profound impact, positively or negatively, on a young person's sense of identity. Indeed, education has been described as a "powerful instrument for the achievement of social engineering".²⁶⁷ As referred to by Article 6, paragraph 1 of the Framework Convention, education can help to strengthen and further develop the identity of persons belonging to minorities while creating awareness and tolerance of other cultures existing in the same society. Educational policies should therefore combine a focus on the universal values, the practical needs of the child, and the respect for distinct cultural traditions and identities.

Under the Framework Convention, Article 12 provides that states shall, where appropriate, take measures in the field of education, in order to foster knowledge of the history, traditions, language and culture of the minorities existing within their territory as well as the majority. The state has thus a role in ensuring that educational curricula reflect the culture of both minorities and majorities. This undertaking is to be read together with the recognition that persons belong to minorities have the right to establish their own educational institutions as an alternative or supplement to public provision.²⁶⁸

The Framework Convention is quite ambiguous in the field of linguistic rights as enshrined in Article 14. Paragraph 1 of this article provides for the right of persons belonging to national minorities to learn their own language, and paragraph 2 of the same article imposes on states an obligation to take measures for the teaching of, or instruction in, a national minority language. However, the second paragraph of Article 14 introduces a series of limitations to the linguistic rights of minorities as it states: "In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, *if there is sufficient demand*, the Parties *shall endeavour* to ensure, *as far as possible* and *within the framework of their education systems*, that persons belonging to those minorities have *adequate opportunities* for being taught the minority language or for receiving instruction in this language."²⁶⁹

Questions arise also as to the scope of application of Article 4 and whether it might be applicable to new minorities stemming from migration. In this respect, the Explanatory Report of the Framework Convention states, rather ambiguously, that the term 'inhabited ... traditionally' - referred to by Article 14 (2) of the FCNM, as well as Article 10 (2) and Article 11 (3) - "does not refer to historical minorities, but only to those *still* living in the same geographical area."²⁷⁰ The scope of application of these provisions, therefore, do not necessarily refer to historical minorities, but it is unclear as to whom the Convention intended to make reference with "those still living in the same geographical area."

²⁶⁷ Patrick Thornberry, "An Unfinished Story of Minority Rights," in Anna-Maria Biro and Petra Kovacs (eds.), *Diversity in Action- Local Public Management of Multi-ethnic Communities in Central and Eastern Europe* (LGI, Budapest, 2001), 47-73, at 66.

²⁶⁸ Art. 13 FCNM.

²⁶⁹ *Emphasis added.*

²⁷⁰ Explanatory Report of the FCNM, para.66. (*Emphasis added.*)

Index:

- 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
- 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

Explanatory Comments: Important aspects related to the right to education are the availability of up-to-date textbooks and educational and pedagogical materials as well as the training and adequate numbers of qualified teachers and educational assistants. The Advisory Committee has constantly underlined that a lack of up-to-date textbooks might represent a serious problem for persons belonging to certain national minorities to the extent that it may be a factor in the decisions of some pupils not to opt for minority language teaching.²⁷¹ In this regard, it is also essential that updated pedagogical materials take into account the contribution of all communities through the consultation of their respective representatives so that minority cultures and traditions are reflected in the curriculum and in textbooks.²⁷²

The availability of sufficient funding for the production of textbook for the teaching of minority language(s), culture and history, and the training of an adequate number of qualified teachers from the minority communities has been also emphasised by the Advisory Committee as an element to enhance the access to education, in particular, for the Roma.²⁷³ The practice of undue placing of Roma children in “special” schools has been considered by the Advisory Committee as incompatible with the Framework Convention as leading to isolation and stigmatisation of these pupils.²⁷⁴

In addition to ensuring adequate domestic production of textbooks, the authorities are also encouraged to consider approving, where appropriate, the use of books produced in the kin-State(s) of the minority concerned.²⁷⁵ Bilateral co-operation programmes with kin-states and cross-border initiatives have been indicated as tools to tackle the problem of the shortage of textbooks and professional staff for instruction in mother tongue.²⁷⁶ However, in Kosovo, while the Advisory Committee has appreciated the valuable co-operation on producing textbooks with Turkey and Bosnia and Herzegovina, it has also stressed that imported textbooks may not adequately reflect the experiences of communities living in Kosovo.²⁷⁷ Moreover, in this respect, it has to be stressed the problem of those minorities which cannot benefit from the support of a kin-state and who may have fewer opportunities to improve the availability of textbooks and qualified teachers in the mother tongue through co-operation programmes with a kin-state.²⁷⁸

²⁷¹ See, for instance, ACFC, (Second) Opinion on Croatia, 13 April 2005, ACFC/INF/OP/II(2004)002, para. 125.

²⁷² ACFC, (First) Opinion on Kosovo, 2 March 2006, ACFC/OP/I(2005)004, para.88

²⁷³ ACFC, (Second) Opinion on Romania, 23 February 2006, ACFC/OP/II(2005)007, paras. 155 and 172; ACFC, (Second) Opinion on the Czech Republic, 26 October 2005, ACFC/INF/OP/II(2005)002, para. 144

²⁷⁴ ACFC, (Second) Opinion on the Czech Republic, 26 October 2005, ACFC/INF/OP/II(2005)002, para. 140; ACFC, (Second) Opinion on Croatia, 13 April 2005, ACFC/INF/OP/II(2004)002, paras. 127-128. See, also ECtHR, *D.H. and Others v. The Czech Republic*, Appl. no. 57325/00, judgment (Grand Chamber) of 13 November 2007.

²⁷⁵ ACFC, (Second) Opinion on Croatia, 13 April 2005, ACFC/INF/OP/II(2004)002, para. 126; ACFC, (Second) Opinion on Moldova, 24 May 2005, ACFC/INF/OP/II(2004)004, para.114

²⁷⁶ ACFC, (Second) Opinion on Croatia, 13 April 2005, ACFC/INF/OP/II(2004)002, para.143.

²⁷⁷ ACFC, (First) Opinion on Kosovo, 2 March 2006, ACFC/OP/I(2005)004, para. 99.

²⁷⁸ ACFC, (Second) Opinion on Romania, 23 February 2006, ACFC/OP/II(2005)007, para.167.

The shortcoming of educational materials and of teachers is particularly noticeable with regard to certain numerically smaller minorities.²⁷⁹ This has been noted, for instance, in Finland, with regard to the smaller Sami languages and to many young Sami who fall outside the scope of the Sami language education, as they live in Helsinki and other municipalities outside the Sami Homeland where there are very few opportunities to obtain Sami language education.²⁸⁰ In Kosovo, the threshold of 15 pupils required to open a class with instruction in a minority language has been considered to raise problems for certain numerically small communities, such as the Bosniacs who are often not able to meet the threshold.²⁸¹ In this case, the adoption of a specific provision allowing for flexibility to accommodate, to the extent possible, requests made by smaller groups appears to be a viable solution.²⁸²

The lack of a clear normative framework as to the applicable norms and the respective responsibilities of state, regions, and municipal authorities for minority education has been identified, in some cases, as a factor that may tend to intensify the politicisation of the question of minority language education. For instance, the Croatian Law on Education in Languages and Scripts of National Minorities does not provide clear conditions and procedures for the implementation of educational models envisaged in the law and this, coupled with disputes about the respective responsibilities of state, county and municipal authorities for the schools with education in minority languages, has negatively affected inter-ethnic relations.²⁸³

School reforms, in terms of de-centralisation²⁸⁴ or ‘rationalisation’ of schools resulting in closing down and merging classes, with a view, for instance, to adjusting the education system to the overall population decrease and to financial constraints, may have a negative impact on minority education and thus provisions allowing for a certain flexibility should be introduced to take into consideration minority needs. In Armenia, for instance, exception to the ‘rationalisation’ process of schools have been made for a number of “protected schools”, which continue to receive funding based on the number of classes and not according to the number of pupils attending a school as in the rest of the country.²⁸⁵

The problem of low school attendance and absenteeism among many minorities, affecting especially girls, is also a source of concern. In Armenia, for instance, the problem is mostly experienced by girls of mainly Yezidi and Kurdish ethnic origin, who for cultural reasons and early marriages, are often taken out of school at a very young age, sometimes before the end of the 8 compulsory school years.²⁸⁶ High drop-out rate is also a problem among Roma children, in particular Roma girls.²⁸⁷ In addition to socio-economic support, measures to

²⁷⁹ Among others, ACFC, (Second) Opinion on Romania, 23 February 2006, ACFC/OP/II(2005)007, para.162.

²⁸⁰ ACFC, (Second) Opinion on Romania, 23 February 2006, ACFC/OP/II(2005)007, paras. 134-135.

²⁸¹ ACFC, (First) Opinion on Kosovo, 2 March 2006, ACFC/OP/I(2005)004, para.98.

²⁸² *Ibid.*

²⁸³ ACFC, (Second) Opinion on Croatia, 13 April 2005, ACFC/INF/OP/II(2004)002, paras. 135-6.

²⁸⁴ *Ibid.*, para. 135.

²⁸⁵ ACFC, (Second) Opinion on Armenia, 24 October 2006, ACFC/OP/II(2006)005, paras. 113-4.

²⁸⁶ *Ibid.*, para. 94.

²⁸⁷ Among others, ACFC, (Second) Opinion on “the former Yugoslav Republic of Macedonia”, 9 July 2008, ACFC/OP/II(2007)002, para. 159; ACFC, (Second) Opinion on Romania, 23 February 2006, ACFC/OP/II(2005)007, para.159.

tackle this issue may range from awareness raising among authorities, families and members of the education system to make them aware of this specific problem to the introduction of extra classes, such as an extra year of pre-school, whereby children of concerned communities are better equipped to attend school.²⁸⁸

Methodological concerns: Perhaps more than in other fields, in the area of education a number of measures are introduced through regulatory and non-legal provisions. Therefore, to implement this indicator it would be crucial to complement it with data on non-legislative measures such as governmental policies and administrative measures.

Indicator G: Freedom of Religion

Definition: Measuring the legislative developments in the field of freedom of religion requires an index describing the existence of a comprehensive legal framework and the conclusion of specific agreements as well as the specific legislative guarantees pertaining to religious communities, ranging from equal treatment to the use of minority language(s).

Rationale : The right to freedom of religion encompasses the general freedom of thought, conscience, and religion, as set out in Article 7 of the Framework Convention, and the right to manifest one's religion or belief as provide for in Article 8 of the FCNM. Paragraph 2 of Article 8 includes an additional element, namely the right to establish religious institutions, organisations and associations.

While the general freedom of religion cannot be infringed, the provision of Article 8 FCNM - a *lex specialis* - is subject to limitations justifiable in a democratic society with a view to achieve a legitimate aim. According to the interpretation given by the European Court of Human Rights for a restriction to be legitimate it must be "prescribed by law" and it must also be examined under the "necessary in a democratic society" clause, as the determinative criterion by which the supervisory organ will evaluate it. Similarly, the interpretation of the phrase, "necessary in a democratic society" epitomises the ECHR's underlying tension between the rights of the individual and the interests of society as a whole. The "necessary in a democratic society" notion cannot be applied in a vacuum, but it must be always tied it to one of the more specific clauses in the same restricting provision, i.e., "protection of morals", "national security", "protection of the rights and freedoms of others", and so on.²⁸⁹

The Strasbourg Court has reviewed several cases where the identity of a minority group is derived from the fact that the applicant belonged to a particular religious group. In the Strasbourg pronouncements an important distinction is made as to whether a particular practice is an essential part of minority rights within the meaning of Article 9 ECHR on the

²⁸⁸ ACFC, (Second) Opinion on "the former Yugoslav Republic of Macedonia", 9 July 2008, ACFC/OP/II(2007)002, para. 161.

²⁸⁹ In conformity with the Strasbourg Court's interpretation of the ECHR's restrictions, any state interference with the exercise of a right must correspond to a 'pressing social need', and the scope and method of the means of restriction must be 'proportionate to the legitimate aim pursued'. See among others, ECtHR, *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A, No. 18, 21 para. 45; ECtHR, *Silver and Others v. the United Kingdom*, judgment of 25 March 1983, Series A, No. 61, 38, para. 98; ECtHR, *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A, No. 45.

right to freedom of religion. As Article 7 and 8 of the Framework Convention, Article 9 ECHR primarily protects, on the one hand, the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*, and, on the other hand, it protects acts which are intimately linked to these attitudes, such as acts of worship or devotion which are aspects of the practice of a religion or belief in a generally recognised form, the so-called *external forum*. The issue of which types of practices belong to the manifestation of religion has been reviewed by the Strasbourg Court in many cases, as for instance those concerning the wearing of Islamic headscarves.²⁹⁰

Index:

- Checking whether a comprehensive legal framework addressing concerns expressed by religious minorities is provided for in the domestic legal system
- Assessing whether the conclusion of agreements between the government and churches and/or religious communities is foreseen in the domestic legislation
- 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

Explanatory comments: At the outset, an important point raised by the Advisory Committee as regards freedom of religion, is that under the Framework Convention also religious minorities constitute national minorities in legal terms such as the Maronites in Cyprus²⁹¹ or the Yesidi in Armenia.²⁹²

The adoption of national laws on the legal status of religious communities and the conclusions of specific agreements between the government and churches and/or religious communities have been considered by the Committee as important elements to address specific concerns expressed by the community concerned. For instance, in Croatia the conclusion of agreements between the Government and the Serbian Orthodox Church and the Islamic Community in 2002 led to progress in the equal access of these religious communities to various institutions, including in terms of the possibility to offer religious services in the army.²⁹³ Similarly, in Finland the 2003 Freedom of Religion Act and the 2003 Act on the Funeral Administration seek to address a number of concerns expressed by persons who do not belong to the two Churches with special status in Finland (Evangelical

²⁹⁰ ECtHR, *Lucia Dablab v. Switzerland*, Appl. No. 42393/98, decision on the admissibility of 15 February 2001; ECtHR, *Sabin v. Turkey*, Appl. No. 44774/98, judgment (Grand Chamber) of 10 November 2005.

²⁹¹ ACFC, (Second) Opinion on Cyprus, 9 July 2008, ACFC/OP/II(2007)004, paras. 18-21.

²⁹² ACFC, (Second) Opinion on Armenia, 24 October 2006, ACFC/OP/II(2006)005, para. 19.

²⁹³ ACFC, (Second) Opinion on Croatia, 13 April 2005, ACFC/INF/OP/II(2004)002, para. 101.

Lutheran and the Orthodox Church of Finland), including difficulties experienced in finding burial sites at a non-discriminatory cost.²⁹⁴

Issues concerning religious institutions, sites and properties, as protected by Article 8 of the Framework Convention, have been raised in connection with their destruction or confiscation. The most disturbing example in this regard has been reported in Kosovo and concerns the destruction of important Orthodox religious sites.²⁹⁵ The Advisory Committee has appreciated the fact that the process of restoration of damaged sites has started under the auspices of the Reconstruction Implementation Commission for Orthodox Religious Sites in Kosovo (RIC), set up in May 2005 by the Council of Europe, the European Commission and UNMIK.²⁹⁶ The adoption of legislative measures taken in recent years by the Romanian authorities have accelerated the restitution of religious property, belonging to national minorities (Hungarian, German, Jewish, Armenian, Greeks, Serbian, Turkish, etc), confiscated during the Communist regime.²⁹⁷ Moreover, a decision adopted by the Romanian Government in 2004 has introduced provision, *inter alia*, for the matter to be referred to the courts where there is a failure to reach an agreement between the churches concerned on the ownership of the property at issue.²⁹⁸

Methodological concerns: In order to implement this indicator particular emphasis must be given not only to the legal instruments that may be adopted by the state concerned but also to the specific agreements concluded with different religious communities or churches. The latter will provide more detailed and specific information regarding the provisions applicable to the religious community concerned. As for other legislative indicators, governmental policies and administrative measures must also complement this indicator as they will shed light on the implementing aspects of the legislative measures related to religious matters.

Indicator H: Media Rights

Definition : Measuring the legislative developments in the field of media rights requires an index describing the existence of a comprehensive and clear legal framework pertaining to minority language programming, the regulation, including through licensing, of public and private media, the involvement of minorities in the programming and other aspects related to broadcasting and printed media, the access to transfrontier media, and the existence of codes of conduct for media professionals regarding the reporting of minority issues.

Rationale : Media rights are of essential relevance for the protection and promotion of the distinct identity of minorities.²⁹⁹ Article 9 of the Framework Convention contains a number of substantive provisions expressed in separate sub-paragraphs that include the right to receive and impart information, regardless of frontiers³⁰⁰, the right to non-discrimination as

²⁹⁴ ACFC, (Second) Opinion on Finland, 20 April 2006, ACFC/OP/II(2006)003, para.90.

²⁹⁵ ACFC, (First) Opinion on Kosovo, 2 March 2006, ACFC/OP/I(2005)004, para. 52.

²⁹⁶ *Ibid.*

²⁹⁷ ACFC, (Second) Opinion on Romania, 23 February 2006, ACFC/OP/II(2005)007, paras. 75-76.

²⁹⁸ *Ibid.*

²⁹⁹ See, HCNM, *Guidelines on the use of Minority Languages in the Broadcast Media*, 10 October 2003.

³⁰⁰ Article 9 (1) FCNM.

to the licensing of sound radio and television broadcasting, and of cinema enterprises,³⁰¹ the possibility to create and use one's own media,³⁰² and the need for special measures ('adequate measures') to facilitate access to the media for persons belonging to national minorities and to promote tolerance and cultural pluralism.³⁰³

Media rights should be interpreted and applied together with other provisions under the Framework Convention such as those pertaining to the promotion of conditions for the maintenance and development of identity and culture (Article 5 FCNM), tolerance and intercultural dialogue (Article 6 FCNM), freedom of expression (Article 7 FCNM). In particular, issues of media and participation have been identified as firmly interconnected as being amongst the main challenges that states face in implementing the Framework Convention.³⁰⁴

Index:

- Checking whether domestic legislation provides for the allocation of frequencies for TV/Radio programmes 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 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 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

Explanatory comments: As said earlier, broadcasting radio and TV programmes in the minority language(s) has been identified as a key tool to promote the identity of minorities. In this regard, a clear legal basis is essential. The 2005 Macedonian Broadcasting Act expressly encourages private operators to broadcast programmes on the cultures and concerns of national minorities in languages other than Macedonian that are spoken by over 20% of the population (Albanian) as well as in the languages of the other communities, and conversely, private operators broadcasting programmes in national minority languages are no

³⁰¹ Article 9(2) FCNM.

³⁰² Article 9(3) FCNM.

³⁰³ Article 9(4) FCNM.

³⁰⁴ Rainer Hofmann, "The Framework Convention at the End of the First Cycle of Monitoring", Presentation made at the Conference 'Filling the Frame', Strasbourg, 30-1 October 2003, reported by John Packer and Sally Holt, 'Article 9' in Marc Weller (ed.), "*The Rights of Minorities...*", 300.

longer required to broadcast in Macedonian as well.³⁰⁵ Likewise, following concerns expressed by the Advisory Committee, in the Russian Federation, legislation prohibiting the use of minority languages in all federal radio and TV broadcasting was amended in 2005 to allow radio/TV companies to broadcast at the federal level in the languages of minorities.³⁰⁶

The involvement of persons belonging to minorities in the media can also contribute to enhance the guarantees provided for under Article 9. The Law on Croatian Radio-Television, for instance, contains an obligation to involve representatives of national minorities in programmes aimed at them,³⁰⁷ and the Finnish Law on Public Service Broadcasting Company (YLE) envisages that the Board of Directors of YLE consults the Sami Parliament before submitting its biannual report to Parliament.³⁰⁸

Methodological concerns: In our modern age, media are subject to rapid developments featured by the introduction of new technologies and instruments, such as internet. In addition to the more traditional printed media and radio/TV broadcasting, to implement this indicator it would be necessary to monitor the existence of legislation reflecting the emergence of new technological means.

4. Effective Participation in Public Life

Whilst persons belonging to national minorities need to be able to preserve their own culture and promote their own identity, they also need to be able to participate in the public life of the state, particularly with regard to matters affecting their culture, identity and institutions.³⁰⁹ The way this right can be organised and exercised depends, to a large extent, on the kind of minority group concerned such as for example large and closely knit minorities having a special interest in participating in the affairs of the country as a whole and in matters affecting the group and, at the same time, smaller or more dispersed groups being mainly concerned with effective participation in decisions on matters concerning them. In addition, autochthonous minorities have, in some cases, a legitimate claim for, though not a right, to territorial autonomy and new minorities stemming from migration who, generally, do not claim such forms of autonomy but other forms of representation.³¹⁰ In these contexts, the form of settlement in which the minority group live is also relevant: in the case of historical minorities living compactly, forms of territorial autonomy can be the best solution to be negotiated, whereas, where minorities live dispersed among the majority, not forming a

³⁰⁵ ACFC, (Second) Opinion on “the former Yugoslav Republic of Macedonia”, 9 July 2008, ACFC/OP/II(2007)002, paras. 107-8.

³⁰⁶ ACFC, (Second) Opinion on the Russian Federation, 2 May 2007, ACFC/OP/II(2006)004, para.180.

³⁰⁷ ACFC, (Second) Opinion on Croatia, 13 April 2005, ACFC/INF/OP/II(2004)002, para. 105.

³⁰⁸ ACFC, (Second) Opinion on Finland, 20 April 2006, ACFC/OP/II(2006)003, para. 90.

³⁰⁹ See, ACFC, *Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs*, 5 May 2008; Joseph Marko, *Effective Participation of National Minorities. A Comment on Conceptual, Legal and Empirical Problems*, Report prepared for the Fourth Meeting of the Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), 19-20 October 2006; HCNM, *The Lund Recommendations Regarding the Effective Participation of National Minorities and Explanatory Note*, 1 September 1999; HCNM, *Warsaw guidelines - Recommendations to assist national minority participation in the electoral process*, elaborating on the Lund Recommendations, 1 January 2001; HCNM, *Recommendations on Policing in Multi-Ethnic Societies*, 9 February 2006.

³¹⁰ See, Article 15 FCNM; Article 5 ICERD; Article 25 ICCPR.

majority in any substantial area, other forms of institutionalisation of these rights are required, which may well include non-territorial, functional variants of autonomy.³¹¹ Obviously, effective participation in public life includes not only participation in political life and how an adequate representation should be devised, but also participation in cultural, social and economic life.

The Explanatory Report of the Framework Convention indicates a non-exhaustive list of measures that member states can promote in order to create the conditions necessary for the effective participation of persons belonging to minorities in cultural, social and economic life and in public affairs, in particular those affecting them: consultation with these persons by means of appropriate procedures and, in particular, through their representative institutions, when states are contemplating legislation or administrative measures likely to affect them directly; involving these persons in the preparation, implementation and assessment of national and regional development plans and programmes likely to affect them directly; undertaking studies, in conjunction with these persons, to assess the possible impact on them of projected development activities; effective participation of persons belonging to minorities in the decision-making processes and elected bodies both at national and local levels; decentralised or local forms of government.³¹²

The effective participation in public life will be discussed through the following set of indicators:

- I. Effective participation in cultural, social and economic life
- J. Effective participation in public affairs

Indicator I: Effective participation in cultural, social and economic life

Definition: Measuring the legislative developments pertaining to the effective participation in cultural, social and economic life requires an index describing access to employment and working conditions, employment in the public sector, promoting employability and adaptability, self-employment, access to land and restitution of property, housing, health, social assistance, cultural associations and modalities to support to them.

Rationale: As mentioned earlier, participation is not confined to the political sphere, but implicates wide areas of public and social life. As Hofmann puts it:” The importance of this right results also from the correct understanding that only those minorities whose members feel some kind of “ownership” of the state in which they live will be prepared to fully integrate themselves into that state and its structures which will, in turn, contribute to stability and peaceful majority-minority relations”.³¹³

Index:

- Checking whether a specific complaints body providing assistance to members of minorities who have been discriminated against in the labour market is foreseen in

³¹¹ See, Asbjørn Eide, “*Prevention of Discrimination...*”.

³¹² Art. 15 FCNM.

³¹³ Rainer Hofmann, “The Framework Convention ...”, 184-5.

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 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

Explanatory Comments: Employment of persons belonging to minority communities in the public administration at the central and/or local level has been constantly stressed by the Advisory Committee as a key tool to enhance the participation of minorities in public life. Through targeted advertisement campaigns and other measures, Kosovo has been quite successful in this regard, in particular in recruiting police officers from minority communities.³¹⁴ Obstacles, however, remain including security problems, which discourage Serbs in particular, but also language, reported by the representatives of the Turkish community.³¹⁵

Participation in economic life by persons belonging to national minorities can be hindered by nationalisation, privatisation and expropriation processes. In this respect, the Romanian Constitution, revised in 2003, introduced, among other new provisions relating to the protection of minorities, a prohibition of nationalisation or any expropriation on the grounds of social, ethnic, religious, political or any other discriminatory criterion in respect of the owners.³¹⁶ Croatia, likewise, has made significant progress in solving cases of repossession of property by the returnees belonging to national minorities and in addressing discriminatory elements that have hampered this process.³¹⁷

Citizenship and/or residency requirements may have a negative impact on the access of a series of rights, such as the access to the labour market and health service, of persons belonging to minorities, in particular with regard to Roma/Gypsies and travellers communities.³¹⁸ Persons belonging to national minorities do not necessarily have to fulfil different requirements from members of majority in order to qualify for certain benefits or forms of assistance such as public housing. However, this does not mean they have access to public housing on an equal basis. For example, some public housing may accept only a limited number of minorities regardless of how many minorities qualify for public housing.

The use and protection of land administered by the state must be reconciled with the protection of the culture of the minority living or using that land. This principle was clearly expressed in the 2004 Finnish Act on Forest Administration, according to which the use and protection of land administered by the State Forest Administration must be reconciled with the protection of Sami culture in the Sami Homeland and carried out in accordance with legislation on reindeer husbandry.³¹⁹

³¹⁴ ACFC, (First) Opinion on Kosovo, 2 March 2006, ACFC/OP/I(2005)004, para. 114

³¹⁵ *Ibid.*

³¹⁶ ACFC, (Second) Opinion on Romania, 23 February 2006, ACFC/OP/II(2005)007, para.43.

³¹⁷ ACFC, (Second) Opinion on Croatia, 13 April 2005, ACFC/INF/OP/II(2004)002, para. 46.

³¹⁸ ACFC, “*Commentary on the Effective Participation ...*”.

³¹⁹ ACFC, (Second) Opinion on Finland, 20 April 2006, ACFC/OP/II(2006)003, para. 51.

The linkage between minority protection, in particular in terms of minority identities and minority lifestyle, and economic activities become more complicated when the nature of economic life can make traditional activities uneconomic. More generally, the problem of uneconomic traditional practices is linked to the issue of the so-called 'museumification' of minorities. When minority groups are protected efforts should not be directed at arbitrarily freezing an evolutionary process. International law does not seek to preserve a minority's identity by stopping the clock or by making minorities into *museum-pieces* which are required to remain on their traditional level of development while the surrounding society experiences significant improvements in their standard of living.³²⁰

Methodological concerns: In order to implement this indicator it would be necessary to consult a broad variety of legal sources ranging from labour law to legislation on the public administration, from instruments pertaining to social assistance and health to cultural associations.

Indicator J: Effective Participation in Public Affairs

Definition: Measuring the legislative development on the effective participation of minorities in public affairs requires an index describing the legislation pertaining to voting rights, political bodies, political parties and the participation of minorities in the legislative process

Rationale: In order to guarantee the effective participation of members of minorities in public affairs various mechanisms can be put in place which, according to Joseph Marko, can be arranged on a normative scale which is formed between two poles, namely the *individual right to vote*, on the one hand, and the *equal representation of groups*, on the other.³²¹ In between rests equal participation in the electoral process, adequate representation in parliament and other elected bodies, the establishment of effective consultative mechanisms, and so on.

Political participation of persons belonging to minorities was considered for long time too sensitive to be addressed in legally binding form.³²² Previously, the issue was addressed in general terms in the ICCPR and other standards on political rights.³²³ Effective participation of persons belonging to minorities has been specifically addressed in the FCNM being the first major international instrument to introduce this right into concrete law and, consequently, imposing a number of legal obligations.³²⁴

Minority participation has two major dimensions: 'participation in decision-making' and 'self-governance'. The first is mostly concerned with issues of 'representation' in the broad

³²⁰ See, Nigel S. Rodley, "Conceptual Problem in the Protection of Minorities: International Legal Developments", 17 *Human Rights Quarterly* (1995), 48-71, at 59.

³²¹ Joseph Marko, *Participation of National Minorities in Decision-making Processes*, Seminar held in Brdo, 1-2 December 1997, 12-21, at 18

³²² See, Marc Weller, "Creating the Conditions ...", 3.

³²³ In particular, Art. 5 ICERD; Art. 25 ICCPR; HRC, General Comment No. 25, *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25)*, CCPR/C/21/Rev.1/Add.7, 12 July 1996.

³²⁴ The more detailed HCNM Lund Recommendations are only soft law.

sense, as it addresses not only representation in parliament (e.g. reserved seats for minority groups) and government/executive bodies, but also members of minorities in the civil service, the police and the judiciary, and even deals with the establishment of advisory bodies and other consultation mechanisms. It also deals with election systems (including references to forms of preference voting and lower numerical thresholds for representation in the legislature for minority political parties).³²⁵ The second dimension refers to the layering of public authority designed usually in the national constitution in ways to accommodate members of minorities. Local and regional layering of authority can range from a confederal system to a federal, a devolved or centralised state structure. Scholars and analysts talk in this context of 'devolved governance' when actual competence is transferred to the regional or local level and of 'decentralised governance' when decisions are taken by officials that are based locally, but that operate within the overall national framework and in the exercise of nationally established competences.

Index:

- 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 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').

³²⁵ Josef Marko, "On the Representation and Participation of National Minorities in Decision-Making Processes", 4 (1) *Human Rights Law Review*, (1999).

- Checking whether domestic legislation or customary 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 or 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 functions are exercised by central authorities and which by forms of self-governance
- If territorial self-governance arrangements are foreseen, checking which 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 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

Explanatory Comments: Participation of persons belonging to national minorities can be hampered by various requirements such as language proficiency, citizenship and residency. Citizenship requirements affect in particular the members of new minorities groups stemming from migration. Moreover, minorities without citizenship are also the persons belonging to the Russian-speaking communities in the Baltic States, who have become non-citizens as a consequence of state succession or state restoration. In this regard, Hungary has recently broaden the scope of application of the 1993 Law on the Rights of National and Ethnic Minorities that will enable non-citizens to participate in elections of the minority self-governments.³²⁶

Similarly, high thresholds in national and/or local elections can be a hindrance in the enjoyment of political rights for members of minorities. In Serbia, the Law on the Election of National Deputies has been amended by exempting political parties of national minorities or any coalitions thereof from the electoral threshold of 5%.³²⁷

³²⁶ ACFC, (Second) Opinion on Hungary, 14 December 2005, ACFC/INF/OP/II(2004)003, para.22.

³²⁷ Comments of the Government of Serbia and Montenegro on the Opinion of the ACFC, 29 April 2004, GVT/COM/INF/OP/I(2004)002, Section 164.

Political bodies are different from civil associations and include all institutionalised and officially representative forms of articulating minorities' interests with advisory or even decision-making power within the official institutional structure acknowledged by the state; political bodies, are for example national councils, advisory boards, committees or assemblies within national bodies, ombudspersons. Their role is of increasing importance, offering members of minorities the possibility to participate in political processes even if they do not have explicit voting rights. Political bodies are potentially an important additional channel for the participation of national minorities in decision-making. For these bodies to succeed, it will be necessary that the respective authorities fully support and consult the councils, and that the councils and other relevant bodies dealing with minority protection establish constructive co-operation.³²⁸ The Advisory Committee also finds it important that the minority-specific councils use fully their legal possibility to establish joint coordination bodies at various levels, bringing together representatives of different national minorities to tackle issues of common concern.

National councils are particularly relevant for the Roma and in fact many States Parties have established such bodies to enhance their participation in the political life of the country. For instance, Finland has created in 2004 permanent regional advisory boards for Roma affairs, and at the European level, upon its proposal a European Roma and Travellers Forum, affiliated with the Council of Europe, has been created in Strasbourg in 2005.³²⁹ Similarly, in Spain a nation-wide Consultative Council for the Roma People has been recently established to improve the preparation and implementation of policies that are likely to affect them.³³⁰

Political representation of minorities can be adversely affected by administrative reforms such as redrawing of administrative boundaries ('gerrymandering') that may reduce their political influence at the central and/or local level leading to a reduction in the enjoyment of various rights under the Framework Convention. The Danish authorities have taken measures aimed to ensure that the administrative reforms - in this case through the reduction of the number of municipalities and regional authorities - do not impair the participation of persons belonging to the German minority in local and regional decision-making processes.³³¹

Methodological concerns: As for several indicators analysed in this study, this indicator alike need to be complemented with a series of non-legal data pertaining to the regulation of specific aspects of the political participation of minorities as well as those related to the implementation of relevant legal instruments as provided through administrative measures and governmental policies.

³²⁸ ACFC, (Second) Opinion on Croatia, 13 April 2005, ACFC/INF/OP/II(2004)002, para. 167.

³²⁹ ACFC, (Second) Opinion on Finland, 20 April 2006, ACFC/OP/II(2006)003, para. 144.

³³⁰ ACFC, (Second) Opinion on Spain, 2 April 2008, ACFC/OP/II(2007)001, para.172.

³³¹ ACFC, (Second) Opinion on Denmark, 11 May 2005, ACFC/OP/II(2004)005, paras. 36-7.

D. Judiciary Indicators

I Theoretical Issues and Thematic Domains

The role of the judiciary is to interpret the law and apply it to the social context within which it has been established. A judge's role is therefore not only to evaluate the circumstances of a case against the textual background of legal norms and, above all, the Constitution and provide reasoning for the decision which is faithful to the text of the Constitution, but the textual analysis undertaken by a judge of every legal norm and most importantly of a country's constitution has to take into consideration the basic normative principles and values enshrined in each constitutional system.³³² One and the same provision can therefore be differently interpreted by different (constitutional) courts, which can have important implications for the protection of minorities. In trying to find a balance between seemingly conflicting rights and/or values, "judges perform a certain margin of appreciation ... so that they are very often blamed for judicial activism, thereby crossing the line between law and politics."³³³ Court rulings can therefore, within the framework provided by the constitution, create a minority-friendly or minority-hostile environment, contribute to the promotion of minority rights and their protection or hamper a progressive development from the perspective of minority rights protection.

This chapter looks into the question on how the impact of the FCNM, and more specifically of the Advisory Committee opinions and the Committee of Ministers' resolutions, on a courts' system can be assessed. For that purpose, an initial distinction between hard and soft supervision has to be made: supervision can consist of a judicial system, where a court (like the European Court of Human Rights (ECtHR)) decides upon individual complaints or applications by states parties. It hands down binding judgments that can be defined as "hard jurisprudence based on hard law". The supervision can also consist of a "quasi-judicial system" where a body of experts (like the Advisory Committee of the FCNM) authors legally non-binding opinions which the competent monitoring body (in the case of the FCNM the Committee of Ministers) uses as the basis for its decisions on the compliance of a state party with its legal obligations under the respective treaty. Hofmann considers these documents together as "soft jurisprudence based on hard law".³³⁴

The FCNM has initially been criticized for its toothless monitoring mechanism. Commentators found that a judicial monitoring mechanism (such as the European Court of Human Rights, which could have been applied in case the Framework Convention was adopted in form of an additional protocol to the ECHR) could have advanced the situations

³³² Joseph Marko, "Minority Protection through Jurisprudence in Comparative Perspective: An Introduction", in 25(3) *Journal of European Integration* (2003), 1755-188, at 184-185.

³³³ *Ibid.*, 185.

³³⁴ Rainer Hofmann, "New Standards for Minority Issues in the Council of Europe and the OSCE", in Jørgen Kühl and Marc Weller (eds.), *Minority Policy in Action: The Bonn-Copenhagen Declarations in a European Context 1955-2005* (ECMI and Department of Border Region Studies, University of Southern Denmark, Flensburg, 2005), 239-277, at 244.

of minorities throughout Europe much more efficiently³³⁵ than the simple reporting obligation. Others believe that the “soft” monitoring mechanism, characterized by a continuous constructive dialogue between the Advisory Committee and the states parties to the FCNM has the potential to “increase the acceptance of the findings of the AC and their implementation, [thereby] contributing to a steady increase of standards of [minority] protection.”³³⁶

Thus, the ECtHR has formally no role in the monitoring of the FCNM. Nevertheless, “because of its tremendous impact on the practical functioning of the whole system of the Council of Europe ... the Strasbourg Court might be considered, in a long-term perspective, as the natural judge of the rights laid down in the FCNM.”³³⁷ By developing its jurisprudence in the light of the FCNM standards, the Court would contribute to the “hardening” of soft jurisprudence. This would have, of course, primarily effect on the parties concerned but due to the authority of the Court it would no doubt generally increase the legal value of the soft jurisprudence under the FCNM.

But not only the European Court of Human Rights can transform the soft jurisprudence of the AC into hard jurisprudence. Also national courts have the same potential, although, of course, with a more limited geographical impact. Particularly important in this respect is the position taken by national constitutional courts, due to their self-evident authority in interpreting the law.³³⁸ Through an analysis of different national courts’ decisions, it will be shown in which ways the FCNM deploys direct effect in the states parties. From the outset, one can agree to Palermo’s assessment, “that the Convention has gained a practical and persuasive importance that is definitely superior to that of a ‘mere’ international treaty” and that “the FCNM is a paramount example of a pan-European document”.³³⁹

While it seems to be clear, that an attempt to assess the impact of the FCNM and of the soft jurisprudence of its monitoring mechanism on the judiciary requires the analysis of court decisions that in one way or the other make reference to the Convention, it should not be forgotten that another aspect is equally important: the impact of the FCNM and the soft jurisprudence on the structures and the organization of the courts. This aspect reaches of course into the field of legislative developments and governmental policies dealt with elsewhere in this study but as it can have decisive impact not only on the environment in which a court is taking its decisions but also on the accessibility of the court for minority representatives it is necessary to give it some space also in this chapter.

³³⁵ See for instance Gudmundur Alfredsson, “A Frame with an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures”, 7(4) *IJMG*R (2000), 291-304, at 304.

³³⁶ Emma Lantschner, “Emerging European Standards of Minority Protection through Soft Jurisprudence?”, in *id.*, Joseph Marko and Antonija Petricusic (eds.), *European Integration and its Effects on Minority Protection in South Eastern Europe* (Nomos, Baden-Baden, 2008), 53-82, at 81.

³³⁷ Francesco Palermo, “Domestic Enforcement and Direct Effect of the Framework Convention for the Protection of National Minorities. On the Judicial Implementation of the (Soft?) Law of Integration”, in Annelies Verstichel et al., *The FCNM: A Useful Pan-European Instrument?* (Intersentia, 2008), 187-214, at 192.

³³⁸ Palermo, “Domestic Enforcement ...”, 192.

³³⁹ Palermo, “Domestic Enforcement ...”, 188-189.

The indicators developed in this chapter will therefore be grouped into two thematic domains: one pertaining to the court's structures and organization and one pertaining to an analysis of the judgements.

II Methodological issues

So far, only very limited research has been carried out about the effect of the FCNM and its monitoring mechanism on the judiciary in general and on court rulings more specifically.³⁴⁰ The indicators developed below are therefore mainly the result of an (non exhaustive) analysis of the opinions of the Advisory Committee and of the resolutions of the Committee of Ministers on one hand, and decisions (mainly of constitutional courts) making reference to the FCNM on the other. Obviously quite some material might be missing in this study as not all (constitutional) courts provide for translations of their judgments into English, or another language understandable for the author of this study.

A first possibility of how to fill the indicators described in this chapter with substance could be an analysis of the second state reports submitted by states parties to the FCNM. The material available after the start of the third monitoring cycle in February 2009 will provide further insight into the impact the FCNM has had on the states parties' practice in the field of the judiciary. For assessing the impact of the FCNM it will of course also be necessary to look into the jurisprudence and analyse the approach taken by courts vis-à-vis the Convention and to investigate the courts' structures and organization.

III Judiciary Indicators

In the following, indicators will be developed grouping them around the above described thematic domains: courts' structures and organization on one hand, and judgements on the other. The indicators identified under these two headings will be discussed by first giving a definition, then a reason for the relevance of its measurement, an index of how it could be measured together with an explanation and finally some considerations about methodological problems.

1. Courts' structures and organization

A court's structure and organization is decisive if a state wants to ensure the access of persons belonging to national minorities to the judiciary and an environment which is prepared to deal with claims brought forward by such persons. Fields that have to be taken into consideration in this context range from the formation and formal preparation of people working in or for judicial authorities, to the recruitment of persons belonging to national minorities for positions in connection with the judiciary, to its accessibility in terms of language use and outreach. It also includes the more or less coordinated and systematic way in which an authority is dealing with cases related to minorities, in particular when it comes to discriminations or ethnically motivated incidents. What is meant here is not so

³⁴⁰ A seminal study on the topic has been provided by Francesco Palermo, "Domestic Enforcement ...".

much how such issues are dealt with in terms of the cases' merits but in terms of their "administration".

The professional groups mainly concerned by these indicators are judges, prosecutors, judicial police, civil servants in the judicial administration, lawyers.

Courts' structures and organization will be discussed in terms of the following set of indicators:

- A. Awareness raising about minority issues and training on the FCNM
- B. Minority representation in legal professions
- C. Accessibility of the judiciary
- D. Coordinated efforts in dealing with discriminations or ethnically motivated incidents

Indicator A: Awareness raising about minority issues and training on the FCNM

Definition: Measuring awareness raising about minority issues and training on the FCNM requires an index describing the efforts undertaken by the authorities to improve the knowledge amongst legal practitioners, judges, prosecutors, judicial police and civil servants in the judicial administration about minority issues in general and the applicable national and international norms (in particular the FCNM) in the field of minority protection in particular.

Rationale: Ignorance about the "other" can contribute to a feeling of mistrust, misunderstanding or even threat that has to be countered. It is therefore of utmost importance that the general public is informed and learns about the existence and the situation of minorities living in their country. What is true for the general public is even more important for those persons whose profession it is to 'judge' (in the broad sense) on persons belonging to such minorities. The FCNM does not contain a specific provision that would oblige states parties to raise the awareness of its population about the situation of minorities and the Framework Convention, including its explanatory report and the rules concerning its monitoring. Therefore, the AC encourages states very often to do so in its general remarks.³⁴¹ It also requires the awareness-raising about the results of previous monitoring cycles.³⁴² However, when the AC notices shortcomings in the implementation of various provisions of the FCNM, it comes quite some times to the conclusion that this is related to a lack of awareness amongst government officials and politicians, but also amongst judges and police.³⁴³

Index:

- 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

³⁴¹ See, e.g., para. 10 of the first opinion on Albania; para. 8 of the first opinion on Austria.

³⁴² See, e.g., para. 6 of the second opinion on the Russian Federation.

³⁴³ See, e.g., para. 29 (under Art. 4) and 40 (under Art. 6) of the first opinion on Albania; para. 43 and 46 (under Art. 4) of the second opinion on Austria.

- 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

Explanatory comment: If the FCNM is supposed to deploy an impact on the judiciary it is of course necessary that those involved in this sector are informed about the contents of the Convention, its state of implementation in their respective country and, at best, have also an idea about how the Convention is applied in other countries. This goes in particular for judges that have to be informed about the legal framework against which they have to decide their cases. That this is not always the case shows an example from the Romanian Constitutional Court. Romania ratified the FCNM on 11 May 1995 and it entered into force on 1 February 1998. In a decision of 20 July 1999, the court stated that “[s]ince Romania has not ratified the European Charter for Regional or Minority Languages or the Framework Convention for the Protection of National Minorities, these two international instruments were not concerned by the constitutional controls mentioned in Article 20 of the Constitution”, which provides for the supremacy of international norms over contradicting national norms. This mistake was commented by the Advisory Committee in its first opinion by stating that it considered that awareness of the FCNM (as well as of other international human rights standards) is one of the essential factors in establishing and maintaining a pluralist and genuinely democratic society. In the view of the AC it was therefore of crucial importance that this awareness process involves both the judicial system and civil society.³⁴⁴

In this context one could also mention the judgment of the Constitutional Court of Montenegro of 11 July 2006 No. 53/06. The Court had to decide about the constitutionality of two provisions of the Law on exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro (službeni list No. 31/06) which provided for the representation of minorities in the parliament of Montenegro (Art. 23) and local assemblies

³⁴⁴ Para. 9 of the first opinion on Romania.

(Art. 24) by stipulating for guaranteed representation of minorities constituting a certain percentage in the overall population through representatives elected from minority lists. The Constitutional Court of Montenegro came to the conclusion that such affirmative action in favour of persons belonging to national minorities was not in agreement with then valid 1992 Constitution of the Republic of Montenegro as it did not contain a legal basis for affirmative action.³⁴⁵ The Court further found that equal voting rights (as laid down by Art. 32 of the Constitution) can only be ensured when there are no privileged groups whose votes worth more. Although the Court acknowledged that Art. 73 of the Constitution, which provides proportional representation of minorities in the public services, state authorities and in local self-government, can be seen as a corrective for potential unequal treatment of persons belonging to national minorities, it gives the legislator no right to provide for special voting rights or guaranteed seats for minorities. Montenegro acceded the FCNM on 6 June 2006; the discussed judgment was adopted only a month later. The fact that the FCNM has not been mentioned in the reasoning of the judgment³⁴⁶ could be an indicator for either a lack of awareness of the judges of the instrument or their reluctance to refer to it, as this could have led, if not to an opposite conclusion, at least to the consideration that affirmative action should be admitted by the Constitution and that it could not be considered as discriminatory. In fact, the new Constitution of Montenegro explicitly foresees “the right to authentic representation ..., according to the principle of affirmative action.”³⁴⁷ After the new Constitution was adopted, the Ministry for the Protection of Human and Minority Rights prepared an initiative to restore the legal power of Art. 23 and 24 of the Law on exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro. This is a typical case, where the three sets of indicators that are developed here separately would need to be combined, in order to see, a) why the FCNM was not referred to in the judgment of the Court, b) which role the FCNM played in the drafting of the new constitutional provision and c) to which extent the Ministry for the Protection of Human and Minority Rights, apart from the new constitutional framework, took also the FCNM into account in its initiative to restore the legal force of the previously abolished articles, and d) how those different factors interplay.

Awareness raising efforts should be carried out all over a country. This is of course a bigger challenge in a country such as the Russian Federation as compared to a country like Malta. However, the Advisory Committee is clear on demanding familiarity with the FCNM and related documents also outside the capitals.

It goes without saying that awareness about the FCNM is also required for persons belonging to national minorities, in order for them to be aware of additional arguments that could back a claim they want to bring in front of a national court. This aspect, however, is addressed under the political discourse indicators.

³⁴⁵ Marko Kmezić, “Montenegro”, in Emma Lantschner, Joseph Marko and Antonija Petričušić, *European Integration and its Effects on Minority Protection in South Eastern Europe* (Nomos, Baden-Baden, 2008), 253-273, at 267.

³⁴⁶ A similar case is the decision of the Slovak Constitutional Court of 18 October 2005, PL ÚS 8/04, in which the court also denied the constitutionality of affirmative action. For a discussion of this case see Alexander Brörtl, “Positive Action and the Principle of Equality: Discussing a Decision of the Constitutional Court of the Slovak Republic”, 5 *European Yearbook of Minority Issues* (2005/6), 377-395.

³⁴⁷ Art. 79(9) of the Constitution of Montenegro of 19 October 2007.

Methodological concerns: Awareness raising campaigns and trainings are easily measurable in quantitative terms but not so easily in qualitative terms, which is, however, the more important component. One well-organised, high quality training may have a greater impact than ten mediocre quality trainings.

Indicator B: Minority representation in legal professions

Definition: Measuring minority representation in legal professions requires an index describing the level of participation (in terms of numbers and hierarchical positions) of persons belonging to national minorities in a specific field of public and economic life, namely in professions such as judges, prosecutors, members of judicial police, civil servants working in the judicial administration and practicing lawyers.

Rationale: Art. 15 of the FCNM prescribes that “[t]he Parties shall create the conditions necessary for the *effective participation* of persons belonging to national minorities in ... economic life and in public affairs, in particular those affecting them” (emphasis added). According to the explanatory report to the FCNM, this article “aims above all to encourage *real equality* between persons belonging to national minorities and those forming part of the majority” (emphasis added). In its thematic commentary on participation, the AC states that public administration in general should reflect, to the extent possible, the diversity of society. “This implies that State Parties are encouraged to identify ways of promoting the recruitment of persons belonging to national minorities in the public sector, including recruitment into the judiciary and the law enforcement bodies”, without however sticking to measures aimed at reaching a rigid, mathematical equality.³⁴⁸

Index:

- 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
- 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

³⁴⁸ Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs (hereinafter “Commentary on Participation”), adopted on 27 February 2008, para. 120-123.

Explanatory comments: The AC ascertained in several of its opinions a disproportionately low number of persons belonging to minority communities who work in judicial structures. This makes it, in the view of the Advisory Committee and the Committee of Ministers, difficult to build confidence in the judicial system among minority communities.³⁴⁹ In order to assess whether the FCNM has had an impact on the situation of minorities in this field, it is necessary to analyse whether the number of persons belonging to national minorities working in a legal profession has increased in the years since the FCNM has come into force. It is therefore essential, that reliable and up to date statistical data is available that allows for the design and implementation of targeted strategies.³⁵⁰ Sometimes states give information about the number of persons belonging to national minorities employed at courts in their state reports.³⁵¹ As women and elderly persons belonging to national minorities are potentially faced with a double kind of discrimination, it is necessary that collected data can be disaggregated by sex and age. This has been requested by the Advisory Committee in general terms in a number of occasions.³⁵² It is, however not enough to ascertain a rising number of minority members working in the judiciary; it is equally important to assess in which positions these persons can be found. For instance, with regard to Macedonia, the Advisory Committee noted with satisfaction the progress achieved in ensuring the representation, albeit to differing extents, of the various minorities in the managerial structures and staff of most public institutions, including the Judicial Council and the Constitutional Court.³⁵³

Measures to promote participation of persons belonging to national minorities in the judiciary and the administration of justice should be implemented in a way which fully guarantees the independence and the effective functioning of the judiciary.³⁵⁴

Methodological concerns: The collection of reliable statistical data, which is a precondition for appropriately addressing an under-representation of persons belonging to national minorities within the judiciary, may cause problems in certain countries that reject in principle the collection of ethnic data. In other countries, where data are available, they are not reliable or are not informative as, for instance, they do not give information about the level of employment of a given number of persons belonging to national minorities.

³⁴⁹ See e.g. para 37 of the opinion on the implementation of the FCNM in Kosovo; and Resolution of the Committee of Ministers ResCMN(2006)9 on the implementation of the Framework Convention for the Protection of National Minorities in Kosovo (Republic of Serbia), 3.

³⁵⁰ Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), “The Impact of International Norms on the Protection of National Minorities in Europe: The Added Value and Essential Role of the Framework Convention for the Protection of National Minorities”, Report prepared by Rainer Hofmann, Strasbourg, 5 December 2006, DH-MIN(2006)018, 12.

³⁵¹ See e.g. the second state report of Austria, at 13, or the second state report of Croatia, at 19.

³⁵² See ACFC Commentary on “The effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs”, adopted on 27 February 2008, ACFC/31DOC(2008)001, para. 30.

³⁵³ Para. 195 of the second opinion on “the former Yugoslav Republic of Macedonia”.

³⁵⁴ See, e.g., paras. 154-159 of the second opinion on Croatia; and para 122 of the AC Commentary on Participation.

Indicator C: Accessibility to the judiciary

Definition: Measuring accessibility to the judiciary requires an index describing which efforts have been made in order to facilitate the communication in the broadest sense of persons belonging to national minorities with judicial authorities.

Rationale: According to Art. 4 of the Framework Convention states parties guarantee to persons belonging to national minorities the right to equality before the law and of equal protection of the law. This requires that whenever a person belonging to a national minority is confronted with a violation of his/her rights, be they rooted in that person's belonging to a minority or in his/her 'simply' being a citizen of that state, s/he is provided with the possibility to claim for redress. The ECHR provides in Art. 6 for the right to a fair trial. Although there is no explicit guarantee in the ECHR of the right to access to a court, the ECtHR has held "that this provision secures to everyone the right to have any claim relating to his/her civil rights and obligations brought before a court or tribunal."³⁵⁵ Persons belonging to national minorities can be disadvantaged in this respect, first because of potential language barriers that might hamper both, the possibility of finding out about possible remedies and of putting them into practice due to problems of communication with judicial authorities. Second, minorities often settle in the periphery of a country where the access to courts is difficult due to the distances which is sometimes even further aggravated by a limited freedom of movement. And thirdly, minorities sometimes find themselves in economically more difficult situations than members of the majority and therefore need the support of the state when, for instance, for certain reasons the assistance of a lawyer proves indispensable for an effective access to a court.³⁵⁶

Index:

- 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 signs 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

³⁵⁵ Nuala Mole and Catharina Harby, "The right to a fair trial. A guide to the implementation of Article 6 of the European Convention on Human Rights", Council of Europe, Human rights handbooks, No. 3, (2003), 35.

³⁵⁶ See on this also ECtHR, *Airey v. Ireland*, judgment of 9 October 1979, para. 26.

- 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)

Explanatory comments: The use of language in contact with the judiciary is a delicate field. Although it seems self-evident that for the defence of ones rights in front of a court it is of utmost importance to understand the allegations and be able to bring in ones arguments in a language in which one feels comfortable, all international human and minority rights instruments, including the FCNM, contain quite limited provisions. Art. 10(3) provides for the right to be promptly informed, in a language that one understands, of the reasons for an arrest, and of the nature and cause of any accusation and to defend oneself in that language, if necessary with the free assistance of an interpreter. The explanatory report of that article states, that this provision is based on Articles 5 and 6 of the ECHR and does not go beyond the safeguards contained in those articles. It would therefore go beyond the scope of the FCNM to expect states to provide for the possibility to hold entire proceedings in a minority language, like it is the case in the Province of Bolzano in Italy with regard to the German-speaking minority, or even to provide for translation if the person understands the majority language.³⁵⁷

All the more it is important, that the minimum required – to provide for the free assistance of an interpreter if an arrested or accused person does not understand the official language – is properly implemented. In that respect, the number of translators working at courts and their qualification is relevant and has in several cases been found unsatisfactory by the Advisory Committee.³⁵⁸ With regard to some countries, the Committee ascertained efforts made between the first and the second monitoring cycle to train specialist interpreters, which made the recruitment into various parts of the judicial system and civil service of additional interpreters possible.³⁵⁹ However, the AC encouraged the authorities to further expand these efforts,³⁶⁰ in particular with regard to languages spoken by smaller minorities, backing them with adequate financial sources.³⁶¹

³⁵⁷ The Strasbourg organs denied in several cases a violation of Articles 5(2) and 6(3)(a) where the person understood the official language. See, e.g., EComHR, Appl. No. 808/60, *ISOP v. Austria*, decision of 8 March 1963; EComHR, Appl. No. 11261/84, *Bideault v. France*, decision of 1 October 1986; ECtHR, Appl. No. 9783/82, *Kamasinski v. Austria*, judgment of 19 December 1989; ECtHR, Appl. No. 26891/95, *Legerblom v. Sweden*, judgment of 14 January 2003. On these cases, in particular the last one, see Roberta Medda-Windischer, “The Jurisprudence of the European Court of Human Rights”, 2 *EYMI* (2002/3), 445-469, at 466-467; and *id.*, “The European Court of Human Rights and Minority Rights”, 25(3) *Journal of European Integration* (2003), 249-271, at 257.

³⁵⁸ Para. 56 of the first opinion on Armenia; para. 33 of the first opinion on Finland; para. 71 of the first opinion on Macedonia (interpreters are provided for also in civil proceedings but difficulties persist due to the shortage of qualified interpreters); para. 64 of the first opinion on Moldova (financial resources are inadequate and/or there is a lack of qualified interpreters, particularly in the case of numerically less important minority languages); para. 57 of the first and paras. 119-120 of the second opinion on the Czech Republic (shortage of interpreters of the Roma language); para. 38 of the first opinion on Hungary.

³⁵⁹ See, e.g., para. 124 of the second opinion on Macedonia.

³⁶⁰ Para. 128 of the second opinion on Macedonia.

³⁶¹ Para. 120 of the second opinion on the Czech Republic.

The Advisory Committee criticized in its opinions cases where the right to be promptly informed, in a language that one understands, of the reasons for an arrest was not regulated by law. In the view of the AC such a situation is not compatible with Article 10(3) FCNM.³⁶² Where such legislation has been introduced between the first and the second monitoring cycle, the AC commended such development.³⁶³

A sign for the will of the authorities to make the courts approachable and accessible to persons belonging to national minorities is also the placement of signs in and on offices and court buildings in the language of the minorities. Similarly, a court's website using also minority languages makes it easier for persons belonging to national minorities to get information that might be necessary for defending their rights.

The question of the availability of legal aid has also been addressed by the AC. It acknowledged, that problems related to the provision of legal aid have implications also for persons belonging to the majority community, their effects are often particularly serious for IDPs and persons belonging to minority communities.³⁶⁴ In that respect it should also be looked into whether adequate measures are taken in order to ensure the access to the judiciary also to persons living in peripheral areas (often persons belonging to national minorities) or persons affected by limited freedom of movement. Such measures could be the establishment or the increase in terms of numbers of court liaison offices, including the possibility of organizing court hearings in such offices as well as a balanced geographical distribution of such offices.

Methodological concerns: To populate this indicator it is necessary to look beyond the legal provisions into the day-to-day practice. A state might have a very advanced legal system, allowing for the use of minority languages in relations with judicial authorities, but in practice implementation is lacking. To get reliable information concerning the “linguistic accessibility” of the judiciary, visits to courts and interviews with persons employed in the judiciary as well as persons belonging to national minorities will be required.. As already mentioned in the explanatory comments, problems related to the accessibility to the judiciary in terms of legal aid and outreach are often faced also by the majority community. When populating this indicator this overall problem should be acknowledged and taken into consideration in the evaluation of findings.

Indicator D: Coordinated efforts in dealing with discriminations or ethnically motivated incidents

Definition: Measuring coordinated efforts in dealing with discriminations or ethnically motivated incidents requires an index describing how law-enforcement bodies, prosecutors and judges work together in recognizing discrimination or ethnically motivated incidents, investigating and administering them.

³⁶² See e.g. para. 80 of the first opinion on Bulgaria.

³⁶³ See e.g. para. 118 of the second opinion on the Czech Republic; paras. 125-126 of the second opinion on Romania.

³⁶⁴ See e.g. para 37 of the opinion on the implementation of the FCNM in Kosovo.

Rationale: The protection against discrimination, prescribed in Art. 4 FCNM, including against physical or verbal attacks or harassment motivated by the ethnicity of the victim is a most basic right of persons belonging to national minorities which the state has to protect. Very often, however, the ethnic background of incidents is denied, they are not properly investigated or archived without having been considered by a judge. Such behaviour by state authorities might lead to a (real or perceived) feeling that ethnically motivated incidents remain unpunished. This contributes to a situation where a “large proportion of every-day manifestations of inter-ethnic hostility and harassment are not reported to law-enforcement bodies, often due to a lack of confidence in the institutions and in the effectiveness of the remedies available.”³⁶⁵ In particular in societies that have recently gone through a warlike or armed conflict “it is vital to show, in a transparent manner, how public institutions deal with inter-ethnic incidents and to ensure that the related processes are objective, unbiased and fair.”³⁶⁶

This process involves mainly law-enforcement bodies, prosecutors and judges but also the media.

Index:

- 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 motivated incidents by law-enforcement bodies, prosecutors offices, courts
- Exchange of such reports among these offices
- Establishment of an ombudsperson
- Monitoring of implementation of judicial decision related to ethnically motivated incidents
- Training and sensitization of police to react to ethnically 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 motivated incidents
- Acknowledgment of ethnically motivated violence at the top of the state authorities and political forces³⁶⁷

Explanatory comments: In order to properly counter and address ethnically motivated incidents it is first of all necessary, that the existence of that problem is acknowledged. This

³⁶⁵ See e.g. para. 53 of the opinion on the implementation of the FCNM in Kosovo.

³⁶⁶ *Ibid.*, para. 54.

³⁶⁷ This is an overlapping area with the indicators on policial discourse.

goes for the general public but is particularly relevant for law-enforcement bodies that are supposed to react and intervene when being confronted with such incidents. Persons belonging to national minorities also have to be properly informed about the legal possibilities they have when they become victims of ethnically-motivated incidents. In order for them to have trust in the responsible institutions it is necessary that they agree on a coordinated way of dealing with such incidents. The flow of information is very important in this respect and includes the ombudsperson (that in some cases can be the most efficient body in dealing with ethnically motivated incidents), the police, the prosecutors and the courts. Such a flow of information could be ensured by the establishment of a common database where the background of incidents can be recorded. The representation of persons belonging to national minorities within all relevant bodies can also be seen as a confidence building measure. A monitoring system within law enforcement bodies should be able to keep track on the behaviour of police-man in situations where they assisted to incidents of inter-ethnic violence or everyday manifestations of intolerance. Persons belonging to national minorities and the population at large should be encouraged to report about such incidents. With due respect to the freedom of press, states have to ensure that media do not report in a way that fuels inter-ethnic hatred and thereby contributes to an increase of ethnically motivated crimes.

Methodological concerns: The evaluation of findings needs to take into consideration the independence required for each of the bodies involved. Also, access to information might be difficult due to the confidentiality of data.

2. Judgements

In the preamble to the FCNM, state parties stipulate their determination “to implement the *principles* set out in this framework Convention through *national legislation and appropriate governmental policies*” (emphasis added). This could imply, just as the fact that it has been adopted in the form of a ‘Framework’ Convention, that the drafters of the Convention did not have in mind a direct effect of the FCNM within the national systems. It is therefore worth looking into the questions on how courts have dealt with the question of direct applicability of the FCNM and in which way they have made reference to the FCNM.

The impact that the FCNM and the “soft jurisprudence” of the Advisory Committee has had on court rulings may be monitored through the following indicators:

- E. Direct applicability of the FCNM within the national systems
- F. Number of cases and fields covered
- G. “Constructive” use of the FCNM
- H. “Disruptive” use of the FCNM
- I. Implementation of court rulings

Indicator E: Direct applicability of the FCNM within the national systems

Definition: Analysis of constitutional provisions with regard to the rank of international treaties within the respective national system

Rationale: In order to be able to make a statement on the self-executing force, i.e. the direct applicability of the FCNM within a national system it is necessary explore which rank international treaties are given by the Constitution of a state.

Index:

- 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

Explanatory comments: Different constitutions apply different approaches towards international law. In order for a judge to be able to apply a provision of the FCNM directly, it needs to have self-executing character. This means first of all that the constitution must either follow the theory of monism, where national and international law are simply manifestation of the single body of norms or follow the doctrine of incorporation or absorption. In addition to that, the provisions of the respective treaty must be formulated specifically enough in order to be applied directly. If they only have the character of directive principles, they only oblige the state to adopt appropriate legislation but don't confer rights to individuals. The FCNM is generally considered to contain "only" principles that are so vaguely worded that they cannot be considered self-executing. This might be true for most of its provisions but there are with no doubt some, which can have self-executive effect. Most of them can be reconnected to general human rights, such as the right to freedom of expression, the right to assembly or the right to equality, some others are more minority specific, such as the right to use the minority language in private and public, the right to use and register names in a minority language etc. The question remains however, which rank do international treaties have within the hierarchy of legal norms within a specific country. In Bosnia and Herzegovina the FCNM has constitutional status, actually, it even prevails over the Constitution. In other states, the FCNM and other international treaties are situated above national laws, whereas in a third category of states, international treaties are at the same rank as national laws, which would mean that a more recent national law that contradicts a provision of an international treaty would, at least in theory, supersede the latter. In Bulgaria the constitutional court was even called to look into the question of constitutionality of the FCNM as a whole.³⁶⁸

Methodological concerns: An analysis of these settings allows a first assessment of what impact the FCNM can "formally" have on judicial proceedings. However, in order to assess the real impact of the FCNM on court proceedings one has to go beyond such a positivistic approach and analyse the judgments themselves. By doing so, one will find out that the FCNM must have a persuasive authority that induces judges to take it into consideration even in cases where it has not even entered into force.³⁶⁹

³⁶⁸ Bulgarian Constitutional Court, judgment of 18 February 1998, case 2/98. See on this, Francesco Palermo, "Domestic Enforcement ...", 194.

³⁶⁹ See e.g. Constitutional Court of Latvia, judgment of 5 June 2003, case No. 2003-02-0106.

Indicator F: Number of cases and fields covered

Definition: Count the number of cases in which direct reference to the FCNM has been made but also cases with no reference to the FCNM but of relevance for persons belonging to national minorities and establish a list of fields that are covered by these cases

Rationale: Counting the number of cases in which direct reference to the FCNM is made gives an idea about the awareness of judges of the Convention and the degree of “‘absorption’ of the FCNM within the judicial culture of the States”.³⁷⁰ If, however, the overall number of cases with a minority subject increases, even without direct reference to the FCNM, this can also be considered as a sign for an increased awareness of minority issues in general. It could also be an indicator for persons belonging to national minorities being better informed about the judicial possibilities they have in enforcing their rights and showing also trust vis-à-vis the judicial authorities. The number of cases with a minority subjects that have been resolved to the advantage of a minority might further be an indicator of the level of implementation of the FCNM and the overall legislative framework for the protection of minorities. Looking into the fields that were mainly covered by such judgments gives information on one hand, about which fields a mostly felt by minority members and on the other, in which fields the FCNM has the biggest potential to develop some “hard-core rights ... that might become judicially enforceable.”³⁷¹

Index:

- 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

Explanatory comments: A cursory research in 2008 resulted in a number of 32 court decisions that made reference to the FCNM. 22 of which were rulings by national constitutional courts, 6 by the ECtHR and 4 by ordinary courts. However, in many countries, there are many more judgments dealing with the protection of national minorities. For instance, out of the 20 judgments touching on minority issues adopted by the Croatian Constitutional Court since the year 2000, only 4 make direct reference to the FCNM. It has been found, that the fields most often covered by these judgments were language and educational rights. Political representation and the protection against discrimination were also issues dealt with in these cases.

Methodological concerns: Research on courts cases is difficult for a number of reasons: not all judgments are easily retrievable and accessible via internet. This is particularly true for ordinary courts. If judgements are available on internet, the language problem might be a further obstacle.

³⁷⁰ Palermo, “Domestic Enforcement ...”, 192.

³⁷¹ Palermo, “Domestic Enforcement ...”, 193.

Indicator G: “Constructive” use of the FCNM

Definition: Measuring “constructive” use of the FCNM requires an analysis of case law where reference has been made to the FCNM with the effect of filling a legislative gap in the national system or promoting the establishment of standards.

Rationale: Finding out about court rulings that have made “constructive” use of the FCNM gives information about how courts interpret different provisions of the Convention. It further gives insight into the weight given within a national legal system not only to the FCNM as such but also to the soft jurisprudence of the Advisory Committee. Cataloguing constructive use of the FCNM in court rulings could be useful also for other courts and used as material for above mentioned trainings for judges.

Index:

- Source of interpretative inspiration, influence on the definition and interpretation of certain concepts
- Parameter for adjudication
- European standard

Explanatory comments: The distinction used by Palermo in its seminal study “Domestic Enforcement and Direct Effect of the Framework Convention for the Protection of National Minorities: On the Judicial Implementation of the (Soft?) Law of Integration”³⁷² is also the basis for the index provided for this indicator.

First, he identified judgments, where the FCNM was referred to as “indirect source of interpretative inspiration, as an *argumentum ad adiuvandum*”. In these cases the FCNM was not the decisive element to decide the case but provided additional support for the decision. This was in particular the case in those judgments that made reference to the FCNM although it was not yet in force in that moment of time,³⁷³ but is quite a common pattern also in judgements that referred to the FCNM when it was already in force.³⁷⁴

Second, he identified judgments, comparatively fewer than cases of the first category, where courts referred to the FCNM “as real parameter for adjudication”. The best example is given by the Romanian Constitutional Court that was called to scrutinize the constitutionality of a legal provision that granted the right to use the minority language in contacts with local public administration in areas where the minority population constitutes at least 20% of the overall population. The court rejected the claim as in its view the law constituted simply the implementation of Article 10(2) of the FCNM, by fixing the details of the enforcement of

³⁷² Palermo, “Domestic Enforcement ...”, 196-201.

³⁷³ This was e.g. the case in Constitutional Court of Romania, 2 April 1996, case. no. 35/196 (Romania ad signed and ratified the Convention but it entered into force only on 1 February 1998); Constitutional Court of Slovenia, 12 February 1998, case U-I-283/94 (at that moment it has signed but not ratified the Convention); and Constitutional Court of Latvia, judgment of 5 June 2003, case no. 2003-02-0106 (Latvia had signed in 1995 but ratified the Convention only in 2005).

³⁷⁴ Examples are: Constitutional Court of Macedonia, 20 May 1998, U.br. 49/98; Constitutional Court of Croatia, 7 February 2007, U-III-3138/2002.

that provision, “which, according to Art. 11.2 and 20.2 of the [Romanian] Constitution, may be directly enforced”.³⁷⁵ The Croatian Court justified affirmative action vis-à-vis its national minorities in the field of political participation also by referring to Art. 4(3) of the FCNM.³⁷⁶ A crucial judgement has been given in 2007 by the European Court of Human Rights. In a Grand Chamber decision³⁷⁷ it overruled the decision of the Chamber³⁷⁸ that found the practice of placing Roma children in “special schools” not discriminatory. In its reasoning the Grand Chamber referred extensively not only to the FCNM as such but more interestingly relied very much also on the opinions of the Advisory Committee.

Third, Palermo identified some few cases “in which the courts more or less explicitly consider the FCNM to be a ‘European standard’”.³⁷⁹ As a “pro-European” example of such a judgement he mentions the Romanian Constitutional Court’s decision on the constitutionality of provisions allowing for limited rights to education in a minority language.³⁸⁰ Interesting is also the reference to the FCNM by the Constitutional Court of South Africa. In a judgment of 4 April 1996³⁸¹ the FCNM was characterized as “the most recent and developed international instrument dealing with minority protection”. Although being a European document the FCNM has thereby deployed some effect even beyond its geographical scope.

Methodological concerns: The same concerns as above apply. Information could be sought by the Secretariat by asking governments to give information about court rulings making reference to the FCNM in their state reports.

Indicator H: “Disruptive” use of the FCNM

Definition: Measuring “disruptive” use of the FCNM requires an analysis of case law where reference has been made to the FCNM with the effect of reducing existing rights or restrictively interpreting them.

Rationale: Art. 22 of the FCNM stipulates: “Nothing in the present framework Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a Party.” Due to the programmatic character of the provisions of the FCNM, courts may be inclined not to consider the provisions as self-executive and therefore to deny a direct applicability of the Convention. When such an interpretation occurs in countries where the constitution provides for the incorporation of international treaties after their ratification and the reasoning of the court obviously ignores the (soft)

³⁷⁵ Constitutional Court of Romania, 9 April 2001, no. 112/2001, at I.1.

³⁷⁶ Constitutional Court of Croatia, 12 April 2001, U-I-732/1998.

³⁷⁷ EctHR, Appl. No. 57325/00, *D.H. et al. v. the Czech Republic*, judgment (Grand Chamber) of 13 November 2007.

³⁷⁸ EctHR, Appl. No. 57325/00, *D.H. et al. v. the Czech Republic*, judgment of 7 February 2006.

³⁷⁹ Palermo, “Domestic Enforcement ...”, 196-199.

³⁸⁰ Constitutional Court of Romania, 20 July 1999, no. 114/1999.

³⁸¹ Constitutional Court of South Africa; Case No CCT 39/95, in the matter of The Gauteng Provincial Legislature, in re: Dispute Concerning the Constitutionality of Certain Provisions of the School Education Bill of 1995, judgment of 4 April 1996.

jurisprudence of the monitoring mechanism, doubts about the impact of that instrument are justified.

Index:

- Used as justification for reducing rights
- Used as argument for restrictive interpretations
- Used to show that no common European standard exists in a certain field

Explanatory comments: The term “disruptive use” is applied here in order to describe situations in which a national court has used the FCNM either to reduce already existing rights of persons belonging to national minorities – which is, of course, a clear violation of Article 22 of the FCNM – or to restrictively interpret certain concepts or to show that a common European standards in a certain has still not emerged and therefore state remain with a very broad margin of appreciation when it comes to the determination of measures for the implementation of the FCNM.

An example for the first situation is a decision of an administrative court in Lithuania. According to Article 4 of the Law on the Protection of Minorities dating back to the year 1989 and amended on 29 January 1999, “in offices and organizations located in areas serving *substantial numbers* of a minority with a different language, the language spoken by that minority shall be used in addition to the Lithuanian language” (emphasis added). Article 5 further provides that in the areas indicated in Article 4, information signs may be displayed both, in Lithuanian and in the language used by that minority. The Law on the State Language of 1995 specifies in Article 18 the type of signs that can be displayed bilingually, namely, the names of the organizations of ethnic communities and their information signs. Lithuania ratified the FCNM on 23 March 2000. According to Article 138 of the Lithuanian Constitution, “[i]nternational treaties ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania.” Finally, the Law on International Treaties provides, that in case of contradiction between national and international law, the latter prevails.

In 2002, the mayor of a municipality with a Polish population as high as 74,7% decided to place bilingual street signs. The administrative court first imposed a fine on the municipality and later changed it into a warning. In its reasoning the court held that bilingual street signs would be in contradiction to Art. 18 of the Law on State Language. It acknowledged that the FCNM provides under certain conditions for a right to place also bilingual street signs, but due to their programmatic character the provisions of the FCNM cannot be directly applied, as they are, just as the provision contained in Art. 5 of the Minority Law, not specific enough regarding the placement of bilingual street signs. The reasoning completely neglected the established practice of the Advisory Committee in evaluating percentages applied for the granting of the right to place bilingual street signs. In the view of the AC, a percentage as high as 50% of the population living in a certain area would go beyond the requirement of “substantial numbers” foreseen in Article 11(3) of the FCNM.³⁸² All the more, it would be

³⁸² On topographical indications: para. 82 of the opinion on Bosnia and Herzegovina; para. 46 of the opinion on Croatia; para. 57 of the opinion on the Ukraine. See also the same opinion with regard to a 50% threshold for the contact with public authorities: paras. 78-81 of the opinion on Bosnia and Herzegovina;

justified to place bilingual street signs in a municipality with close to 75% of minority population. Interesting in this context is also the information provided by Lithuania in its second state report: A “legal analysis” carried out during the preparation of a draft on the amendments to the Government Resolution regulating, amongst other things, the procedure for the designation and registration of street signs indicated “that the amending provisions to the Procedure enabling the official use of local names, street names and other topographical indication in the minority language would not conform to the provisions of Article 18 of the Law of the Republic of Lithuania on the State Language.”³⁸³

Instead of interpreting the admittedly vague provision of Art. 5 of the Minority Law in the light of the equally vague provision of the FCNM but very clear interpretation of it by the Advisory Committee, the court has preferred to take the Language Law as parameter for its decision. This might be due to the fact, first, that the court has given overly much weight to the clause “in the framework of their legal system” contained in Article 11(3) FCNM as justifying a limitation of the rights through a national law that protects a value that is considered to be higher than the protection of a minority language, namely, the protection of the state language. Second, this attitude can be explained by the fact that the opinions of the Advisory Committee are not considered to be binding, as is shown by the declaration of inadmissibility of an attempted reopening of the procedure, based on criticism voiced, amongst others, by the Advisory Committee.³⁸⁴

Although in the present case the constitution provides for the incorporation of international treaties into the national legal system and for the primacy of international over national law, the FCNM or rather the opinions of the Advisory Committee specifying the provision of the FCNM, did not have a “positive” impact on the position and decision of the court and, through the clause “in the framework of their legal system”, might have rather given an argument for deciding against the minority’s cause.

In this context it is also worth mentioning the judgment of the European Court of Human Rights in the case *Chapman v. United Kingdom*.³⁸⁵ According to the applicant, a Gypsy woman that alleged a violation of her right to respect for her home and her private and family life (Art. 8 ECHR) as well as a discrimination against her as a Gypsy (Art. 14 ECHR), the Court was supposed to take into account the role of the FCNM “in reducing the margin of appreciation accorded to States in light of the recognition of the problems of vulnerable groups, such as Gypsies.” The Court reacted to this by observing “that there may be said to be an *emerging international consensus* amongst the Contracting States of the Council of Europe *recognising the special needs* of minorities and *an obligation to protect their security, identity and lifestyle* (... in particular the Framework Convention for the Protection of National Minorities), not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.”³⁸⁶ The Court went on to say that “[h]owever, [it] ... is *not persuaded that the consensus is sufficiently concrete* for it to derive any

paras. 43-45 of the opinion on Croatia; paras. 61-62 of the opinion on Moldova; paras. 49-53 of the opinion on the Ukraine; paras. 40-41 of the opinion on Estonia.

³⁸³ Second report submitted by Lithuania, received on 3 November 2006, 65.

³⁸⁴ Para. 58 of the first opinion on Lithuania.

³⁸⁵ ECtHR, Appl. No. 27238/95, *Chapman v. United Kingdom*, judgment of 18 January 2001.

³⁸⁶ *Ibid.*, para. 93.

guidance as to the conduct or standards which Contracting States consider desirable *in any particular situation*. *The framework convention, for example, sets out general principles and goals but the signatory States were unable to agree on means of implementation.*”³⁸⁷

This judgment could have the effect of undermining the standard-setting impact of the FCNM in particular of the opinions of the AC and the resolutions of the CM. However, an important number of judges adopted a joint dissenting opinion where they state that “[t]his consensus includes a recognition that the protection of the rights of minorities ... requires not only that Contracting States refrain from policies or practices which discriminate against them but that also, where necessary, they should take positive steps to improve their situation through, for example, legislation or specific programmes. *We cannot therefore agree with the majority’s assertion that the consensus is not sufficiently concrete*”.³⁸⁸

The fact that reference to the FCNM does not always bring the wished result in a claim brought to the court by a person belonging to a national minority does not necessarily mean that the FCNM hasn’t had any impact at all on the court’s decision. Those two judgments simply show, that the respective courts absolutely stuck to the letter of the FCNM without taking into account the standards that have been developed through the soft jurisprudence of the Advisory Committee.

The persuasive effect of the FCNM as a “pan-European document” appears in a judgment of the Latvian Constitutional Court, although the court denied that the FCNM had become an international norm of international customary law. It thereby tried to dissuade from the assumption that the signing of the FCNM and its content would restrict Latvia in the realization of an educational policy limiting the rights of the Russian community in Latvia. At the time of the decision of the Court, Latvia had signed and a couple of weeks later also ratified the FCNM. According to Palermo, “such *excusatio non petita*, together with the ‘suspect’ timing of the decision, provides evidence of the potential of the FCNM to be considered as a sort of a common ground whose persuasive effect goes beyond the formal status of ratified international treaties in the domestic legal system (albeit not yet as international customary law)”.³⁸⁹

Methodological concerns: The same concerns as above apply.

Indicator I: Implementation of court rulings

Definition: Measuring the impact of the FCNM on the implementation of court rulings requires an analysis of the government’s and the legislator’s behaviour after the adoption of the judgment which can be either proactive or reluctant. This is a field where the three parts, developed in this study separately, are closely intertwined.

³⁸⁷ *Ibid.*, para. 94.

³⁸⁸ *Ibid.*, joint dissenting opinion of judges Pastor Riduejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall, para. 3.

³⁸⁹ Palermo, “Domestic Enforcement ...”, 200-201.

Rationale: Just as laws are not worth anything if not followed by consequent implementation, a judgment which is not translated into practice does not change anything in the situation of persons belonging to national minorities or of the minority as a whole. This is particularly true, when a judgment requires government action or legislative reform. It is therefore necessary to look into the question of how states react to court's judgments, be they from a national court or from an international court, such as the European Court of Human Rights and if their reaction is guided by the FCNM and the standards developed through the Advisory Committee on the FCNM?

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- 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?

Explanatory comments: This indicator is at the crossing between a judiciary, a policy and a legislative indicator. The implementation of court ruling may trigger both political discourse and government or legislative actions. First, a court's ruling might/should set off a national discourse, creating local debates in media and even parliaments. Second, if there is a remedy, it must result in some government actions depending on the case. This can be anything from changing legislation to allocating funds to address the specific problem and the design of new strategies or programmes dealing with the issue. Whatever is done, needs to be evaluated as to the concrete effect it has had to remediate the problem.

The Czech Republic has for instance been confronted with criticism by the Advisory Committee on the FCNM³⁹⁰ long before the European Court of Human Rights decided in a landmark case, basing itself partly on the findings of the AC, that the systematic placement of Roma children in special remedial schools is a discriminatory practice.³⁹¹ A recent memorandum published by a coalition of rights groups³⁹² showed, that although the legislation has been changed with regard to special schools, segregation of Roma children in education remains widespread. Research conducted by the European Roma Rights Centre during the first half of 2008 came to the conclusion that despite assurances from the Czech government, the situation of Roma students had not improved. "In fact, curriculum modifications of 2007 have actually made it harder for Roma students to move into the

³⁹⁰ Para. 61 of the first and paras. 141-148 and paras. 152-154 of the second opinion on the Czech Republic.

³⁹¹ ECtHR, Appl. No. 57325/00, *D.H. et al. v. Czech Republic*, judgment of 7 February 2006 (which did not find a violation of the ECHR) and judgment (Grand Chamber) of 13 November 2007 (which found a violation of the ECHR).

³⁹² The statement was signed by the European Roma Rights Centre (ERRC), the Roma Education Fund, the Open Society Justice Initiative, and the Open Society Institute.

educational mainstream.” The executive director of the Open Society Justice Initiative said that the Czech authorities had relabeled ‘special remedial schools’ as ‘practical primary schools,’ but the reality of unequal educational opportunity for Roma children had not changed. In their communication to the Committee of Ministers, the human rights organizations outlined several steps the Czech government must take to end segregation of Roma students, including:

- Enacting national legislation requiring public authorities to desegregate the educational system.
- Declaring publicly the goal of providing equal access to educational opportunities for all by 2015, creating a comprehensive strategic plan for achieving that goal, and allocating funding for enacting the plan.
- Revising the process of testing and assessing students to bring it into line with European standards and eliminate anti-Roma bias.
- Providing better information to Roma parents on the benefits of integration.³⁹³

In this or similar cases it becomes obvious that the measure set by the government missed their target and the government did not seem to make a change of the system a priority. A judgment of the ECtHR is binding only with regard to the parties of the case. States might therefore have an easy escape with regard to a fundamental revision of legislation and practice by claiming that they have implemented the judgment once they have compensated the victims for their damage. The opinions of the Advisory Committee and the resolutions of the Committee of Ministers are, however, much more general in nature. If they are referred to in court judgments it is easier to establish a link between an individual case decided by a court and a more fundamental reform of system required by the Advisory Committee and the Committee of Ministers.

Methodological concerns: To populate this indicator, extensive research is required that will have to take into consideration several of the indicators identified in chapters 1 and 2. Indicators developed in this study cover, however, only the legal and political domain. In order to find out if the measures set subsequent to a court ruling have met their target, it will also be necessary to examine the social, cultural and economic domain.

³⁹³ “Rights Groups Press Czech Government on Roma Education”, 16 September 2008, at <http://www.errc.org/cikk.php?cikk=2982>. The Memorandum Concerning the Implementation and State of General Measures in the Judgment of D.H. and Others v. The Czech Republic (application no. 57325/00) is available at <http://www.errc.org/db/03/47/m00000347.pdf>.