



**CONFERENCE:  
ENHANCING THE IMPACT OF  
THE FRAMEWORK CONVENTION**

9 - 10 October 2008  
Palais de l'Europe, Strasbourg

**The use of the Framework Convention for the Protection of National  
Minorities by other Council of Europe mechanisms**  
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*The views expressed are those of the author only*

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## 1. Introduction

The coming into existence of the CoE Framework Convention for the Protection of National Minorities (FCNM) was considered an important milestone since it was the first legally binding international instrument devoted to the plight of minorities. Nevertheless, from the beginning, the FCNM attracted more criticism than appraisal. The main criticism focused on the programme-type character of the provisions in the Convention and the lack of definition of ‘national minority’. In addition, the established monitoring mechanism, a dual mechanism composed of the political Committee of Ministers and an independent Advisory Committee (ACFC), was heavily rejected.<sup>1</sup> However, in the years following this criticism the FCNM turned into an important reference document, not only in relations between the Advisory Committee and the government when discussing State reports, but also as a reference document for other international organisations.<sup>2</sup> For instance, the EU has urged States to ratify the Framework Convention (within the framework of the accession negotiations). The OSCE High Commissioner on National Minorities has encouraged States to ratify the FCNM during his country visits.<sup>3</sup>

This report will focus on mechanisms within the CoE itself. The main question to be analysed is whether CoE mechanisms that address minority issues in their activities make use of the FCNM and the ACFC’ opinions in their work and if so, whether this leads to synergies, overlap or contradictory opinions. In particular, a selection of the case law of the European Court of Human Rights, the country specific and thematic reports of the Commissioner for Human Rights, the work of the Venice Commission, and recommendations of the Parliamentary Assembly will be analysed. The study does not claim to be exhaustive and will not present an overview of all reports or cases in which use is made of the FCNM or the opinions of the ACFC.<sup>4</sup> The report serves as a first indication of the complementarity or lack thereof between the various CoE bodies dealing with minority rights protection. In addition, the relationship between non-judicial versus judicial means in the field of minority protection

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<sup>1</sup> Recommendation 1255 (1995) on the protection of the rights of minorities, para. 7. Alfredsson, A., A Frame with an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures, *International Journal on Minority and Group Rights*, Vol. 7, 2000, pp. 291-304, pp. 292 and 297. Wheatley, S., The Council of Europe’s Framework Convention on National Minorities, *Web Journal of Current Legal Issues*, 1996, p. 12. Troebst, S., *The Council of Europe’s Framework Convention for the Protection of National Minorities revisited*, ECMI paper No. 2, December 1998, p. 11 and Gilbert, G., The Council of Europe and Minority Rights, *Human Rights Quarterly*, Vol. 18, No. 1, 1996, pp. 160-189, p. 189.

<sup>2</sup> See also Letschert, *The Impact of Minority Rights Mechanisms*, T.M.C. Asser /Cambridge University Press, 2005, Chapter 4.

<sup>3</sup> For a discussion of the use of the FCNM by other actors, see the following reports presented during the Conference: “*The use of FCNM by other international actors, the OSCE and the UN*” by Ms Zdenka Machnyikova, independent consultant, Ottawa/Prague and “*The relevance of the FCNM as part of the pre-accession process to the EU and post-accession developments in the states concerned*” by Mr Christophe Hillion, Professor, University of Leiden. For a recent analysis on increasing synergies in minority rights protection through different international and regional bodies, including contributions on the CoE and minority protection, see Henrard, K. & Dunbar, R. (Eds.), *Synergies in Minority Rights Protection*, London: Cambridge University Press, 2008.

<sup>4</sup> Due to time and space restrictions, the activities of the Expert Committee under the European Charter of Regional and Minority Languages and the Committee under the European Social Charter have not been included.

will be analysed. Sections 3 to 6 will present conclusions relating to each of the bodies examined. A more general conclusion is presented in the final section.

## **2. Methodology**

A review of a selection of existing case law of the European Court of Human Rights was conducted. The selection was based on previous (academic) work in which the European Court's jurisprudence relevant for minorities was analysed.<sup>5</sup> A selection of country or thematic reports produced by the various mechanisms was examined, searching through the CoE internet archives. As to the countries, the selection was based upon, amongst others, the court cases assessed in section 3 (and thus the countries against which the case was filed), and countries in which the issue of the protection of Roma people (in particular the education of Roma children) was examined. The Advisory Committee has expressed concern over discrimination of the Roma in the majority of its country-specific opinions of the first cycle. A number of Roma individuals have approached the European Court of Human Rights, which has rendered several judgments involving Roma applicants. The Parliamentary Assembly has frequently addressed issues relating to the Roma, notably in its 2002 recommendation on the Legal Situation of the Roma in Europe (Rec. 1557). Finally, the Commissioner for Human Rights in its report of 15 February 2006 pays specific attention to the human rights situation of the Roma, Sinti and Travellers.<sup>6</sup>

## **3. A Selection of Case-law of the European Court of Human Rights**

### *Introductory remarks*

The European Convention on Human Rights (ECHR) does not specifically refer to minorities nor does it contain a provision guaranteeing minority rights as such. Attempts to include minority rights failed, as can be witnessed from the *travaux préparatoires*.<sup>7</sup> The only specific reference to minorities can be found in Article 14:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other

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<sup>5</sup> See, for instance, Henrard, K., Ever-Increasing Synergy towards a Stronger Level of Minority Protection between Minority-Specific and Non-Minority-Specific Instruments, *European Yearbook of Minority Issues*, Vol. 3, 2003/4 (Leiden and Boston, Martinus Nijhoff Publishers, 2005),15-41. For the Conference 'Enhancing the Impact of the Framework Convention: Past Experience, Present Achievements and Future Challenges, 9-10 October 2008 Strasbourg, a Summary of Selected Case Law of the European Court of Human Rights with Relevance to National Minorities was prepared.

<sup>6</sup> In footnote 6 of this document, the above-mentioned information was presented. Note that the CoE, in 1995, set up an Experts' Committee on Roma, Gypsies and Travellers (MG-S-ROM). This Committee is the first Council of Europe body responsible for reviewing the situation of Roma and Travellers in Europe on a regular basis. For an overview of its activities, see the 2004 report on Activities relating to Roma and Travellers, 17 January 2005, available through [http://www.coe.int/T/DG3/RomaTravellers/documentation/activityreports/RomaDivisionActivitiesReport2004\\_en.asp](http://www.coe.int/T/DG3/RomaTravellers/documentation/activityreports/RomaDivisionActivitiesReport2004_en.asp). Note furthermore that the Committee of Ministers adopted in 2000 a Recommendation (2000)4 on the education of Roma/Gypsy children in Europe.

<sup>7</sup> Council of Europe, Collected Edition of the *Travaux Préparatoires* of the European Convention on Human Rights, 1987.

opinion, national or social origin, association with a national minority, property, birth or other status.

Discrimination on the basis of association with a national minority is prohibited, however, only in relation to one of the rights set in the ECHR. In other words, the protection of persons belonging to national minorities under the ECHR arises expressly in relation to their association with a national minority but can only be invoked in conjunction with one of the Convention's substantive rights.<sup>8</sup> The entry into force of Protocol 12 has, however, changed this.<sup>9</sup>

The impact of the ECHR on the further development of minority rights law must, however, not be underestimated despite the fact that Article 14 can only be invoked in conjunction with the rights set forth in the Convention. The Convention contains several rights that are of relevance for minorities, *inter alia*, Articles 8 (respect for private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression), and 11 (freedom of assembly and association). Besides the provisions in the Convention, Protocol I to the ECHR contains some provisions which are of added value for minorities, in particular Article 2 (right to education) and Article 3 (right to free elections).<sup>10</sup> Minorities are entitled to invoke a violation of these rights, not always without success. This can be witnessed from a number of cases dealing with the right to freedom of expression of minority groups (Article 10).<sup>11</sup> In several cases the Court has decided in favour of applicants who sought redress for violations that often specifically concern persons belonging to a minority.<sup>12</sup> Note that an individual member of a minority and the minority group itself are recognised as having *locus standi* to bring cases when a breach of the ECHR is assumed.<sup>13</sup>

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<sup>8</sup> 'The commission finds that the situation complained of falls outside the scope of the provisions of the Convention [...]. The Convention does not provide for any rights of a [...] minority as such, and the protection of individual members of such minority is limited to the right not to be discriminated in the enjoyment of the Convention rights on the grounds of their belonging to the minority'. Cited in Gilbert, G., *The Legal Protection Accorded to Minority Groups in Europe*, *Netherlands Yearbook of International Law*, Vol. XXIII, 1992, p. 81.

<sup>9</sup> Protocol 12 provides a right to non-discrimination which affords a scope of protection which extends beyond the 'enjoyment of the rights and freedoms set forth in the Convention.'

<sup>10</sup> For a comparison with the FCNM provisions, see Thornberry & Martín Estébanèz, *Minority Rights in Europe*, Council of Europe Publishing, 2004, pp. 103ff.

<sup>11</sup> For an extensive overview of cases before the European Court on Human Rights relating to minority rights, see the successive reports in the *European Yearbook of Minority Issues: The Jurisprudence of the European Court of Human Rights*, *EYMI* (2001/2), pp. 487-534; *EYMI* (2002/3), pp. 445-69, *EYMI* (2003/4). See also Henrard, K., Charting the gradual emergence of a more robust level of minority protection: minority specific instruments and the European Union, *Netherlands Quarterly of Human Rights*, vol. 22 (2004) no. 4, pp. 559-584.

<sup>12</sup> It has, however, also been observed that 'these individual human rights do contribute to the right to identity of minorities but not to a satisfactory extent.' One of the reasons is that 'the contracting states tend to get a rather broad margin of appreciation in the assessment of the proportionality principle, which provokes the seemingly justifiable criticism that the supervision by the Court and the Commission is too subsidiary and deferent to the contracting states.' Henrard, *Devising an Adequate System of Minority Protection, Individual Human Rights, Minority Rights and the Right to Self-Determination*, Martinus Nijhoff Publishers, 2000, pp. 75 and 319.

<sup>13</sup> Article 34 of the ECHR states that 'the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation [...].' See also *Zentralrat Deutscher Sinti und Roma and Romani Rose v. Germany*, Eur. Comm. Hum. Rts., No. 35208/97, 27 May 1997, where a Roma and Sinti association presented a claim as representatives of its individual members and could not identify the individuals and show that it had received specific instructions from each of them. For other judgments relating to the admissibility of applications by minorities or minority associations, see Gilbert, G., *The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights*, *Human Rights Quarterly*, Vol. 24, No. 3, 2002, pp. 736-780, pp. 739 and 740.

### *Reference to the FCNM and the ACFC in the Court's Jurisprudence*

The aim of this section is to assess whether the Court makes reference to the FCNM in its jurisprudence and if it relies on the opinions of the Advisory Commission. In order to do so, three cases were selected.

#### Gorzelik and Others v. Poland

In the case *Gorzelik and Others v. Poland* (2004) the Court turned to the FCNM for guidance regarding the definition of national minority. The Court had to address the question whether the refusal to register an association as an 'organisation of the Silesian national minority' violated Article 11 of the ECHR. The organisation was refused to register because the application to register was aimed at registering an organisation of a minority which, according to the Government, could not be regarded as a minority.<sup>14</sup> The Court stated that the notion of national minority was not defined in any international treaty and practice regarding official recognition by States of national, ethnic or other minorities varies from country to country or even within countries.<sup>15</sup> The Court furthermore stated that 'it cannot be said that the Contracting States are obliged by international law to adopt a particular concept of 'national minority' in their legislation or to introduce a procedure for the official recognition of minority groups.'<sup>16</sup> The Court found that the Polish authorities had tried to persuade the association using a name which the public might find misleading as it was being linked to a non-existent nation. The Court decided that the authorities had acted in order to protect other, similar ethnic groups whose rights might be affected by the registration of the association.<sup>17</sup> Consequently, there was no breach of Article 11. Upon this judgment applicants requested a transferal to the Grand Chamber. In arguing its judgment, the Grand Chamber made several references to the FCNM. In para. 93 the Court held that 'freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities, and that, as laid down in the Preamble to the Council of Europe's Framework Convention, 'a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity.'<sup>18</sup> The Grand Chamber decided, however, that the Polish refusal was no violation of Article 11.<sup>19</sup>

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<sup>14</sup> Allowing registration would result in circumventing the provisions of the 1993 Elections Act and other statutes conferring particular privileges on national minorities. The main issue of dispute was paragraph 30 of the memorandum of association which stated that 'the Union is an organisation of the Silesian national minority'. The Government asked the association to leave out this paragraph which was refused. The applicants criticised 'the absence of any definition of a national minority or any procedure whereby such a minority could obtain recognition under domestic law. They contended that lacuna in the law made it impossible for them to foresee what criteria they were required to fulfil to have their association registered and left an unlimited discretionary power in that sphere to the authorities. *Gorzelik and others v. Poland*, Eur. Crt. Hum. Rts., No. 44158/98, 17 February 2004, p. 31.

<sup>15</sup> See also the Joint Concurring Opinion of Judges Costa and Zupancic, Joined by Judge Kovler who state that 'questions relating to national minorities are complex and still somewhat vague.' *Ibid.*, p. 47.

<sup>16</sup> *Ibid.*, p. 31.

<sup>17</sup> *Ibid.*, p. 33.

<sup>18</sup> See for a discussion of the Gorzelik Case also Hofmann, R., *Nationale Minderheiten und der Europäische Gerichtshof für Menschenrechte*, in *Festschrift für Georg Ress* Carl Heymanns Verlag, 2005, pp. 1011-1026.

<sup>19</sup> In para. 106 the Court concludes that 'it was not the applicants' freedom of association per se that was restricted by the State. The authorities did not prevent them from forming an association to express and promote distinctive

The ACFC in its first opinion on Poland (November 2003) referred to the judgment made in the *Gorzelik case*. It first observes that ‘in reply to the Advisory Committee’s questionnaire, the authorities stated that the legislation did not provide any specific procedure for recognising a group as a national minority. The Advisory Committee notes, however, that some Polish authorities seem to use the registration procedure of the Law on Associations as a means to determine whether or not a group can be considered a national minority and encourage the Polish Government to examine whether this practice is the most appropriate.’<sup>20</sup> A few paragraphs further, it notes that ‘in a recent case involving persons seeking registration of their association called the “Union of People of Silesian Nationality” (Związek Ludności Narodowości Śląskiej), the European Court of Human Rights found no violation of the freedom of association by the Polish authorities. The Advisory Committee points out, however, that the Court did not express a view on whether Silesians were a national minority [...].’<sup>21</sup> The Committee comments in para. 28 that ‘The Polish authorities consider that Silesians cannot be treated as a national minority nor be protected by the Framework Convention. Whatever the approach ultimately adopted, the Advisory Committee urges the Polish authorities to continue their dialogue with the Silesians on this matter and to take care that persons claiming to belong to the Silesian group are able to express their identity.’

#### Chapman v. the United Kingdom

In the case *Chapman v. the United Kingdom* reference was also made to the FCNM. The case concerns enforcement measures taken against a Gypsy woman allegedly violating Articles 8 and 14. The applicant stated that:

the growing international consensus about the importance of providing the rights of minorities with legal protection, as illustrated, inter alia, by the Framework Convention for the Protection of National Minorities, emphasized that this was also of significance to the community as a whole as a fundamental value of a civilized democracy. In these circumstances, any margin of appreciation accorded to domestic decision-making bodies should be narrower rather than wider.<sup>22</sup>

The Court acknowledged the growing international consensus in this field but also stated that:

the Court is not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation. The framework convention, for example, sets out general

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features of a minority but from creating a legal entity which, through registration under the Law on associations and the description it gave itself in paragraph 30 of its memorandum of association, would inevitably become entitled to a special status under the 1993 Elections Act. Given that the national authorities were entitled to consider that the contested interference met a “pressing social need” and given that the interference was not disproportionate to the legitimate aims pursued, the refusal to register the applicants' association can be regarded as having been “necessary in a democratic society” within the meaning of Article 11 § 2 of the Convention.’

<sup>20</sup> See ACFC/INF/OP/I(2004)005, 27 November 2003, para 21.

<sup>21</sup> Ibid, para 58.

<sup>22</sup> *Chapman v. the United Kingdom*, Eur. Ct. Hum. Rts., No. 27238/95, 18 January 2001, para. 83. The applicants bought land on which they wished to live in their mobile homes. They were refused planning permission because of environmental concerns.

principles and goals but the signatory States were unable to agree on means of implementation.<sup>23</sup>

The Court did acknowledge the vulnerable position of Gypsies as a minority because of which special consideration must be given to their needs and their different lifestyle. The Court even stated that ‘there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life.’<sup>24</sup> The Court, however, found no violation of Article 8 and referred to the wide margin of appreciation of the State in this regard. Moreover, the Court did not find any lack of objective or reasonable justification for the measures taken against the applicant. Note that seven Judges gave a dissenting opinion, stating that according to them the consensus about the importance of providing the rights of minorities with legal protection is sufficiently concrete.<sup>25</sup>

#### D.H. and Others v. Czech Republic

In the case *D.H. and Others v. Czech Republic*,<sup>26</sup> the Court makes explicit reference to and use of the Advisory Committee’s opinions relating to the Czech Republic. The case concerns the claim of a group of Roma that they had been discriminated against in the enjoyment of their right to education on account of their race, colour, association with a national minority and ethnic origin. This claim is based on the placement of Roma pupils in special schools for children with intellectual deficiencies. According to the applicants, over half of the pupils in such special schools are of Roma origin, though Roma make out only about 2,26 % of the Czech Population. The applicants thus alleged that there was a violation of Article 2 of Additional Protocol 1. The First Chamber held in its judgment that there was no violation, because the system of special schools was not introduced solely for Roma children, and that considerable efforts had been made in those schools to help certain categories of children to receive a basic education.<sup>27</sup> The Grand Chamber did not follow the First Chamber’s reasoning.

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<sup>23</sup> *Ibid.*, paras. 93 and 94.

<sup>24</sup> *Ibid.*, para. 96.

<sup>25</sup> Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Stráznická, Lorenzen, Fischbach and Casadevall: ‘There is an emerging consensus amongst the member States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle [...] not only for the purpose of safeguarding the interests of the minorities themselves but also in order to preserve a cultural diversity of value to the whole community. This consensus includes a recognition that the protection of the rights of minorities, such as Gypsies, requires not only that Contracting States refrain from policies or practices which discriminate against them but also that, 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 [...]’ Para. 3. See also Henrard, 2004.

<sup>26</sup> Appl. No. 57325/00 - Judgement of 13 November 2007 (Grand Chamber), (Chamber Judgement of 7 February 2006).

<sup>27</sup> In the dissenting opinion of judge Cabral Barreto to the decision of the First Chamber, the State report submitted under the FCNM was referred to as containing an acknowledgment of the Government of discriminatory practices: As the Government expressly recognised in their report lodged on 1 April 1999 under Article 25 § 1 of the Framework Convention for the Protection of National Minorities, which is cited at paragraph 26 of the judgment, that at the time (which coincides with the relevant period in the instant case): “Romany children with average or above-average intellect [we]re often placed in such schools on the basis of results of psychological tests (this happen[ed] always with the consent of the parents). These tests [we]re conceived for the majority population and do not take Romany specifics into consideration”. At the time, in some “specialised schools” Romany pupils made up between 80% and 90% of the total number of pupils. In my opinion, this



In its Decision, the Court noted that ‘it is not satisfied that the difference in treatment between Roma children and non-Roma children was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued (para. 208).’ Therefore, there has been a violation of Article 14 of the Convention, read in conjunction with Article 2 of Protocol No. 1 (para. 210).

In the first Chambers judgment, the Court makes use of a few CoE sources, under which a report of ECRI (2007), and the State reports submitted of 1999 and 2004 of the Czech Republic pursuant to Article 25 of the FCNM. In the latter two reports, the Government makes extensive reference to the situation of the Roma in special schools. The Court refers to the fact that ‘several organisations, including Council of Europe bodies, have expressed concern about the arrangements whereby Roma children living in the Czech Republic are placed in special schools and about the difficulties they have in gaining access to ordinary schools.’ Then the Court makes the interesting statement that ‘however, [...] its role is different from that of the aforementioned bodies and that, like the Czech Constitutional Court, it is not its task to assess the overall social context. Its sole task in the instant case is to examine the individual applications before it and to establish on the basis of the relevant facts whether the reason for the applicants’ placement in the special schools was their ethnic or racial origin’ (para. 45).

Whereas the first Chamber only referred to the State reports submitted under the FCNM and not to the Advisory Committee’s Opinion, the Grand Chamber did make extensive use of the Advisory Committee’s first and second opinion (published 25 January 2002<sup>28</sup> and 26 October 2005<sup>29</sup>). Already in paragraph 18 it notes that ‘The Advisory Committee on the Framework Convention for the Protection of National Minorities observed in its report of 26 October 2005 that, according to unofficial estimates, the Roma represent up to 70% of pupils enrolled in special schools.’ (see also para. 41). Furthermore, in para. 51 the Court quotes the Advisory Committee’s opinion that placement in a special school “makes it more difficult for Roma children to gain access to other levels of education, thus reducing their chances of integrating in the society. Although legislation no longer prevents children from advancing from 'special' to regular secondary schools, the level of education offered by 'special' schools generally does not make it possible to cope with the requirements of secondary schools, with the result that most drop out of the system”. The Grand Chamber also makes extensive use of the observations made by ECRI and the Commissioner for Human Rights. Finally, in para. 200, the Grand Chamber heavily relies on the conclusions and recommendations made by the

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constitutes an express acknowledgement by the Czech State of the discriminatory practices complained of by the applicants.’ Extensive reference is also made to observations and recommendations made by ECRI.

<sup>28</sup> In its first Opinion on the Czech Republic, the Advisory Committee expressed concern at the educational situation of the Roma, and considered that the practice of undue placing of Roma children in “special” schools was not compatible with the Framework Convention. The authorities were encouraged to continue their efforts to eliminate isolation of these pupils, and find other ways to improve their educational situation. ACFC/INF/OP/I(2002)002, 6 April 2001.

<sup>29</sup> ‘145. Although constant monitoring and evaluation of the school situation of Roma children is one of the Government’s priorities, the State Report says little about the extent to which they are currently integrated in schools, or the effectiveness and impact of the many measures taken for them. The Advisory Committee notes with concern that these measures have produced few improvements. It also notes that local authorities do not systematically implement the Government’s school support scheme, and do not always have the determination needed to act effectively in this field’. ACFC/INF/OP/II(2005)002, 26 October 2005.

Advisory Committee, ECRI and the Commissioner for Human Rights when formulating its judgment.

## Conclusions

The main CoE body currently competent to address individual violations of minority rights is the European Court of Human Rights. It has developed important case law in the field of minority rights. Persons belonging to minorities may submit complaints regarding alleged violations of minority rights observing certain procedural requirements. However, the Court is limited in its judgments to the rights enshrined in the ECHR. Although the European Convention contains rights that are of relevance for minorities, it lacks certain specific minority rights, such as the right to education in the mother tongue or the right to address the authorities in the mother tongue. Based on the convention, it is not always possible to take the specific needs of minorities into account, which can, among other things, be witnessed from the European Court's jurisprudence in the earlier mentioned *Chapman case*.

The above-mentioned cases give the impression that the Court is making use of the FCNM and the Advisory Committee's opinions in its judgment.<sup>30</sup> Whereas the Court in the *Chapman case* considered that the FCNM sets out general principles unsuitable to give any concrete guidance to the judges in Strasbourg, the *D.H. case* demonstrates that the Court is using the Advisory Committee's opinions, even to substantiate its own judgment.

However, the dissenting opinions to the above-described judgments also demonstrate that not every judge agrees with this. Where in the *Chapman case* the dissenting opinions of the Strasbourg judges demonstrated that more and more judges are inclined to give due account to international developments in the field of minority protection,<sup>31</sup> the dissenting opinions to the *D.H. case* present a different picture. For instance, Judge Borrego Borrego strongly disagrees with the Grand Chamber's judgment basically because it takes into account the overall social context in deciding the case, instead of only examining the individual applications (in which he follows the reasoning of the First Chamber in this case).<sup>32</sup> He points out that this is in

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<sup>30</sup> Already in 1997 did the European Commission on Human Rights refer to the FCNM, see *Nicoletta Polacco & Alessandro Garofalo v. Italy*, Eur. Comm. Hum. Rts., No. 23450/94, 15 September 1997, where the Commission recognised 'the importance of the protection of linguistic minorities for stability, democratic security and peace, which has been shown by the upheavals of European history, and as a source of cultural wealth and traditions.' The European Commission appeared more inclined to take the peculiar situation of minorities into account when deciding a case. See for example *Buckley v. the United Kingdom*, Eur. Ct. Hum. Rts., No. 23/1995/529/615, 26 August 1996 in which the Commission concluded that there was a violation of Article 8 whereas the Court decided the opposite. Some judges however disagreed; see Judges Pettiti, Repik and Lohmus, Dissenting Opinions.

<sup>31</sup> See Dissenting Opinions in *Buckley v. the United Kingdom* in 1996 and *Chapman v. the United Kingdom* in 2001.

<sup>32</sup> 'The Court notes that as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority'. Is it the Court's role to be doing this?' Dissenting Opinion Judge Borrego Borrego.

contradiction with the role which all judicial bodies assume (on the role of judicial and non-judicial bodies, see section 9).<sup>33</sup>

That more and more judges refer to the FCNM and make use of the Advisory Committee's opinions was not self-evident. The FCNM was not intended to create justifiable rights nor was it envisaged to create a role for the Court in interpreting its provisions or supervising the implementation. Such an effect could, however, take place. For instance, the Court's judgment in the *D.H. case*, together with the recommendation made by the Advisory Committee in its Second Opinion<sup>34</sup> could encourage the Czech Republic to make further progress.

Discussions have taken place to give the Court a more pronounced role in the enforcement of minority rights, either by giving advisory opinions on the interpretation of the FCNM provisions, or by adopting an additional protocol on the rights of national minorities to the ECHR (see further section 9).

#### **4. The Commissioner for Human Rights**

The Commissioner for Human Rights is an independent institution within the Council of Europe, entrusted with the task to promote the awareness of and respect for human rights in the 47 Council of Europe member states. The Commissioner has a few major themes such as cooperation with national human rights structures or eradicating discrimination. Assessing whether countries adhere to international minority rights standards is also part of his work. In a recent speech entitled "Protection of national minorities and regional or minority languages in Europe: Where do we stand?" the Commissioner stated that 'the protection of non-dominant, national minority and linguistic, groups in Europe will remain on top of my agenda'.<sup>35</sup>

This section gives a brief analysis of a selection of country-reports of the Commissioner (Romania, Lithuania, Czech Republic, Albania, Bosnia and Herzegovina) and of the observations made in a thematic report, namely on the situation of the Roma. The aim is to assess whether the Commissioner makes use of the work of the Advisory Committee and if so, to determine contradictions or synergies between these two CoE bodies. It should be noted upfront that not all country reports of the Commissioner have been compared with the opinions of the Advisory Committee and the conclusions should therefore be read in light of this limitation.

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<sup>33</sup> He furthermore disagrees with the Grand Chamber including extensive reviews of 'the "Council of Europe sources" (14 pages), "Community law and practice" (5 pages), United Nations materials (7 pages) and "other sources" (3 pages [...]).'

<sup>34</sup> 154. More determined action is needed to combat isolation of Roma children in both ordinary and "special" schools. A clearer approach, coupled with instructions and immediate action on all levels, is needed to put an end to unjustified placement of these children in "special" schools designed for children with mental disabilities. Effective monitoring measures, particularly designed to eliminate undue placement of children in such schools, should be one of the authorities' constant priorities. ACFC/INF/OP/II(2005)002, 26 October 2005.

<sup>35</sup> CommDH/Speech(2008)2, Intervention by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 10th Anniversary of the entry into force of the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages, Strasbourg, 11 March 2008, available through:

<https://wcd.coe.int/ViewDoc.jsp?id=1260079&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>.

In his 2008 report on his visit to Albania,<sup>36</sup> the Commissioner relied on the ACFC opinion relating to the personal scope of application of the FCNM.<sup>37</sup> He noted that the authorities should ‘re-examine the possibility of recognizing the Egyptian community as a separate minority in line with the Opinion of the Advisory Committee and in consultation with the representatives of the said community itself’.<sup>38</sup>

Also in his report relating to his visit to Bosnia and Herzegovina, the Commissioner relies on the opinion of the Advisory Committee. In para 82 he notes that ‘in Bosnia and Herzegovina, the three constituent peoples are not considered as national minorities. However, de facto persons belonging to one of the three constituent peoples often find themselves in a minority position in the area where they reside, thus making them vulnerable and subject to various types of discrimination. In view of this fact, the Advisory Committee considered in its Opinion that “Bosniacs and Croats in the Republika Srpska as well as Serbs in the Federation could also be given the possibility - in case they so wish - to rely on the protection provided by the Framework Convention as far as the issues concerned are within the competence of the Entities.” And in para. 83 the Commissioner notes that he ‘finds the view adopted by the Advisory Committee useful and practical and recommends that it should be implemented.’<sup>39</sup>

In a thematic report published in 2006, the Commissioner highlighted the various issues the Roma are confronted with, from discrimination in housing, education, employment and health care, racially-motivated violence and relations with law enforcement authorities, issues related to asylum, to displacement and trafficking in human beings.<sup>40</sup> He made recommendations relating to all these issues. The Commissioner also referred to the issue at hand in the *D.H. case* and noted that ‘Roma children are frequently placed in classes for children with special needs without an adequate psychological or pedagogical assessment, the real criteria clearly being their ethnic origin.’<sup>41</sup> In his concluding remarks, he furthermore referred to CoE instruments, noting that, amongst other, countries should ratify the FCNM.<sup>42</sup>

In his country reports, he has paid specific attention to the situation of the Roma, referring to, amongst others, the particularly long history of continued discrimination and hostility, occasionally amounting to persecution. And that therefore more sustained, dynamic efforts are urgently needed for the effective protection of Roma throughout Europe.

In the Commissioner’s report regarding Romania, the Commissioner ‘recommended allocating the necessary resources to develop the national strategy on behalf of the Roma, particularly by improving their circumstances, and their access to the labour market and by facilitating access

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<sup>36</sup> Strasbourg, 18 June 2008, CommDH(2008)8, Report by the Commissioner for Human Rights Thomas Hammarberg on his visit to Albania, 27 October – 2 November 2007.

<sup>37</sup> Strasbourg, 12 September 2002, ACFC/INF/OP/I(2003)004, Opinion on Albania. The 2<sup>nd</sup> cycle Opinion was adopted on 29 May 2008 (not yet public).

<sup>38</sup> para. 38 under summary of recommendations.

<sup>39</sup> CommDH(2008)1, Report by the Commissioner for Human Rights Thomas Hammarberg on his visit to Bosnia and Herzegovina, 4 - 11 June 2007 (para 78).

<sup>40</sup> CommDH(2006)1 15 February 2006, Final report by Mr Alvaro Gil-Robles, Commissioner for Human Rights on the human rights situation of the Roma, Sinti and Travellers in Europe.

<sup>41</sup> *Ibid.*, para 43, see also para 50.

<sup>42</sup> *Ibid.*, p. 43.

to identity documents.’<sup>43</sup> In addition, ‘significant efforts remain to be made to allow members of the Roma community to have full access to medical services, civil status and a good-quality education. [...] Finally, programmes to allow everyone to have access to essential services such as water and electricity must be intensified.’<sup>44</sup> The Commissioner’s report does not make explicit reference to the Advisory Committee’s opinion on Romania that was made public just a month before.

In that Opinion, the ACFC noted that ‘further measures are needed to ensure more effective implementation of the anti-discrimination legislation and to raise public awareness and tolerance, especially concerning full and effective equality of the Roma. The social and economic situation of the Roma remains problematic, and increased efforts, including of a financial nature, are needed to address manifestations of discrimination and the difficulties still faced by the Roma in the fields of employment, housing, health and education.’<sup>45</sup>

Also in the Memorandum to the Lithuanian Government regarding the Commissioner’s Assessment of the progress made in implementing the 2004 recommendations, no explicit reference is made to opinions of the Advisory Committee. The Commissioner refers in his report to the poor situation of the Roma (also to the low attendance of Roma children in schools), and draws upon conclusions made by ECRI.<sup>46</sup> In 2003, the ACFC adopted its opinion on Lithuania,<sup>47</sup> in which the issue of education of Roma children is also examined. The ACFC notes in para. 64 that ‘the situation of the Roma in the sphere of education is a matter of concern. The Advisory Committee is aware that the Roma are faced with socio-economic difficulties which have considerable influence on their access to education and that improvements in this situation require determined and coordinated action, with measures taken at various levels (economic, social, linguistic and cultural).’

In his 2003 report on assessing the progress made by the Czech Republic, the Commissioner drew attention to the large presence of young members of the Roma/Gypsy community in “special” schools and classes for children suffering from slight mental disability. In his follow-up report of 2006, he notes that ‘in spite of the efforts made to increase the number of preparatory classes and assistant teachers for Roma pupils, the situation still remains of concern. As the Commissioner recommended in his final report on the situation of the Roma, Sinti, and Travellers in Europe, where segregated education still exists in one form or another, it must be replaced by regular integrated education and, where appropriate, prohibited through

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<sup>43</sup> Strasbourg, 29 March 2006, CommDH(2006)7, Follow Up Report on Romania (2002-2005). Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights, para. 7.

<sup>44</sup> Ibid.

<sup>45</sup> Strasbourg, 23 February 2006, ACFC/OP/II(2005)007 Advisory Committee on the Framework Convention for the Protection of National Minorities, Second Opinion on Romania, adopted on 24 November 2005.

<sup>46</sup> The Commissioner urged measures to be taken to promote Roma integration, while preserving their identity, not only in Kirtimai, but also in other parts in Lithuania, and recommended the broadening of the existing integration programme for the Roma community with a view to improve the access to employment, housing, health and education. Strasbourg, 16 May 2007, CommDH(2007)8, Memorandum to the Lithuanian Government Assessment of the progress made in implementing the 2004 recommendations of the Council of Europe Commissioner for Human Rights, para. 59.

<sup>47</sup> Strasbourg, 21 February 2003, ACFC/INF/OP/I(2003)008, Opinion on Lithuania. The 2nd cycle Opinion was adopted on 28 February 2008 (not yet public).

legislation. The Commissioner calls upon the Czech authorities, therefore, to pursue their efforts in this direction and make greater resources available for the provision of pre-school education, language training and school assistant training in order to ensure the success of efforts to fully integrate Roma pupils into the regular school system.’<sup>48</sup> Reference is made to the first ruling in the *D.H. case* as described before. The ACFC’s opinion is not referred to in this follow-up report (in contrast to the Grand Chamber in the *D.H. case*, see section 3), nor is explicit reference made to the Advisory Committee’s first thematic commentary on education which was published in the beginning of March 2006<sup>49</sup> (the Commissioner’s report was published at the end of March 2006).

Despite the absence of explicit cross-references to the FCNM and ACFC Opinions, no major differences in approaches toward minority protection have been noted. The emphasis can be different but, generally speaking, the same problems faced by the Roma have been identified and the recommendations are complementary.

## Conclusions

Whether the references to the work of the ACFC in the more recent reports on Albania and Bosnia Herzegovina is a new policy or ‘just a coincidence’ is difficult to determine. What can be noted is a diffuse picture, since some other recent reports of the Commissioner in which the issue of minority protection is also addressed do not refer to the opinions of the Advisory Committee.<sup>50</sup> It is therefore difficult to provide a clear-cut answer to the question whether the Commissioner’s thematic work or observations in his country reports consistently rely on the opinions of the ACFC. Nevertheless, some observations can be made. From the above brief analysis, contradictions between the observations of the Commissioner and the opinions of the ACFC cannot be derived. However, it is recommendable that, as part of regular procedure, the Commissioner, in reports in which the Commissioner analyses the minority rights situation and comes up with recommendations, continues to make use of the work of other CoE bodies, like the ACFC.<sup>51</sup> This serves multiple aims. First, it prevents the risk of possible contradictions in opinions or recommendations. Second, referring to and relying on each others work and thus hearing the same message from different bodies could increase pressure on Governments to make further progress on the issues at hand.

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<sup>48</sup> CommDH(2006)15, Follow-up Report on the Czech Republic (2003 – 2005), Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights, para. 27, 29 March 2006.

<sup>49</sup> Strasbourg, 2 March 2006, ACFC/25DOC(2006)002, Commentary on Education under the Framework Convention for the Protection of National Minorities.

<sup>50</sup> See for instance the Report by the Commissioner for Human Rights, Mr Thomas Hammarberg, on his visit to “the former Yugoslav Republic of Macedonia”, 25 – 29 February 2008. The Advisory Committee adopted its 2<sup>nd</sup> opinion on Macedonia on 23 February 2007, ACFC/OP/II(2007)002.

<sup>51</sup> It should be noted that inter-secretariat consultation takes place between the Commissioner and the FCNM Secretariat on a country by country basis, which helps to ensure complementarity even if this is not visible for the general public.

## 5. Venice Commission

The European Commission for Democracy through Law (normally referred to as the Venice Commission) was established in 1990.<sup>52</sup> The Commission's main task has been to advise member States in the process of adoption of constitutions in conformity with the standards of Europe's constitutional heritage. Other key-areas include advising on electoral laws and referendums, cooperation with constitutional courts and the initiation of transnational studies, reports and seminars.<sup>53</sup> In the framework of the Commission's constitutional advisory activities it has commented upon several minority provisions and constitutional laws on the protection of minorities.<sup>54</sup> Furthermore, the Commission made a draft proposal for a European Convention for the Protection of Minorities.<sup>55</sup> The draft includes an extensive set of rights, including, *inter alia*, provisions relating to the use of language before public authorities and education.<sup>56</sup> The proposal of the Venice Commission was never adopted by the Committee of Ministers because, amongst others, it considered the supervisory system too binding. The document should, however, not be neglected since it has been an important reference document in the work of the Committees DH-MIN<sup>57</sup> and CAHMIN. Although the Venice Commission has not been working on other minority rights instruments so far, it has remained actively engaged in the clarification and promotion of minority standards, mainly when advising on draft minority rights (domestic) legislation.

When advising governments on their constitution or minority rights legislation, the Venice Commission's comments were not always in line with the approach of other international minority mechanisms or the ACFC. As an example the Venice Commission's previous approach regarding the definition of minorities can be mentioned. It advised the Croatian

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<sup>52</sup> The Commission is composed of 'independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science.' See Article 2, paras. 1-3 of the Statute of the European Commission for Democracy through Law, adopted by CoM Res. (2002)3. The members serve in their individual capacity.

<sup>53</sup> See for example the *Study on the Protection of National Minorities by their Kin-State*, Science and Technique of Democracy, No. 32 and *The Protection of Minorities, Collected Texts of the European Commission for Democracy through Law*, No. 9.

<sup>54</sup> See for example the Venice Commission's involvement relating to the Croatian Draft Constitutional Law on the Rights of National Minorities. See for more information Bojic Bultrini, D. & Granata-Menghini, S., *The Protection of Minority Rights in the Works of the European Commission for Democracy Through Law: July 2003-June 2004*, *EYMI*, Vol. 3, 2003/4, pp. 423-428.

<sup>55</sup> *The Protection of Minorities, Collected Texts of the European Commission for Democracy through Law*, Science and Technique of Democracy, No. 9, Council of Europe Press, 1994, p. 26. The usefulness in an expanded Europe of an instrument of wider application than to members of the Council of Europe only, was one of the basic concepts behind the Venice Commission's draft.

<sup>56</sup> For more information regarding the rights as set forth in the Proposal see the Explanatory Report by the Proposal, p. 30ff. For a thorough discussion of the Proposed Convention see also Malinverni, G., (member of the Venice Commission), *The Draft Convention for the Protection of Minorities, the Proposal of the European Commission for Democracy through Law*, *Human Rights Law Journal*, Vol. 12, 1991, pp. 265-269.

<sup>57</sup> The Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN) is a sub-committee of the Steering Committee for Human Rights, entrusted with the task to act as an intergovernmental forum 'for the exchange of information, views and experience on policies and good practice for the protection of national minorities at the domestic level and in the context of international instruments.' The activities of DH-MIN were suspended in 2000 due to budgetary considerations. However, in 2005 it continued its work.

Government on the Draft Constitutional Law on the Rights of National Minorities. Much debate took place regarding the definition of minorities. The draft article limited the scope of application to citizens. Experts from the Venice Commission, who assisted the Working Group that drafted the Law, finally accepted this limitation, although they did refer to recent tendencies of minority protection in international law that illustrate a different position. In its opinion on the draft, the Commission ‘recalls that the traditional position in international law is to include citizenship among the objective elements of the definition of *national minorities* (see notably the definition provided by Francesco Capotorti in 1978, Article 2 § 1 of the Venice Commission’s Proposal for a European Convention for the protection of national minorities, Article 1 of Recommendation 1201/1993 of the Council of Europe’s Parliamentary Assembly and Article 1 of the European Charter for Regional and Minority languages). However, a new, more dynamic tendency to extend minority protection to non-citizens has developed over the recent past. This view is expressed notably by the UN Human Rights Committee and the Advisory Committee on the Framework Convention. The latter defends an article-by-article approach to the question of definition. In the Commission’s opinion, the choice of limiting the application *ratione personae* of specific minority protection to citizens only is, from the strictly legal point of view, defensible. States are nevertheless free, and encouraged, to extend it to other individuals, notably non-citizens.’<sup>58</sup>

However, from a report drawn up by the Venice Commission in 2007 entitled ‘Non-Citizens and Minority Rights’ it follows that the Commission is nowadays following the approach of the ACFC and other international minority rights mechanisms. In the conclusions of this report it is noted that ‘the Commission will encourage those States which have neither adopted constitutional provisions nor entered a formal declaration under the FCNM which would restrict the scope of minority protection to their citizens only, to abstain from introducing a citizenship requirement in a domestic definition and/or in a declaration. Furthermore, the Commission will encourage these States to consider, where necessary, the possibility of extending, on an article-by-article basis, the scope of protection of the rights and facilities concerned to non-citizens.’<sup>59</sup> Moreover, ‘the Commission will invite States, in their efforts to better circumscribe, on an article-by-article basis, the personal scope of enhanced minority rights, to make judicious and possibly combined use of the objective criteria which appear most suited to the context. These criteria include, inter alia, lawful and effective residence, numerical size, time factor coupled with a certain link with a territory and, only if and as long as needed from the constitutional viewpoint, citizenship.’<sup>60</sup>

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<sup>58</sup> See CDL (2001) 20, 5 March 2001, Meeting of the Venice Commission Rapporteurs with the Croatian Working Group Drafting the Constitutional Law on the Rights of National Minorities in Croatia, Zagreb 4-5 January 2001. See also CDL-AD (2003)9, Opinion on the Constitutional Law on the Rights of National Minorities in Croatia. See also Opinion on the two draft laws amending the law on national minorities in Ukraine, adopted by the Venice Commission at its 58th Plenary Session, (Venice, 12-13 March 2004).

<sup>59</sup> Report on Non-Citizens and Minority Rights, CDL-AD (2007)001, Conclusions para 144. See also Vademecum of Venice Commission Opinions and Reports concerning the Protection of Minorities, CDL-MIN (2007)001.

<sup>60</sup> See for instance the Venice Commission on the Draft Constitution of Montenegro: ‘54. The law should be amended and the word “citizen” taken out of the definition. Indeed, the scope of the minority rights should be understood in an inclusive manner and these rights should be restricted to citizens only to the extent necessary.’ Strasbourg, 20 December 2007, Opinion no. 392 / 2006, CDL-AD(2007)047Or. Engl. Opinion on the constitution of Montenegro, Adopted by the Venice Commission at its 73rd Plenary Session, (Venice, 14-15 December 2007). Asbjorn Eide, former President of the ACFC, was asked to provide comments.



The Venice Commission sometimes invites a representative of the ACFC to present its expert opinion when the Venice Commission is preparing an opinion on laws relating to minorities. See for instance the Venice Commission's Opinion on the revised draft law on exercise of the rights and freedoms of national and ethnic minorities in Montenegro.<sup>61</sup> Furthermore, what can be observed is that the Commission, in its opinions on draft legislation, sometimes relies on the opinions adopted by the Advisory Committee.<sup>62</sup>

## Conclusions

The efforts made by the Venice Commission to try and identify an approach drawing on the main international and European developments, including under the FCNM, on different questions, such as the position of non-citizens and minority rights, is laudable. This may result in a greater coordination in approaches towards minority issues by different bodies.

The Croatian example has shown the danger of conflicting opinions, because it provides Governments with the opportunity to choose the opinion they prefer and it affects the authority of, in this case, the ACFC. Discussions have taken place whether the ACFC should itself start advising Governments on draft legislation relating to minorities. This would not be desirable. Rather, based on the acquired expertise of the ACFC in the field of minority rights protection, it would be recommendable that, when the Venice Commission advises on legislation relating to minorities, a member of the ACFC is included. This would ensure that the required legislative experience (of the Venice Commission) and the required minority rights expertise (of the AC) is combined.

## 6. Parliamentary Assembly Recommendations

The Parliamentary Assembly (PA) is, already from the beginning, one of the biggest promoters of the FCNM. It has adopted several recommendations relating to the FCNM.<sup>63</sup> In a number of recommendations the PA urges all member States to sign and/or ratify the FCNM without reservations and declarations. In Recommendation 1492 (2001) it urges States that have not yet signed the Convention, especially France and Turkey, to bring their constitutions into harmony with the European standards in order to remove any obstacle to the nature and ratification of the Convention. In Recommendation 1623 (2003) the PA suggests several practical measures to encourage member States to ratify the Convention without any further delay, *inter alia*, organizing round tables on signature and ratification of the FCNM similar to efforts made to encourage early ratification of the European Social Charter and the revised Social Charter. The PA further decided in this recommendation that persistent refusal to sign or ratify the FCNM or to implement its standards should be subject of particular attention in

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<sup>61</sup> Strasbourg, 30 June 2004, Opinion no. 270 / 2003, CDL-AD(2004)026, Opinion on the revised draft law on exercise of the rights and freedoms of national and ethnic minorities in Montenegro, adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004).

<sup>62</sup> Strasbourg, 25 October 2005, Opinion no. 345 / 2005, CDL-AD(2005)026, Opinion on the draft law on the statute of national minorities living in Romania, adopted by the Venice Commission at its 64th Plenary Session (Venice, 21-22 October 2005). See also the Opinion on the revised draft law on exercise of the rights and freedoms of national and ethnic minorities in Montenegro (footnote 65).

<sup>63</sup> Already in 1995 it drafted a number of recommendations containing proposals regarding the implementation mechanism under the Framework Convention, under which Recommendations 1255 (1995), 1285 (1995) and 1300 (1996). Most of these proposals were taken over in the CoM's Res. (97)10 on the monitoring arrangements.

the monitoring procedures of the CoE. A well-known monitoring method within the CoE concerns the procedure to monitor the honouring of obligations that member States undertook when they joined the CoE. That the PA has been interested in the further promotion of the FCNM can be witnessed from the heated debate that was caused by the reservation submitted by Belgium following ratification, which ultimately led to the adoption of a special Resolution 1301 (2002) concerning 'Protection of Minorities in Belgium'.

Sometimes the PA concludes too soon that a country lives up to its obligations. An example is Recommendation 1213(i) relating to the integration of minorities "the former Yugoslav Republic of Macedonia". The recommendation criticizes several aspects, mainly relating to education.<sup>64</sup> Despite the criticism, the Assembly concluded by stating that "the former Yugoslav Republic of Macedonia" has honoured its obligations and most of its commitments whilst the remaining commitments are in the process of being fulfilled. In Recommendation 1453 (2000) the PA declared the monitoring procedure closed. According to many too premature, considering the non-compliance with several commitments as prescribed in Opinion No. 91 on the Application by "the former Yugoslav Republic of Macedonia" for Membership of the CoE.<sup>65</sup>

Lastly, the PA has also adopted thematic recommendations relating to the situation of the Roma. Recommendation no. 1203 (1993) on Gypsies in Europe, and Recommendation no. 1557 (2002): 'The legal situation of Roma in Europe. The latter refers in para 15 c ii and iv to 'eradicating all practices of segregated schooling for Romany children, particularly that of routing Romany children to schools or classes for the mentally disabled'. Furthermore, an introductory memorandum was drawn up on the situation of the Roma and relevant activities of the CoE.<sup>66</sup> The report provides a good overview of the activities of various CoE bodies in the field of the protection of Roma people.

## **7. Complementarity of Judicial and Non-Judicial Mechanisms**

Since the 1990's, the 'model' of minority protection, basically in relation to judicial or non-judicial implementation options has been intensively discussed. This discussion has two sides; one concerns the norms and the other the mechanisms that monitor the norms. A lot has been written on the advantages and disadvantages of non-judicial versus judicial mechanisms and instruments containing minority rights. The exact differences between, especially quasi-judicial or non-judicial mechanisms are difficult to establish. For instance, is the ACFC a quasi-judicial mechanism, basing its opinions on a judicial instrument or more a non-judicial mechanism, being competent to deliver non-judicial advisory opinions and dependent on a political body for support for these opinions?

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<sup>64</sup> Resolution 1213, 2000, para. i.a.

<sup>65</sup> See Thornberry & Martín Estébanez, *Minority Rights in Europe*, Council of Europe Publishing, 2004, pp. 488 and 499.

<sup>66</sup> AS/Jur (2008) 29 rev, 3 September 2008, ajdoc29 2008rev, Committee on Legal Affairs and Human Rights, The situation of Roma in Europe and relevant activities of the Council of Europe, Introductory memorandum Rapporteur: Mr József Berényi, Slovak Republic, EPP/CD.

Several international minority rights mechanisms (OSCE High Commissioner on National Minorities, the former UN Working Group on Minorities,<sup>67</sup> the ACFC) address minority issues from a general point of view. They address the situation of minority groups without possibilities to become engaged with individual violations of minority rights. That clearly falls outside the mandate of these mechanisms. This has for some been the reason to criticize the mechanisms. However, addressing minority issues from a broader point of view or judging upon individual violations are both two different métiers and should be addressed accordingly.

As mentioned in section 3, the European Court of Human Rights has developed important case law relevant to minorities. On the other hand, it was also observed that the Court often cannot take the specific situation of minorities into account (see for instance the *Gorzelik and Chapman* cases). The reason why the Court has been accused of not always being able to provide sufficient remedies for minorities should not be sought in the mechanism itself but in the rights on which it has to base its judgments. A specific minority convention or additional protocol containing specific minority rights would most probably bring the solution. It has been contended that ‘minority rights, including special measures and group rights, must be addressed in a protocol to the European Convention if persons belonging to minorities are ever to enjoy full dignity and equal rights with majority populations. Furthermore, it is argued that judicial response to demands for special measures would seriously contribute to the realization of minority rights in both law and fact.’<sup>68</sup> Others, however, believe that ‘minority rights are a highly contentious issue which, in the first instance, should be addressed at the political level.’<sup>69</sup> Moreover, ‘minority rights questions are so inherently context-sensitive that it is impractical (and counterproductive) to pursue detailed, judicially enforceable normative codes of universal applicability. Instead, it is better to press for broad acceptance of a limited set of general principles, some of which, like the non-discrimination norm, are already well established, and to use those principles as a guide for pursuing political resolutions of minority-majority disputes in societies polarized along those line.’<sup>70</sup>

Within the CoE discussions took place to add an additional protocol to the ECHR. The discussion regarding the adoption of an additional protocol to the ECHR regained interest in 2001 when the PA drew up a report regarding the rights of minorities. The CoM, the CDDH and the AC, however, considered that it was premature to re-open the debate on this issue and referred to Protocol 12 through which any discrimination against a member of a national minority will be covered by the general prohibition on discrimination.<sup>71</sup> Next to discussions on adding an additional protocol to the ECHR, it has been proposed to give the European Court of

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<sup>67</sup> The former UN Working Group on Minorities is replaced by the UN Forum on Minorities which will hold its first session in December 2008, see <http://www2.ohchr.org/english/bodies/hrcouncil/minority/forum.htm>.

<sup>68</sup> Alfredsson, G., A Frame with an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures, *International Journal on Minority and Group Rights*, Vol. 7, 2000, pp. 291-304, p. 291.

<sup>69</sup> Gilbert, G., Minority Rights under the Council of Europe, in Wheatley S. & Cumper, P. (eds.), *Minority Rights in the 'New Europe'*, Martinus Nijhoff Publishers, 1999, p. 64.

<sup>70</sup> Wippman, D., The Evolution and Implementation of Minority Rights, *Fordham Law Review*, Vol. LXVI, No. 2, 1997, pp. 597-627, p. 598. This is in line with the opinion of the First Chamber in the *D.H. and others v. Czech Republic* case, see section 3.

<sup>71</sup> Note that Protocol 12 has widened the scope of the non-discrimination provision in Article 14 but does not grant specific rights to minorities.

Human Rights the competence to give advisory opinions on the interpretation of the FCNM provisions.<sup>72</sup> Adding such a competence would, however, duplicate the activities undertaken by the AC, especially now that the AC has started adopting general thematic commentaries, and might also cause differing views.

Up till now not much progress has been made regarding the proposals to develop a new minority rights protocol within the CoE. Realistically, it will most probably stay with proposals for quit some time. An additional protocol will require a clear definition of the term minorities, which will not be easy to realise. If consensus could be reached on a definition, it will most probably reflect the lowest denominator, an assumption based on the practice of States Parties under the FCNM to restrict the personal scope of application in declarations. The fact that minority rights are couched in language that is imprecise because of which it might pose difficulties to the judicially enforceability of the rights must also be taken into account.<sup>73</sup> Consensus on judicial enforceable rights will not be that simple, considering the discussions held during the drafting process of the FCNM and the ultimate incorporation of programme-type provisions.

If the procedures that provide individual remedies for individual minority rights violations (and the instruments these procedures are based on) would be enhanced and strengthened, there would still be a need to complement such procedures with non-judicial procedures. The complementarity of judicial and non-judicial mechanisms becomes clear when the specific value of each type is realised. Non-judicial bodies use non-confrontational tools to induce governments to implement minority standards. Key characteristics embraced by non-judicial mechanisms include constructive dialogue, advice and persuasiveness. It has been observed that one of the difficulties in this particular field of rights could be that ‘the protection of minorities presents more clearly pronounced political characteristics, which strike much closer to matters of State sovereignty. When a minority claims, for example, greater autonomy, it raises less a point of law than a political problem for which a tribunal will have considerable difficulty finding a satisfactory solution.’<sup>74</sup> Indeed, the implementation of minority rights often touches upon sensitive issues that still divide society and politics. What seems needed most of

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<sup>72</sup> PA Rec. 1492 (2001) para. X. The Recommendation also reiterates its proposal to adopt an additional protocol on the rights of minorities to the European Convention on Human Rights. The Venice Commission has suggested to assign the Commission with the task of interpreting CoE conventions lacking their own interpretation mechanisms (if it were decided not to establish a general judicial authority as was the main topic of discussion in this proposal), see Venice Commission, Opinion on the Establishment of a General Judicial Authority, 45<sup>th</sup> Plenary Meeting, 15-16 December 2000.

<sup>73</sup> See, however, Pentassuglia, *EYMI*, 2001, p. 35, where he indicates that ‘programme-type elements and/or flexible wordings can be found in a large number of international human rights instruments, including the ECHR.’ See also the Doctrine of Effectiveness applied by the ECHR: ‘the ECHR would remain largely ‘theoretical or illusory’ unless its provisions are interpreted and applied by the Court in such a manner as to make them ‘practical and effective’, for the benefit of individuals.’ Helfer, L.R. & Slaughter, A.M., Towards a Theory of Effective Supranational Adjudication, *Yale Law Journal*, Vol. 107. No. 2, 1997, pp. 273-392, p. 311.

<sup>74</sup> Malinverni, G., The Draft Convention for the Protection of Minorities, the Proposal of the European Commission for Democracy through Law, *Human Rights Law Journal*, Vol. 12, 1991, pp. 265-269, p. 268. See, however, Pentassuglia who notes that ‘it is desirable that ‘judicial-like’ models of supervision gain a prominent role over time with regard to norm-interpretation and dispute settlement, thereby improving the coherence of the minority rights regime.’ See Pentassuglia, G., *Minorities in International Law, Minorities Issues Handbook*, Council of Europe Press, 2002, p. 223.

all is to begin a process of awareness-raising and demonstrating the necessity of the implementation of such norms. Ultimately the success of any implementation of and compliance with minority rights lies in the internalisation of the rules and principles in the behaviour of people and the willingness of States to enforce compliance if necessary. International institutions have a supportive role in this process. Most international institutions have therefore chosen for a cooperative approach, whereby they try to persuade and convince States of the importance of implementing minority and indigenous rights. They can only influence this process, not enforce it.<sup>75</sup>

The ACFC pursues a general approach when addressing minority issues of which all minorities could benefit, whereas judicial protection, offered by the European Court of Human Rights mostly affects the person bringing the case to one of these bodies. Although judgments of the Court also have a larger effect in that it demonstrates to other States that violations are punished which might discourage States of committing similar violations. It should furthermore be noted that the European Court is dependent on individuals to bring cases to the Court. A non-judicial mechanism like the ACFC may become engaged on his own initiative. Moreover, a non-judicial mechanism is flexible in that it can develop new approaches when deemed necessary. Indeed, ‘non-judicial supervision respects the autonomy of the Parties and takes into consideration their wishes and interests. This factor may well offer more of a guarantee that the decision reached will be respected. The procedure is flexible and can use its own authority and influence rectifying an infringement or violation. [...] In addition, the deciding body can offer new, attractive alternatives, possibly in fields not directly connected with the matter at issue. It can break fresh ground, taking account of the overall picture and considering all aspects of the problem.’<sup>76</sup>

## 8. Concluding Observations

As can be witnessed from the preceding sections, the Council of Europe has multiple mechanisms and means of action at its disposal in the sphere of minority rights. The question of complementarity and concurrence between these various instruments is therefore an actual topic within the CoE.<sup>77</sup> The essential problem could to be the phenomenon of compartmentalisation and ignorance of the activities of other mechanisms.<sup>78</sup> A lack of coordination and cooperation could increase the risk of divergences between the case-law, guidelines or opinions that stem from the different mechanisms. This could even become

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<sup>75</sup> See Eide, A & Letschert, R.M., Institutional Development within the UN and Regional Institutions, *Special Edition of the International Journal on Minority and Group Rights*, Vol. 14, nos. 2-3, 2007, pp. 299-323.

<sup>76</sup> Chowdhury, T.M.R., *Legal Framework of International Supervision*, Akademityck, Sweden, 1986, p. 231. See also Rooker, M., *The International Supervision of Protection of Romany People in Europe*, Nijmegen University Press, 2002, p. 375.

<sup>77</sup> See in this regard Imbert, P.H., (former Director General of Human Rights), Complementarity of Mechanisms within the Council of Europe / Perspectives of the Directorate of Human Rights, *Human Rights Law Journal*, 2000, Vol. 21, No. 8, pp. 292-295, p. 292 who states that ‘the problems that may result from the coexistence of different approaches, methods or mechanisms in this field are not essentially different in nature from those resulting from the existence of different international institutions operating in the same field.’

<sup>78</sup> ‘The different mechanisms sometimes appear to operate like gardeners each working in their own garden without looking to see what their neighbour is growing on the other side of the fence, ignoring the paths connecting the various gardens and, more importantly, without chatting with their neighbour over the fence.’ *Ibid.*, p. 293.

dangerous when States receive contradictory messages from these mechanisms.<sup>79</sup> Consequently, ‘in the short term, this does not help states to take appropriate action; in the longer term, it may harm the credibility and authority of the mechanisms concerned.’<sup>80</sup>

This report aimed to give a first indication of signs of synergies, overlap or differences between the various CoE bodies addressing issues relating to minority protection. The following observations can be made. The analysis of different reports, recommendations and opinions suggests that there is a certain convergence of the relevance of the findings and recommendations even though this is perhaps not consistently evidenced with explicit cross-referencing. However, it is positive that no major contradictory messages are being given, which is also due to the informal consultation processes which are in place in the Secretariat of the bodies concerned. For instance, the deplorable situation of the Roma, in particular also the poor educational possibilities for Roma children who are, in several countries, placed in special schools, is by all bodies addressed, and no major differences in approach can be observed. Whether this leads to increased synergy is another matter. Henrard defines synergy in a broad sense, thereby not limiting it ‘to explicit references to standards and/or review practices in terms of other instruments but also including more implicit cases of synergy, visible in cases of highly congruent argumentations and developments along very similar lines.’<sup>81</sup> Following this definition, increasing synergy between the activities of various CoE bodies, relating to, for instance, developments on ways to address the situation of the Roma, or the definition of minorities seems to be present.

Nevertheless, when analysing a selection of reports, recommendations and opinions issued by the various CoE bodies, it struck me that these documents only rarely refer to the activities of other bodies engaged in the country or with regard to a particular theme and their respective recommendations. By referring to, and supporting each others interpretations, the effectiveness of each body’s own activities will enhance, and more importantly, to all probability increase its influence on the implementation of the envisaged recommendations.<sup>82</sup> Ways to ensure this should not be left in the middle but should be addressed in modalities in which arrangements should be made on how this should take place. The advantage of such modalities would be that arrangements would be institutionalised and not only dependent on good personal contacts between representatives of the various bodies.

The relationship between judicial and non-judicial bodies was also addressed. Coordination between these types of bodies merits further research. The approach of the European Court of Human Rights (basing the judgments on the European Convention on Human Rights and its protocols) might not always correspond to the opinion of non-judicial bodies addressing similar issues but basing their opinions on other instruments (such as the FCNM). Part of the problem here appears to be a difference of minority rights in the various instruments (the

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<sup>79</sup> See the example of the Croatian Constitutional Law where it was demonstrated that the CoE Venice Commission at that time adhered to a different opinion than the Advisory Committee and the OSCE High Commissioner on National Minorities regarding the inclusion of a citizenship requirement in the definition of minorities in domestic legislation.

<sup>80</sup> Imbert, 2000, p. 293.

<sup>81</sup> Henrard, 2003/4, p. 14.

<sup>82</sup> See also Letschert, 2005, Chapter 9.

provisions in the Framework Convention contain far-reaching minority rights compared to the European Convention on Human Rights) and the way these rights are being interpreted by the bodies entrusted with that task.

This report was intended to give a first indication on the use of and support for the FCNM and the AC's work by other CoE mechanisms. More in-depth research needs to be done to make an overall assessment whether the interpretations relating to important minority (or related) topics of the various CoE bodies concur. It is furthermore recommendable to undertake a thorough comparison of the interpretations given by the ACFC and the Committee of Experts under the European Charter on Regional and Minority Languages with regard to the use of minority languages.<sup>83</sup> Furthermore, a thorough analysis to assess the overlap and complementarity of the ACFC and the European Commission against Racism and Intolerance should be the focus of future research.<sup>84</sup>

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<sup>83</sup> Henrard stated in an article assessing synergy between different minority rights mechanisms the following relating to the Committee of Experts under the Language Charter and the ACFN: [...] state obligations as regards linguistic, educational and participatory rights for minorities are given progressive, rather demanding interpretations. Furthermore, these developments under both instruments are very similar, revealing a first level of synergy, 2003/4, p. 24.

<sup>84</sup> See in this regard the commentary by Robert Dunbar, The relations between the Framework Convention and the Language Charter, University of Glasgow, at the conference 'Filling the frame: 5 years of monitoring the Framework Convention for the Protection of National Minorities', October 2003.