COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 5 December 2006

DH-MIN(2006)018

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*

* Professor of International Law at the University of Frankfurt, Germany.

This report was prepared upon the request of the Secretariat of the Framework Convention for the Protection of National Minorities and of the DH-MIN, 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, France. The views expressed in the present expert paper are those of the author and do not necessarily reflect the views of the DH-MIN or its Members.

I. Introduction

The task of this paper is to discuss and assess the impact of international non-discrimination norms and of the norms of the Council of Europe Framework Convention for the Protection of National Minorities (hereafter: Framework Convention) on the protection of national minorities in Europe. As will be shown in the initial brief historic overview of the development of international efforts to protect the rights of persons belonging to national minorities, the issue of the relationship between the right to non-discrimination and the specific rights of persons belonging to ethnic, linguistic, and religious minorities, or, as they will be referred to in line with the terminology used both by the OSCE and its High Commissioner on National Minorities and the Council of Europe: national minorities, has always been – and apparently remains to be – of central relevance to this area of international law.

This initial brief historic overview will be followed by an outline of the contents of those international norms on non-discrimination which have – or might have – an impact on national minorities in Europe: In this context, the main focus will be on Article 26 of the 1966 UN International Covenant on Civil and Political Rights providing for a non-accessory right to non-discrimination since the pertinent activities of the European Union, i.e. in particular Directive 2000/43/EC (Racial Equality Directive), and the relevant Council of Europe instruments, in particular the accessory right to non-discrimination provided for in Article 14 of the European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights (ECtHR), and the non-accessory right to non-discrimination as provided for by the 12th Additional Protocol to the ECHR, are being extensively dealt with in papers presented by *Olivier de Schutter* and *Kristine Henrard*. This section will be followed by a discussion of what should be considered as the major issue of this paper, namely the question whether and to what extent the Framework Convention, in the light of this set of international instruments on non-discrimination, provides for added value as concerns the legal situation of persons belonging to national minorities. This question will be addressed, first, in a short discussion of some of the conceptual issues connected with the right to non-discrimination as they are reflected in the Framework Convention; this discussion will be followed, second, by a presentation of some substantive issues of minority rights protection as they appear from the monitoring practice of the Advisory Committee on the Framework Convention for the Protection of National Minorities (hereafter: Advisory Committee); this main section of the paper will be concluded by some thoughts on the enforcement and implementation of the provisions of the Framework Convention. In order better to illustrate the result of the assessment as to whether the Framework Convention and its monitoring system constitute some added value as concerns the legal and factual situation of persons belonging to national minorities, this paper will end with a discussion of the widely debated issue of - alleged - discrimination of Roma pupils as concerns their access to education by comparing the pertinent findings of the Committee of Ministers of the Council of Europe in some of its Resolutions on country-specific opinions of the Advisory Committee, on the one hand, with the recent judgment of the ECtHR in the case of D.H. and others v Czech Republic, on the other hand.

II. A brief historic overview[1]

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

[1] For more detailed presentations see, e.g., F. Capotorti, Minorities, in: Bernhardt (ed.), Encyclopaedia of Public International Law, Vol. III (1997), 410 ff.; A. Eide, The Framework Convention in Historical and Global Perspective, in: Weller (ed.), The Rights of Minorities (2005), 25 ff. (33 ff); P. Thornberry, International Law and the Rights of National Minorities (1991), 38 ff.

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

On the other hand, it is well-known that the first system of international protection of the rights of national minorities was created after World War I and assumed a certain degree of unity within the framework of the League of Nations. This system was built on treaties concluded by Poland, Yugoslavia, Czechoslovakia and Romania with the principal Allied and Associated Powers and pertinent provisions in the peace treaties concluded by Austria, Bulgaria, Hungary, and Turkey. It was further completed by a set of bilateral treaties such as those concluded between Finland and Sweden concerning the Åland Islands (which is still in force) or between Germany and Poland concerning Upper Silesia as well as unilateral declarations made by Albania, the Baltic States and Iraq upon their admission to the League of Nations. This system provided for the recognition of group rights (and not only individual rights), and included a right to non-discrimination but, above all, provided for a wide set of additional rights in the fields of state administration, culture, and education. It failed, however, due to an increasing reluctance among the states concerned to abide by their treaty obligations in a period characterized by a growing atmosphere of aggressive nationalism, and the lack of competences, and political will, of the League of Nations to enforce the implementation of this system.[2]

After World War II, the United Nations did not endeavour to recreate the League of Nations system nor did they substitute it with a minority rights protection system of their own.[3] This absence of action reflected the then prevailing attitude that international protection of minority rights, construed as group rights, could be supplemented by an effective system of human rights protection based on individual rights, in particular the prohibition of discrimination on grounds such as ethnicity, language, race, and religion. Therefore, the 1948 Universal Declaration of Human Rights contains, in Article 2, a guarantee of non-discrimination but no provision on minority rights. The same is true for the 1950 European Convention on Human Rights, which provides, in Article 14, for an accessory right to non-discrimination.

On the universal level, this approach changed considerably in the 1960s.[4] The first step taken was the adoption of the 1965 Convention on the Elimination of all Forms of Racial Discrimination (CERD). Its provisions, in particular Article 5, have been used by the CERD Committee as an important tool to safeguard the rights of minorities going far beyond protection against discrimination.[5] Nonetheless, Article 27 of the 1966 International Covenant on Civil and Political Rights (ICCPR) is generally considered to be the most relevant provision on the protection of the rights of persons belonging to

[2] See Thornberry, *ibid*., 46 ff.
[3] See Eide (*supra* note 1), 37 ff.; and Thornberry, *ibid*., 137 ff.
[4] See Capotorti (*supra* note 1), 413 ff; Eide, *ibid*., 39 ff: and Thornberry, *ibid*., 257 ff.
[5] See R. Wolfrum, The Committee on the Elimination of Racial Discrimination, Max Planck Yearbook of United Nations Law 3 (1999), 489 ff.

national minorities on the universal level.[6] In the present context, it must be stressed that since, in Article 26, the ICCPR provides for a non-accessory right to non-discrimination, the ICCPR was the first international instrument to embrace both a provision on non-discrimination *and* a provision on minority rights. This fact should be seen as an important argument in favour of the position that a right to non-discrimination is not sufficient to guarantee the effective protection of minority rights.

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

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

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

The unequalled relevance of the Framework Convention as concerns the protection of minority rights in Europe is also reflected by the fact that, on 23 August 2004, the United Nations Interim Administration Mission in Kosovo (UNMIK) and the Council of Europe concluded an Agreement whereby UNMIK accepted to be bound not only by the substantive provisions of the Framework Convention, an obligation which already resulted from the pertinent unilateral acceptance to be found in Article 1.3 of UNMIK Regulation 1991/1, but also to be bound by the provisions on the monitoring of the implementation of the Framework Convention by UNMIK in Kosovo.[9] This act is the first time ever acceptance of a United Nations Interim Administration to be bound not only by the substantive provisions of a human rights instrument but also by its provisions on monitoring. It should be stressed that UNMIK, abiding by its obligation resulting from that Agreement, submitted its Report on 2 June

[6] On this provision see, e.g., R. Burchill, Minority Rights, in: A. Conte/ S. Davidson/ R. Burchill (eds.), Defending Civil and Political Rights – The Jurisprudence of the United Nations Human Rights Committee (2004), 183 ff: S. Joseph/ J Schultz/ M. Castan (eds.), The International Covenant on Civil and Political Rights (2nd ed. 2004), 752 ff., M. Nowak, UN Covenant on Civil and Political Rights. CCPR Commentary (2nd ed. 2005), 635 ff.

[7] For an overview see A. Bloed/ P. van Dijk, Protection of Minority Rights Through Bilateral Treaties: The Case of Central and Eastern Europe (1999); and E. Lantschner/ R. Medda-Windischer, Protection of National Minorities Through Bilateral Agreements in South Eastern Europe, European Yearbook of Minority Issues 1 (2003), 535 ff.

[8] See, e.g., M. van der Stoel, The Role of the OSCE High Commissioner on National Minorities in the Field of Conflict Prevention, Recueil des Cours 296 (2002), 9 ff.

[9] On this Agreement see R. Hofmann, Protecting Minority Rights in Kosovo, in: K. Dicke et al. (eds.), Weltinnenrecht, Liber amicorum Jost Delbrück 2005), 347 ff.

2005 and, subsequent to a visit to Kosovo in October 2005, the Advisory Committee adopted its Opinion on Kosovo on 25 November 2006. After this Opinion had been introduced to the GR-H on 21 February 2006, UNMIK decided to make the Opinion publicly accessible on 2 March 2006. On 21 June 2006, the Committee of Ministers adopted its pertinent Resolution.

Finally, it is important to note that the issue of minority rights has, at least so far, not been of major relevance for the *internal* policies and legislative activities of the European Communities/Union. It remains to be seen whether the introduction of a reference to minority rights in the draft Treaty on a Constitution for Europe will have an impact on the future legislative work of EU and EC; in this context it must be mentioned, however, that the absence of pertinent legislative activities might not only be due to an absence of political will to engage in such activities, but also to the absence of related powers specifically attributed to EU/EC. This situation starkly contrasts to the importance of minority issues for the *external* policies of the EU: Minority rights constitute a central point of the *Copenhagen Criteria* applicable to the previous and present enlargement-process and have been of essential relevance for EU stabilization efforts in the West Balkans and the implementation of the European Neighbourhood Policy, but also in other regions of the world.

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

III. International instruments on non-discrimination and their impact on the situation in Europe

As stated above, this section will only briefly touch upon Article 26 of the ICCPR, EC Directive 2000/43, Article 14 of the ECHR and the provisions of the 12th Additional Protocol to the ECHR as their impact on the situation in Europe is extensively dealt with in the papers by *Kristine Henrard* and *Olivier de Schutter*. In order to complete this initial overview of instruments or provisions on non-discrimination, it will also briefly discuss Article 4 of the Framework Convention the relevance of which will be more thoroughly presented in the later section on the substantive issues arising from the pertinent practice of the Advisory Committee.

1. Article 26 of the International Covenant on Civil and Political Rights

At the outset, it should be recalled that all Council of Europe Member States are parties to the ICCPR and have, thus, accepted to be bound by the non-accessory right to non-discrimination enshrined in Article 26 of the ICCPR. Almost all of them have also accepted the right of individual complaint in respect of this right. Since the adoption of its views in the cases *Broeks*, *Danning*, and *Zwaan-de Vries,*[10] all against the Netherlands, pertaining to social security entitlements, the Human Rights Committee (HRC) has interpreted this provision as a non-accessory right to non-discrimination. It should be emphasized that Article 26 of the ICCPR prohibits discrimination "on any ground" which means that the list of explicitly prohibited grounds of discrimination is non-exhaustive as also witnessed by the reference to "other status"; it is, therefore, clear that any discrimination based on a person belonging to an ethnic, linguistic, and religious minority is, in principle, prohibited unless there are reasons to justify the alleged unequal treatment. It is also important to note that this right is considered to prohibit discrimination not only by the state or other public authorities, but also requires positive protection against discrimination by private actors[11]. Finally, it should be mentioned that the HRC has interpreted Article 26 of the ICCPR in such a way as to prohibit both direct and indirect

[10] *Broeks v The Netherlands,* N° 172/1984; *Danning v The Netherlands*, N° 180/1984; *Zwaan-de Vries v The Netherlands*, N° 182/1984; on these cases see Nowak (*supra* note 6), 605.
[11] See Nahlik *v Austria*, N° 608/1995; see Nowak, *ibid*., 634.

discrimination,[12] including cases in which seemingly neutral provisions or policies have discriminatory effects.[13]

In view of this, it is interesting to note that, so far, Article 26 of the ICCPR has been of very little relevance to the protection of the rights of persons belonging to national minorities. In fact, all views of the HRC which are considered to be relevant for the protection of the rights of persons belonging to national minorities have been based upon Article 27 of the ICCPR. It is also important to note that the relevance, as concerns Europe, of the pertinent jurisprudence of the HRC – notwithstanding its 1994 General Comment on Article 27 of the ICCPR[14] – remains limited: Most of the very few individual communications, originating from Europe and submitted with respect to an alleged violation of Article 27 of the ICCPR, concerned the very specific issue of land rights of *Sami* which clearly cannot be dealt with under the heading of non-discrimination;[15] most of the remaining communications were received from members of the *Breton* community in France and had to be declared inadmissible due to the pertinent reservation made by France upon her ratification of the ICCPR.[16]

2. Council of the European Union - Council Directive 2000/43

The provisions of the EC Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin constitute, once being appropriately transposed into the domestic law of EU Member States, an important safeguard against discrimination for persons to whom this Directive – or more correctly: the domestic legislation resulting from the transposition – is applicable (possibly also persons belonging to linguistic or religious minorities and not only ethnic minorities). Therefore, the Advisory Committee, in its Opinions, has consistently urged EU Member States to transpose this Directive as an important contribution to the respect of their obligation to guarantee equal treatment and equality before the law as an obligation flowing from Article 4 of the Framework Convention. It is important to stress that the Directive, if properly transposed, will offer protection against direct and indirect discrimination, both by public authorities and private parties – it should be noted that this *horizontal effect* explicitly provided for by the Directive clearly exceeds the general effects of the Directives as they emerge from the consistent jurisprudence of the European Court of Justice (ECJ). It is also important to note that the Directive implies an obligation for EU Member States to provide for adequate procedures available to victims of prohibited discrimination in order to obtain appropriate compensation.

Although the EC Directive 2000/43 was not designed as such for the protection of persons belonging to national minorities, it clearly constitutes an important step to safeguard the legal position of persons belonging to racial and ethnic minorities. However, since it does not provide for any positive measures in favour of persons belonging to national minorities or any specific rights, it seems to reflect the approach predominant in the immediate post-World War II period according to which the implementation of the prohibition of discrimination constitutes a sufficient means to protect and promote the distinct identity of persons belonging to national minorities. This approach, however, does not fully reflect the currently prevailing assessment. Moreover, it must be borne in mind that, notwithstanding future enlargements of the European Union, there will be, at last for some time to come, a considerable number of highly important Council of Europe Member States which will not be EU Member States and for which the Directive, therefore, will be without any direct legal relevance.

3. Article 14 of the European Convention on Human Rights

As stated above, the ECHR, fully in line with the approach predominant at the time of its drafting, does not provide for any provision explicitly protecting the rights of persons belonging to national minorities. Moreover, the ECtHR has been – at least so far - relatively reluctant to accommodate the

[12] See *Simunek et al. v the Czech Republic*, N° 516/1992; see Nowak, *ibid*., 621 ff..
[13] See *Althammer v Austria*, N° 998/2001.
[14] See General Comment 23/50 of 8 April 1994, reprinted in Nowak, *ibid*., 1120.
[15] *Kitok v Sweden*, N° 197/1985; *Sara et al. v Finland*, N° 431/1990 ; *Ilmari Länsman v Finland*, N° 511/1992 ; *Jouni Länsman v Finland*, N° 671/1995 ; and *Äärelä v Finland,* N° 671/1995; on this issue see Nowak, *ibid*., 649 ff.
[16] See, e.g., *T.K. and M.K. v France*, N° 220 and 222/1987; on this issue see Nowak, *ibid*., XXVIII ff.

specific needs of national minorities in its jurisprudence: While it has recognized that the traditional lifestyle of British Travellers might be protected under Article 8 of the ECHR, it has – again: so far – in no case of this nature held that there was a violation of that provision.[17] Slightly different is the situation as regards the protection of the freedom of opinion and association as protected under Articles 10 and 11 of the ECHR: From the judgements in *United Communist Party*, *Sidiropoulos* and *Ilinden*[18] the important conclusion might be drawn that activities of political organizations aiming at the promotion of the distinct identity of national minorities do not *per se* constitute a threat to national security and must, therefore, not be prohibited unless there are additional reasons, e.g. indications that such aims shall be achieved by non-democratic means. Finally, reference should be made to the judgement in *Metropolitan Church of Bessarabia*[19] where the ECtHR held that the refusal of state authorities to register the church of a religious minority might amount to a violation of Article 9 of the ECHR.

In view of this situation, i.e. the reluctance of the ECtHR to deal with minority rights issues under the various general provisions of the ECHR, it is of course interesting to examine whether, and to what extent, Article 14 of the ECHR with its accessory right to non-discrimination has been of practical relevance as concerns the protection of the rights of persons belonging to national minorities. To make a long story short: Notwithstanding the non-exhaustive list of grounds of discrimination which allows for the applicability of this provision to applicants belonging to all national minorities and the inclusion of indirect discrimination[20], the answer must be "No". And indeed, the 2004 judgment in *Nachova* (confirmed in 2005 by the Grand Chamber[21]) was not only the first, but also remains one of the very few cases where the ECtHR found discrimination on the ground of race.[22] And it may very well be so, not despite, but rather because of, the very strong condemnation of racial discrimination by the Council of Europe: In order to hold that a State Party had violated Article 14 of the ECHR, in conjunction with another right protected in the ECHR, the ECtHR will only come to such a conclusion if there exist very strong indications that such a discrimination on racial grounds had actually occurred. Thus, it is difficult to imagine that this fundamental approach will change – as will be shown later in the discussion of *D.H. & Others v Czech Republic*.

4. Additional Protocol No. 12 to the European Convention on Human Rights

The recent entry into force of the 12th Additional Protocol to the ECHR has added to the already existing accessory right to non-discrimination, a non-accessory right to non-discrimination. So, at least for the still quite limited number of States Parties to this Additional Protocol, the situation under the body of ECHR instruments resembles the one under the ICCPR where there is, in Article 2, an accessory right to non-discrimination and, in Article 26, a non-accessory right to non-discrimination.

For persons belonging to national minorities and allegedly being victims of discrimination in "any right set forth by law" by an action attributable to any of the – still only – 14 States Parties, the 12th Additional Protocol offers an additional avenue to combat discrimination by means of individual complaints and, thus, by seeking to obtain legally binding judgments. It remains to be seen, however, whether this avenue will be an effective one: This depends not only on the preparedness of the ECtHR to adopt, in the context of the 12th Additional Protocol, a more pro-active role as concerns the rights of persons belonging to national minorities than it was hitherto prepared to do under Article 14 of the ECHR. Much more important will be whether and to what extent the notion of "any right set forth by

[17] See ECtHR, *Buckley v United Kingdom*, Judgment of 25 September 1996, RJD 1998-IX; *Chapman v United Kingdom*, Judgment of 18 January 2001, RJD 20001-I; *The Gypsy Council v United Kingdom*, Judgment of 14 May 2002 (reprinted in European Human Rights Law Review 2002, 705).

[18] See ECtHR, *United Communist Party v Turkey*, Judgment of 30 January 1998, RJD 1998-I; *Sidiropoulos v Greece*, Judgment of 10 July 1998, RJD 1998-IV; *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*, Judgment of 2 October 2001, RJD 2001-IX.

[19] See ECtHR, *Metropolitan Church of Bessarabia v Moldova*, Judgment of 13 December 2001, RJD 2001-XII.

[20] Since the decision in *Thlimmenos v Greece*, Judgment of 6 April 2000, Report of Judgments and Decisions 2000-IV.

[21] ECtHR *Nachova v Bulgaria*; Judgment of 6 July 2005 (violation of Article 14 in conjunction with Article 2 – discrimination on ground of Roma origin).

[22] But see ECtHR, *Timishev v Russia*, Judgment of 13 December 2005 where the Court decided that there had been, inter alia, a violation of Article 14 in conjunction with Article 2 of Protocol N° 2 (discrimination on grounds of Chechen origin).

law" which clearly refers back to national legislation might constitute a high hurdle: As concerns, e.g., the right to mother-tongue instruction which is generally seen as a right truly essential for the protection and promotion of the distinct identity of persons belonging to national minorities, this would require the guarantee of such mother-tongue instruction in domestic law in order to make a complaint for an alleged violation of such a right admissible under the 12th Additional Protocol. Moreover, applicants would have to convince the ECtHR that this individual exclusion from such education amounted to discrimination.

It should be noted that the ratification of the 12th Additional Protocol might constitute a possibility to improve domestic protection of the rights of persons belonging to national minorities in those States which so far have considered themselves not to be in a position to ratify the Framework Convention as the most comprehensive legally binding international human rights instrument in this field. However, it should also be noted that, with the sole exception of Luxembourg, no Member State of the Council of Europe has so far ratified the 12th Additional Protocol; some have even not signed it.

In conclusion, it seems that the 12th Additional Protocol, notwithstanding its very positive aspects as a means to further improve the protection of persons belonging to national minorities, cannot be considered as significantly reducing the importance of the Framework Convention in this field of human rights law.

5. Article 4 of the Framework Convention for the Protection of National Minorities

It must also be recalled that Article 4 of the Framework Convention provides for a guarantee to persons belonging to national minorities of the right of equality before the law and of equal protection of the law. In its quite substantial jurisprudence, the Advisory Committee has consistently stressed that Article 4 of the Framework Convention requires not only the enactment of legislation protecting all persons against discrimination, both by public authorities and private entities, but also effective remedies against such acts of discrimination.[23] This, and related findings under Article 4 of the Framework Convention have been consistently supported by the Committee of Ministers of the Council of Europe. However, it must also be stressed that the entire architecture of the system established under the Framework Convention is built upon the assessment that a right to non-discrimination, even if most effectively implemented, is not sufficient to ensure the protection and promotion of the distinct identity of persons belonging to national minorities; in order to fully achieve this ultimate goal of minority rights protection, additional rights guaranteeing the specific needs of such persons are considered to be necessary.

6. European Commission against Racism and Intolerance

Throughout its more than ten years of existence and activities, ECRI has indeed considerably contributed to combating discrimination based on, *inter alia*, ethnic grounds and, thus, to safeguarding the distinct identity of persons belonging to national minorities. However, as ECRI is not a treaty-based body, it does not come within the realm of this study which is tasked to deal with the impact of international non-discrimination *norms* on the protection of national minorities.

[23] See, e.g. para. 21 of the Opinion on Austria; para. 24 of the Opinion on Azerbaijan; paras. 33-36 of the Opinion on Bosnia and Herzegovina; paras. 29-40 of the Opinion on Bulgaria; paras. 21-25 of the (first) and 42 of the (second) Opinion on Croatia; paras. 23-24 of the Opinion on Cyprus; paras. 24-26 of the (first) and 39 of the (second) Opinion on the Czech Republic; para. 25 of the (first) Opinion on Denmark; paras. 37-39 of the (second) Opinion on Hungary; para. 22 of the (First) Opinion on Germany; paras. 42-48 of the (second) opinion on Romania (welcoming the adoption of pertinent legislation and calling for its implementation to be improved); para. 31 of the Opinion on Serbia and Montenegro; para. 17 of the (first) and paras. 34-40 of the (second) Opinion on Slovakia (welcoming the adoption of pertinent legislation and calling for its implementation to be improved); paras. 26-28 of the (first) Opinion on Slovenia; paras. 25-28 of the Opinion on Spain; paras. 28-29 of the Opinion on the Former Yugoslav Republic of Macedonia; and paras. 26-28 of the Opinion on Ukraine. See also paras. 35-39 of the Opinion on Kosovo.

IV. Non-discrimination and National Minorities. The Added Value of the Framework Convention

As stated above, this section will deal with the question as to whether the both the normative and the monitoring system of the Framework Convention represent *added value*, as concerns the protection of the rights of persons belonging to national minorities, when compared to the situation characterised by the mere applicability of the non-discrimination rule. This question will be addressed by discussing some conceptual and substantive issues as well issues related to the monitoring of the obligations incurred by States Parties to the Framework Convention. Nonetheless, it must be stressed that, for obvious reasons, the mere existence of the Framework Convention as a legally binding instrument providing for a set of specific rights of persons belonging to national minorities constitutes *per se* a most important *added value* as compared to the results which may be achieved by the operation of the non-discrimination rule as such specific rights considerably facilitate to accommodate the specific needs of persons belonging to national minorities.

1. Conceptual issues

Conceptual issues to be discussed include the issue of recognition of national minorities, the principle of non-discrimination, the equality requirement and the role of special measures.

a) Recognition of national minorities

At the outset, it must be recalled that none of the relevant international instrument provides for a definition of the term *national minority* which, in turn, raises the intricate question of recognition of national minorities. In view of the very complex factual and legal situation prevailing in Europe as concerns national minorities, it seems indeed impossible to formulate such a definition the application of which would result in clear-cut solutions in any given case. Therefore, States and monitoring bodies should indeed have some margin of appreciation when deciding whether a group of persons qualifies as a national minority for the purposes of a given international instrument. This approach is clearly reflected in the pertinent practice of the Advisory Committee.[24]

The Advisory Committee was faced with the fact that a number of States Parties had added declarations to their instruments of ratification usually limiting the breadth of their Framework Convention obligations to groups commonly referred to as 'old' or 'traditional' minorities, i.e. those having long-lasting ties with the territory on which they reside and being nationals of the state of which that territory is a part. These States wish to exclude 'new' minorities from the personal scope of application of the Framework Convention. Some States Parties took a similar approach indicating in their state reports that the Framework Convention covered only 'old' minorities, whereas other states opted for a broader and more inclusive approach.

In view of the intricate legal problems raised by such declarations[25], the Advisory Committee decided to make use of the flexibility inherent in the wording of the Framework Convention and adopted the following flexible approach: It is based on the understanding that, in the absence of a definition of the term 'national minority' in the Framework Convention, the States Parties had to examine the personal scope of application to be accorded to the Framework Convention within their respective jurisdictions. The position of each government was, therefore, deemed to be the outcome of this examination. Moreover, the Advisory Committee was – and continues to be – of the opinion that, on the one hand, States Parties have a margin of appreciation in this respect in order to take into due account the specific circumstances prevailing in their countries and that, on the other hand, this margin of appreciation must be exercised in accordance with general principles of international law and the fundamental principles set out in Article 3 of the Framework Convention. The Advisory Committee

[24] For a detailed presentation of this practice see R. Hofmann, The Framework Convention for the Protection of National Minorities: An Introduction, in: M. Weller (ed.), The Rights of Minorities (Oxford 2005), 1 ff. (16 ff.).

[25] See J.A. Frowein/ R. Bank, The Effect of Member States' Declarations Defining ‚National Minorities' upon Signature of Ratification of the Council of Europe Framework Convention for the Protection of National Minorities, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 59 (1999), 649 ff.

stressed, in particular, that the implementation of the Framework Convention should not be a source of arbitrary or unjustified distinctions which, in fact, would result in the discrimination of national minorities which are not recognised as such by the States Parties concerned as compared to those groups to which such recognition would be given. For this reason, the Advisory Committee considered that examining the scope of application given to the implementation of the Framework Convention by each State Party was part of its duty, in order to verify that no such arbitrary or unjustified distinctions, resulting in a situation of discrimination, were being made by the States Parties. Furthermore, it considered that it had to verify the proper application of the fundamental principles set out in Article 3 of the Framework Convention. If, in the view of the Advisory Committee, this was clearly the case, i.e. if a decision not to recognize a group of persons as a national minority for the purposes of the Framework Convention was based on arbitrary or unjustified distinctions, such an assessment would be clearly spelled out in the relevant country-specific opinion.[26] In other – less clear – situations the Advisory Committee would call on the States Parties concerned to discuss the issue with representatives of the group in question.[27]

It is interesting to note that this approach reminds one, to some extent, of the one taken by the ECtHR in the *Gorzelik* case.[28] In this case dealing with the question whether a group of persons claiming to constitute a *Silesian* national minority for the purposes of polish electoral law, the Grand Chamber explicitly held that, since international law does not provide for a generally accepted definition of the term 'national minority', states are under no international law obligation to apply, in their domestic legal order, any such specific definition derived from international law, but may rely on any definition provided for in their domestic legislation. This might indeed be interpreted as if the Court had joined the ranks of those who argue that *self-identification* alone is not sufficient to oblige states to recognize a certain group of persons as a national minority – at least as long as such a status results in certain benefits, privileges or positive measures. And indeed there might be good reasons to accept that, normally, the decision as to whether a group of persons constitutes a national minority depends upon the *self-identification* of these persons, whereas in a situation in which a state, in its legislation, accords certain positive measures to national minorities, the basic decision whether a group of persons constitutes a national minority in the sense national legislation is taken by the authorities of that state (*state recognition*) and that such a decision would be subject only to limited international scrutiny, i.e. whether it is arbitrary or not or, in other words, whether it results in a discriminatory situation or not.[29]

Finally, as regards the issue of 'new' minorities (i.e. those persons who are not citizens of their country of residence or who belong to a group that has only recently moved to the area in which it resides), the Advisory Committee has consistently held that some of the provisions of the Framework Convention – such as Article 11 (3) with its explicit reference to 'areas traditionally inhabited' by persons belonging to a national minority – would obviously be applicable only to 'old' minorities. In contrast thereto, it is clear that Article 6 of the Framework Convention applies to 'all persons living on

[26] See, e.g., paras. 17-22 of the Opinion on Albania in which the Advisory Committee held that the *a priori* exclusion of the Egyptians as a group which had resided for centuries in Albania from the personal scope of application of the FCNM was incompatible with Article 3 FCNM; and paras. 13-25 of the (first) Opinion on Denmark where the same conclusion was reached with respect to the Roma – a conclusion which was explicitly confirmed in the pertinent Resolution of the Committee of Ministers; in view of the continued unwillingness of the Danish authorities to grant protection to the Roma under the FCNM, the Advisory Committee repeated and, thus, confirmed its above conclusion in paras. 50-53 of its (second) Opinion on Denmark which was again backed by the Committee of Ministers in its (second) Resolution on Denmark.

[27] See e.g. paras. 12-20 of the Opinion on Austria concerning inhabitants of Vienna of Polish origin; paras. 19-24 of the Opinion on Bulgaria concerning Macedonians and Pomaks; paras. 14 -18 of the (first) and paras. 24-25 of the (second) Opinion on Romania concerning the Csangos; paras. 24-25 of the (first) Opinion on Slovenia concerning the German-speaking minority – a concern echoed in para. 36 of the (second) Opinion on Slovenia; paras. 23-24 of the Opinion on Spain concerning the population of Berber origin in Ceuta and Melilla; paras. 13-19 of the Opinion on Sweden concerning the inhabitants of Scania and Gotland; paras. 24-25 of the Opinion on the Former Yugoslav Republic of Macedonia concerning Bosniaks and Egyptians; paras. 13-16 of the Opinion on Ukraine concerning the Rusyns; and paras. 11-16 of the Opinion on the United Kingdom concerning the Cornish people.

[28] ECtHR, *Gorzelik v Poland*, Judgment of 17 February 2004, RJD 2004-I; on this judgment see, e.g., R. Hofmann, Nationale Minderheiten und der Europäische Gerichtshof für Menschenrechte, in: J. Bröhmer et al. (Eds.), Internationale Gemeinschaft und Menschenrechte. Festschrift für Georg Ress (2004), 1011 ff.

[29] In para. 28 of its Opinion on Poland, the Advisory committee called on the Polish authorities to discuss with the persons concerned the question as to whether the "Silesian national minority" should be recognized as a national minority for the purposes of the FCNM.

the territory' of a given State Party and, thus, also to persons belonging to 'new' minorities.[30] Furthermore, it indeed seems possible to also argue that other provisions, such as articles 3, 5, 7 and 8 Framework Convention, could, at least in certain circumstances, be applicable to persons belonging to 'new' minorities. Based upon this analysis, the Advisory Committee opted for a flexible approach that makes it possible to consider the inclusion of persons belonging to such groups in the application of the Framework Convention on an article-by-article basis. As a result thereof, the Advisory Committee expressed its opinion that the competent state authorities should consider the issue in consultation with those concerned.[31]

b) The principle of non-discrimination and the equality requirement

The principle of non-discrimination and the equality requirement are guaranteed by Article 4 of the Framework Convention:[32] Paragraph (1) provides for the right of equality before the law and of equal protection of the law; it also prohibits any discrimination based on minority membership and characteristics. Paragraph 2 calls for positive measures in order to promote full and effective equality between persons belonging to the "majority" and any national minority. Finally, Paragraph 3 provides that such positive measures shall not be considered to be an act of discrimination.

In addition to equal treatment in law and by public authorities, 'equal rights' is usually understood as also including equal opportunities in the actual enjoyment and exercise of human rights. In the Explanatory Report accompanying the Framework Convention, it is stated that no separate provision on the principle of equal opportunity had been included since "such an inclusion had been considered unnecessary as the principle was already applied in paragraph 2 of the article".[33]

The issue of discrimination in law and, in particular, in fact has been consistently addressed by the Advisory Committee. In order to be able to assess the facts, it has repeatedly called on States Parties to identify ways of gathering reliable statistical data,[34] even in countries where, in view of the historical context and the particularly sensitive situation, exhaustive statistical data pertaining to national minorities cannot be collected[35] since the absence of accurate data could seriously hamper the ability of states to target, implement and monitor measures ensuring the full and effective equality of persons belonging to national minorities. It must also be stressed that the Advisory Committee has used statistical evidence to support its findings on the existence of indirect discrimination.[36]

Although the Advisory Committee has often linked Article 4 with other provisions of the Framework Convention, it is absolutely clear from the wording of Article 4 of the Framework Convention that it must be considered as a general, non-accessory right to non-discrimination. This is also clearly reflected in the practice of the Advisory Committee; as an example might be mentioned that, while refraining from addressing general issues of citizenship legislation, it welcomed legislative development which contributed to the elimination of difficulties faced in an inequitable manner by

[30] See, e.g., para. 35 of the Opinion on Austria; para. 76 of the (second) Opinion on Denmark; paras. 37-40 of the (first) Opinion on Germany; para. 40 of the (first) and para. 78 of the (second) opinion on Italy, para. 36 of the Opinion on Norway; and para. 37 of the Opinion on Sweden.

[31] See, e.g., para. 20 of the Opinion on Austria, para. 25 of the Opinion on Bosnia and Herzegovina; para. 28 of the Opinion on Bulgaria; para. 18 of the (first) Opinion on Germany; para. 14 of the (first) Opinion on Hungary, para. 17 of the (first) Opinion on Italy; para. 29 of the Opinion on Poland; para. 24 of the Opinion on Serbia and Montenegro; para. 24 of the Opinion on Switzerland; and para. 25 of the (first) and paras. 40-41 of the (second) Opinion on Slovenia.

[32] On Article 4 FCNM see the commentary by G. Alfredsson, in: Weller (*supra* note 24), 145 ff.

[33] Explanatory Report, paras. 38-41.

[34] See, e.g., para. 22 of the Opinion on Austria; para. 27 of the Opinion on Azerbaijan; para. 41 of the Opinion on Bulgaria; para. 29 of the (first) Opinion on Croatia; para. 28 of the (first) Opinion on the Czech Republic; para. 69 of the (first) and paras. 32-35 of the (second) Opinion on Hungary; para. 35 of the Opinion on Poland; para. 26 of the (first) and paras. 34-40 of the (second) Opinion on Romania (welcoming positive developments); para. 44 of the Opnion on Serbia and Montenegro; para. 21 of the (first) and paras. 27-32 of the (second) Opinion on Slovakia; and paras. 41-42 of the Opinion on the Former Yugoslav Republic of Macedonia. See also paras. 28-34 of the Opinion on Kosovo.

[35] See, e.g., para. 21 of the (first) Opinion on Germany; para. 27 of the Opinion on Norway; and para. 41 of the Opinion on Spain.

[36] See e.g. paras. 61-63 of the (first) and, in particular, paras. 145-150 of the (second) Opinion on the Czech Republic concerning the situation of Roma children in the Czech education system.

persons belonging to national minorities, as regards attempts to invoke relevant norms in order to clarify citizenship issues.[37]

As will be seen in the below section on substantive issues, the Advisory Committee has consistently applied the principle of non-discrimination in such a way as to include both direct and indirect discrimination. It might well be stated that the Advisory Committee has adopted a result-oriented approach, i.e. it assesses whether or not there exists *in fact* discrimination against persons belonging to national minorities and, if so, it calls on the States Parties to take the necessary measures which might range from changes in the legislation to changes in its application by administrative and judicial authorities; it has also consistently called on States Parties to ensure that private actors may not apply discriminatory practices against persons belonging to national minorities.[38] So, it seems justified to stress that the Advisory Committee has consistently used a kind of "non-discrimination approach" in order to ensure equality in fact between persons belonging to the minority population as compared to the situation of persons belonging to the majority population.

c) The role of special measures

In order to achieve full and effective equality, States Parties to the Framework Convention are under a legal obligation to adopt, if and to the extent necessary, special measures that take into account the specific conditions of the persons concerned. Such measures need to be 'adequate', that is in conformity with the principle of proportionality in order to avoid violations of the rights of others as well as discrimination against others. The principle of proportionality extends both to the time during which such positive measures might be applied, as well as to their substantive scope. This has also been the consistent practice of the Advisory Committee.[39] This implies that States Parties should not only constantly assess whether there is a need to adopt and implement positive measures but that they should equally constantly monitor whether such programmes have achieved their goal and should, therefore, be discontinued.

As will be seen in the subsequent section on substantive issues, the Advisory Committee has welcomed and/or recommended a series of positive measures such as adoption and strict implementation of anti-discrimination legislation in public, criminal and civil law with effective means of enforcement, or special programmes adopted with a view to improve the economic and social situation of persons belonging to national minorities including funding of relevant activities in such fields as culture, education and politics, and to facilitate their access to the public service. Generally speaking, it is difficult to see any area of public life which the Advisory Committee might consider as *a priori* falling outside the scope of adopting positive measures.

Finally, it should be stressed that the drafters of the Framework Convention sought to strike a balance between the need to maintain or, if need be, strengthen social cohesion, on the one hand, and to enhance the necessary respect for the specific identity of any person belonging to a national minority, on the other hand. As will be seen in the subsequent section dealing with substantive issues, in particular as regards Article 15 of the ECHR, the Advisory Committee has been consistently guided by the understanding that the ultimate goal of minority rights protection consists of achieving the full integration of persons belonging to national minorities into the society of the States in which they live while, at the same time, guaranteeing the preservation and promotion of their distinct identity. This means that both the forced assimilation of persons belonging to national minorities as well as processes resulting in the establishment of "parallel societies" constituted by such persons and in which the fundamental values of the constitutional order of the State in which such persons live would

[37] See, e.g., para. 31 of the (first) Opinion on the Czech Republic; para. 27 of the (first) and paras. 28-30 of the (second) Opinion on Croatia; para. 26 of the (first) and paras. 46-50 of the (second) Opinion on Estonia; paras. 30-31 of the Opinion on Lithuania; paras. 37-38 of the (first) Opinion on the Russian Federation; para. 32 of the Opinion on Serbia and Montenegro; paras. 30-32 of the (first) and paras. 56-59 of the (second) Opinion on Slovenia; paras. 36-37 of the Opinion on the Former Yugoslav Republic of Macedonia; and para. 29 of the Opinion on Ukraine.

[38] See *supra* text accompanying note 23.

[39] See, e.g., para. 18 of the (first) Opinion on Italy where it expressly stated that legislative provisions applicable in South Tyrol and which constitute such positive measures should "allow for developments over time and not be rigidly set in time."

not be fully respected, are clearly incompatible with this *raison d'être* of minority rights protection. It is also in this light that the relationship between the right to non-discrimination and the obligation to adopt positive measures must be seen.

2. Substantive issues

The following section deals with some substantive issues which have been of particular relevance to the practice of the Advisory Committee. They concern the preservation and development of minority cultures; freedoms of assembly, association and religion; media; the use of minority languages in public; education in, and of, minority languages; effective participation in public, social, and economic life.

a) Preservation and development of minority cultures

The legal obligation of states to protect and to promote, including by positive measures, the culture of national minorities as a most essential aspect of their distinct identity is clearly recognised in Articles 4 (2) and 5 (1) of the Framework Convention.[40]

Throughout its practice, the Advisory Committee welcomed state measures in support of cultural activities of national minorities and stressed that they should be implemented in close contact with the persons concerned.[41] Moreover, it called strongly for a solution to the Sami land rights issue[42] and noted with concern the absence of adequate stopping sites for Travellers and the effect this has on their ability to maintain and develop their culture and to preserve the essential elements of their identity, of which travelling is an important aspect.[43] The Advisory Committee also expressed its deep concern about the forced dissolution of Horno, a municipality in Lusatia with Sorbian character, aimed at allowing lignite quarrying to continue, as such measures are likely to make the preservation of the Sorbian minority identity more difficult due to the population displacement involved.[44] It has also stressed that, in some countries, Roma face a broad range of socio-economic problems to a disproportionate degree. Therefore, it welcomed pertinent government action and stressed that such programmes should be developed in close contact with those concerned and, when implemented, particular attention should be paid to the situation of Roma women.[45]

---

[40] On Article 4 see the commentary by G. Alfredsson, in: Weller (*supra* note 24), 145 ff.; and on Article 5 (1) see the commentary by G. Gilbert, in: Weller, *ibid*., 154 ff.

[41] See, e.g., paras. 24-27 of the opinion on Austria; paras. 42-47 of the Opinion on Bulgaria; paras. 60-67 of the (second) Opinion on the Czech Republic; paras. 27-28 of the (first) and paras. 60-62 of the (second) Opinion on Estonia; paras. 58-64 of the (second) Opinion on Finland, paras. 25-28 of the (first) Opinion on Germany; paras. 37-39 of the (first) and paras. 66-70 of the (second) Opinion on Italy; paras. 38-40 of the (first) and paras. 52-54 of the (second) Opinion on Moldova; paras. 42-43 of the Opinion on Poland, paras. 30-31 of the (first) and paras. 74 of the (second) Opinion on Romania (welcoming legislative improvements but calling for better implementation); paras. 46-48 of the (first) Opinion on the Russian Federation; paras. 22-24 of the (first) and paras. 59-63 of the (second) Opinion on Slovakia (welcoming legislative improvements but calling for better implementation); and paras. 43-45 of the Opinion on the Former Yugoslav Republic of Macedonia. See also paras. 49-51 of the Opinion on Kosovo.

[42] See paras. 21-23 of the (first) and paras. 50-56 of the (second) Opinion on Finland, para. 38 of the Opinion on Norway; and paras. 30-32 of the Opinion on Sweden.

[43] See paras. 48-55 of the Opinion on Ireland; para. 58 of the (second) Opinion on Italy; para. 47 of the Opinion on Spain; paras. 34-38 of the Opinion on Switzerland, and paras. 40-42 of the Opinion on the United Kingdom.

[44] See paras. 29-32 of the (first) Opinion on Germany.

[45] See, e.g., paras. 44-51 of the Opinion on Bosnia and Herzegovina; paras. 32-36, 48 and 52-60 of the Opinion on Bulgaria; paras. 69-74 of the (second) Opinion on Croatia; paras. 28-30 of the (first) and paras. 49-59 of the (second) opinion on the Czech Republic; paras. 40-44 of the (second) Opinion on Finland; paras. 18-19 of the (first) and paras. 46-54 of the (second) Opinion on Hungary; paras. 55-60 of the (second) Opinion on Italy; paras. 33-66 of the (first) and paras. 43-38 of the (second) Opinion on Moldova; paras. 36-39 of the Opinion on Poland; paras. 27-29 of the (first) and paras. 50-59 of the (second) Opinion on Romania; paras. 39-43 of the Opinion on Serbia and Montenegro; paras. 20-21 of the (first) and paras. 42-50 of the (second) Opinion on Slovakia; paras. 62-74 of the (second) Opinion on Slovenia; and paras. 31-38 of the Opinion on Spain. See also paras. 45-46 of the Opinion on Kosovo.

b) Freedoms of assembly, association, and religion

It is a truism that freedom of religion and political rights such as freedoms of assembly and association belong to the very basics of any truly democratic society. Moreover, in view of the special situation of national minorities, they have particular relevance for persons belonging to such minorities. Therefore, it is important that they are not only guaranteed in the ECHR but also protected under Articles 7 and 8 of the Framework Convention.[46]

With respect to political rights, freedoms of assembly and association, it must be stressed that the Advisory Committee has followed the same approach as the ECtHR in its judgments in the *United Communist Party*, *Sidiropoulos* and *Ilinden* cases:[47] The activities of political organisations aimed at the promotion of the distinct identity of national minorities do not *per se* constitute a threat to national security and must, therefore, not be prohibited unless there are additional reasons, such as indications that such aims shall be achieved by non-democratic means.[48] Of particular relevance is the view that domestic legislation prohibiting as such the establishment of political parties of national minorities raises considerable problems as to its compatibility with Article 7 of the Framework Convention.[49]

As regards freedom of religion, the main point is that it has been recognized that 'religious' minorities constitute 'national' minorities in the sense of the Framework Convention.[50] Whereas the pertinent practice of the Advisory Committee mainly related to very specific issues often connected with disputes concerning property rights of churches and other religious monuments, it might be useful to stress that the Advisory Committee, while recognizing that Article 8 of the Framework Convention does not exclude all differences in the treatment of religious entities, is of the opinion that such differences must not result in undue limitations of the rights of persons belonging to national minorities.[51] More specifically, it has held that the absence of comprehensive legislation to protect individuals from religious discrimination or religious hatred has an adverse effect on persons belonging to national minorities, in particular if blasphemy laws are restricted solely to one religion.[52] Furthermore, the Advisory Committee, while considering that a state church system is not in itself in contradiction with Article 8 of the Framework Convention and that the latter does not entail an obligation *per se* to fund religious activities, was of the opinion that, where such funding exists, it must be in conformity with the principle of equality before the law and equal protection of the law as guaranteed under Article 4 of the Framework Convention.[53]

It is interesting to note that, as regards freedoms of association and religion, the major concerns of the Advisory Committee were related to situations involving discrimination, both direct and indirect, against national minorities and their organisations. The possibility to address such issues in an effective way was certainly enhanced by the fact that the Advisory Committee could rely on a specific provision and did not need to rely on a general norm prohibiting discrimination.

---

[46] On Articles 7 and 8 FCNM see the commentaries by Z. Machnyikova, in: Weller (*supra* note 24), 193 ff. and 225 ff. respectively.

[47] ECtHR, *United Communist Party v Turkey*, Judgment of 30 January 1998, RJD 1998-I; ECtHR, *Sidiropoulos v Greece*, Judgment of 10 July 1998, RJD 1998-IV; ECtHR, *Stankov and the United Macedonian organisation Ilinden v Bulgaria*, Judgment of 2 October 2001, RJD 2001-IX.

[48] See, e.g., paras. 43-45 of the Opinion on Azerbaijan; and para. 49 of the (first) opinion on Moldova.

[49] See paras. 68-70 of the (first) Opinion on the Russian Federation; on this issue see also paras. 61-63 of the Opinion on Bulgaria.

[50] See paras. 18-21 of the Opinion on Cyprus with respect to Maronites and Armenians; see also para. 19 of the (first) Opinion on Armenia with respect to the Yesidi.

[51] See, e.g., para. 38 of the (first) and para. 101 of the (second) Opinion (welcoming important improvements) on Croatia; paras. 79-81 of the (second) Opinion on Moldova (concerning difficulties to register religious organisations); and para. 67 of the Opinion on Serbia and Montenegro.

[52] See paras. 57-61 of the Opinion on the United Kingdom.

[53] See, e.g., para. 29 of the (first) and para. 110 of the (second) Opinion on Denmark; and para. 29 of the (first) and para. 91 of the (second) Opinion on Finland.

c) Media

Media rights including, in particular, the right to have adequate access to, and visibility in, public audio-visual media and to establish private print and audio-visual media (sound radio and television broadcasting) are obviously of fundamental relevance for the protection and promotion of the distinct identity of national minorities. In an era in which societal developments are largely influenced by the media, information on, and created by, national minorities is clearly essential for the understanding of such distinct identities both by the majority population and the persons belonging to such minorities themselves. Moreover, since most national minorities in Europe have their own, distinct language as one criterion – and one of the most important – to distinguish them from the majority population, print and audio-visual media using such languages are essential for learning such languages as well as for keeping them alive. This fundamental importance of media rights is, in addition to the general provision of Article 10 of the ECHR, also reflected in Article 9 of the Framework Convention.[54]

Media rights of national minorities have so far not been of any major relevance for the jurisprudence of the European Court of Human Rights under Article 10 of the ECHR. As regards the practice of the Advisory Committee, it is important to note that the bulk of its concerns relates to situations of insufficient access of national minorities to public radio and television broadcasting programmes and the unequal allocation to different national minorities of financial and other resources relating to private radio and television programmes.[55] It seems clear that the vulnerability of national minorities as concerns media and media rights is particularly high – a situation which not only calls for specific awareness of all state authorities as concerns the portrayal of persons belonging to national minorities in the media but also requires the adoption of positive measures, including financial support, as generally foreseen in Article 9 (4) of the Framework Convention. The Advisory Committee has, however, not yet been in a position to develop clear criteria which could be used in order to determine issues, such as "insufficient" access to, or "insufficient" coverage by, public media or "insufficient" financial funding of private radio and television programmes run by national minorities. Further work in this respect is clearly called for and it is to be hoped that the Advisory Committee will find the time to embark on such thematic work which would eventually result in the express identification of good practices or the establishment of standards which might then assist states parties in developing their domestic legislation and practice. On the other hand, it is equally important to keep in mind that large factual and legal differences characterizing the situation of national minorities in Framework Convention member states might make it very difficult to draft such precise standards to be applied everywhere; this might make it inevitable that the Advisory Committee focuses on situations which it deems to be incompatible with Article 9 of the Framework Convention.[56]

Thus, whereas it seems justified to state that there is still much potential for substantial improvement as regards the situation in the audio-visual media, a more positive assessment applies in the field of print media. There are only a limited number of critical statements concerning mainly the lack of

[54] On Article 9 FCNM see the commentary by J. Packer/ S. Holt, in: Weller (*supra* note 24), 264 ff.; see also K. Jakubowicz, Persons Belonging to National Minorities and the Media, International Journal on Minority and Group Rights 10 (2003), 291 ff.

[55] See,e.g., paras. 47-49 of the Opinion on Albania; paras. 47-50 of the (first) Opinion on Armenia; paras. 38-40 of the Opinion on Austria; paras. 50-52 of the Opinion on Azerbaijan; paras. 68-73 of the Opinion on Bulgaria; paras. 40-42 of the (first) and paras. 107-109 of the (second) Opinion on Croatia; paras. 53-54 of the (first) and paras. 107-109 of the (second) opinion on the Czech Republic; paras. 116-120 of the (second) Opinion on Denmark; paras. 55-57 of the (first) and para. 85 of the (second) Opinion on Estonia; paras. 44-47 of the (first) Opinion on Germany; paras. 88-92 of the (second) Opinion on Italy; paras. 56-57 of the (first) and paras. 89-91 of the (second) Opinion on Moldova; paras. 62-65 of the Opinion on Poland; paras. 110-120 of the (second) Opinion on Romania; paras. 76-78 of the (first) Opinion on the Russian Federation; para. 62 of the Opinion on Spain; paras. 42-43 of the Opinion on Sweden; para. 62 of the Opinion on the Former Yugoslav Republic of Macedonia; and paras. 43-47 of the Opinion on Ukraine.

[56] See, e.g., para. 144 of the (first) Opinion on the Russian Federation where the Advisory Committee found hat the "overall *a priori* exclusion of the use of the languages of national minorities in federal radio and TV broadcasting, implied in the Law on Languages of the Peoples of the Russian Federation, is overly restrictive and not compatible with Article 9"; see also for a similar prohibition – and assessment – para. 50 of the Opinion on Azerbaijan.

financial support for print media owned by, and catering for, the needs of persons belonging to national minorities.[57]

To conclude it seems justified to stress that the issue of discrimination of persons belonging to national minorities as regards their access to media has been identified as a major issue by the Advisory Committee. In contrast thereto, it is interesting to note that this problem has not been addressed by the ECtHR as, apparently, the persons concerned did not submit individual complaints based on an alleged violation of Article 14 of the ECHR in conjunction with Article 10 of the ECHR.

d) Use of minority languages in public

Since most national minorities in Europe are characterized by their language, linguistic rights are of essential relevance to the protection and promotion of their distinct identity. As a consequence, Articles 10 and 11 of the Framework Convention provide for guarantees of such linguistic rights.[58]

Such linguistic rights include the right to use one's own language in the private and public spheres and, to some extent, in contacts with administrative and judicial bodies; the right to use one's own name in the minority language and the right to official recognition thereof; and the right to display, in a minority language, signs of a private nature and, under specific conditions, to display topographical signs in a minority language.

At the outset, it must be stressed that the Advisory Committee has, on several occasions, expressed its view that the Framework Convention does not preclude the existence of a single state language. It has also recognized the legitimacy of measures to promote and to protect such a single state language, provided that such initiatives are implemented in a way that safeguards the rights of persons belonging to national minorities.[59] With respect to several States, the Advisory Committee concluded that there were considerable problems as to the practical implementation of domestic legislation providing for the use of minority languages in official dealings with administrative authorities.[60] More specifically, it explicitly welcomed legislation in Austria, the Czech Republic, Romania, the Slovak Republic and the former Yugoslav Republic of Macedonia which allowed for such use of minority languages in areas in which the minority population represented 10% (Austria) or 20% (Romania, the Slovak Republic and the former Yugoslav Republic of Macedonia) of the overall population[61] while, in contrast, it declared a quota of 50% to be too high.[62] These statements might indeed be indicative of the Advisory Committee's future approach as regards the formulation of generally applicable standards. A final point should be mentioned: the Advisory Committee emphasized that if persons belonging to national minorities also have a command of the (dominant) language, this is not decisive,

---

[57] See, e.g., para. 51 of the (first) Opinion on Armenia; para. 74 of the Opinion on Bulgaria; para. 52 of the Opinion on Lithuania; para. 44 of the Opinion on Norway; para. 64 of the Opinion on Spain; and para. 46 of the Opinion on Sweden.

[58] On Articles 10 and 11 FCNM see the commentary by F. de Varennes, in: Weller (*supra* note 24), 301 ff. and 329 ff., respectively; see also R. Dunbar, Minority Language Rights under International Law, International and Comparative Law Quarterly 50 (2001), 90 ff..

[59] See, e.g., paras. 53-55 of the Opinion on Azerbaijan; para. 39 of the (first) and para. 92 of the (second) opinion on Estonia; para. 70 of the Opinion on Lithuania; para. 81 of the (first) and para. 95 of the (second) Opinion (welcoming considerable improvements) on Moldova; and para. 63 of the Opinion on Ukraine.

[60] See, e.g., paras. 57-59 of the (first) Opinion on Armenia; paras. 56-57 of the Opinion on Azerbaijan; paras. 77-79 of the Opinion on Bulgaria; paras. 106 and 111 of the (second) Opinion on Finland; paras. 80-82 of the (second) opinion on Hungary; paras. 54-56 of the Opinion on Lithuania; paras. 66-67 of the Opinion on Poland, paras. 80-85 of the (first) opinion on the Russian Federation; paras. 48-50 of the Opinion on Sweden; and para. 56 of the Opinion on Switzerland. See also paras. 75-77 of the Opinion on Kosovo.

[61] See paras. 44-46 of the Opinion on Austria; para. 10 of the (second) Opinion on the Czech Republic (explicitly welcoming new legislation); para. 49 of the (first) and paras. 131-133 of the (second) Opinion on Romania; para. 36 of the (first) Opinion on Slovakia; and para. 68 of the Opinion on the Former Yugoslav Republic of Macedonia.

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

as the effective use of minority languages remains essential in consolidating the presence of minority languages in the public sphere.[63]

As to the right to use one's own name in the form of the minority language, the Advisory Committee strongly welcomed pertinent legislative reforms[64] and criticized cases in which persons were forced to use versions of their names in the state language.[65] With respect to the right to display in a minority language "signs and other information of a private nature to the public", it concluded that the pertinent Estonian legislation was incompatible with Article 11 (2) of the Framework Convention as being overly restrictive; as a result thereof, the Estonian authorities changed the implementation of the legal provision at issue in such a way that it is no longer incompatible with Article 11 (2) of the Framework Convention.[66] As concerns topographical signs, the Advisory Committee welcomed relevant possibilities available in certain states,[67] but criticised in some instances a lack of clarity in the pertinent legislation.[68] More specifically, it explicitly welcomed a judgment of the Austrian *Verfassungsgerichtshof* (Constitutional Court) in which it had ruled that, if a national minority formed more than 10% of the total population in an area over a long period of time, this was sufficient to entitle the inhabitants to the display of bilingual topographical indications.[69] The same positive assessment was given to Czech legislation by virtue of which bilingual topographical signs may be displayed if 10% of the population residing in a municipality consider themselves as persons belonging to the national minority concerned, and, of these, at least 40% so request.[70] In contrast, it considered a quota of 50% an obstacle to the effective exercise of such right[71] and held – not surprisingly – the absence of any possibility to display bilingual topographical signs as being incompatible with Article 11 (2) of the Framework Convention.[72] The above numbers might indeed be indicative as regards the future formulation of generally applicable standards in this field.

Again, it is important to note that the Advisory Committee could relatively successfully deal with this issue whereas it cannot be brought in an effective way before the ECtHR due to the absence of any specific right dealing with the use of minority languages.

e) Education in and of minority languages

It is a truism that education is the key for the successful protection and promotion of any cultural identity, in particular that of national minorities. Since, as stated above, national minorities in Europe are usually defined by their distinct language and culture, the right to learn one's mother tongue is an absolute *conditio sine qua non* for the survival of any national minority. Therefore, educational rights are indeed of central relevance for the international protection of national minorities. But for a state policy aimed at the preservation and promotion of the distinct identity of a national minority, it is not enough for pupils belonging to a minority to learn – and be taught – their minority language. It is equally important that they are familiarized with their history and culture – as well as with the language, history and culture of the majority population. Finally, it is also necessary to acquaint pupils

[63] See, e.g., para. 49 of the (first) Opinion on Germany.
[64] See, e.g., para. 63 of the Opinion on Bulgaria; para. 58 of the (first) and para. 122 of the (second) Opinion on the Czech Republic; and paras. 58-59 of the Opinion on Norway.
[65] See, e.g., para. 55 of the Opinion on Albania; para. 37 of the (first) Opinion on Slovakia but see para. 91 of the (second) Opinion on Slovakia strongly welcoming that no such cases have been reported since the adoption of the (first) Opinion; and paras. 54-56 of the Opinion on Ukraine. See also para. 82 of the Opinion on Kosovo.
[66] See para. 43 of the (first) and para. 104 of the (second) Opinion on Estonia; see also para. 59 of the Opinion on Azerbaijan; and para. 70 of the Opinion on Poland.
[67] See, e.g., para. 100 of the (second) Opinion on Estonia; para. 35 of the (first) Opinion on Finland; para. 52 of the (first) Opinion on Italy, para. 69 of the (first) Opinion on Slovenia; and para. 51 of the Opinion on Sweden. See also paras. 78-81 of the Opinion on Kosovo.
[68] See, e.g., para. 56 of the Opinion on Albania; paras. 82-83 of the Opinion on Bulgaria; para. 58 of the Opinion on Lithuania; para. 87 of the (first) Opinion on the Russian Federation, and para. 83 of the Opinion on Serbia and Montenegro.
[69] See para. 50 of the Opinion on Austria.
[70] See para. 126 of the (second) Opinion on the Czech Republic; these figures constitute a further improvement as compared to the previous situation, cf. para. 59 of the (first) Opinion on the Czech Republic; see also para. 73 of the Opinion on the Former Yugoslav Republic of Macedonia welcoming pertinent legislation allowing for bilingual topographical signs in areas with a minority population exceeding 20% of the total population.
[71] See para. 57 of the Opinion on Ukraine; see also para. 82 of the Opinion on Bosnia and Herzegovina.
[72] See paras. 71-72 of the Opinion on Poland.

– and the general public – belonging to the majority population with the history and culture of the national minorities residing in their country and to enable them, if they so wish, to learn minority languages.

Thus, it is clear that the issue of educational rights of persons belonging to national minorities ranks highly among the issues dealt with in the field of minority rights protection. This assessment resulted in the guarantee of educational rights in Articles 12, 13 and 14 of the Framework Convention.[73]

Whereas such rights have, as yet, not been of particular significance for the jurisprudence of the European Court of Human Rights,[74] this is, of course, different as regards the practice of the Advisory Committee. With respect to the rights guaranteed under Article 12 of the Framework Convention, it had to accord particular attention to the situation of Roma children: not only did the Advisory Committee express its deep concern about the abnormally high level of absenteeism among Roma pupils,[75] but also about an apparently widespread practice of placing Roma children in special educational groups or even schools designed for mentally disabled children, due to either real or perceived linguistic and cultural differences between the Roma and the majority. The Advisory Committee stressed that such placing should only occur when absolutely necessary on the basis of consistent, objective and comprehensive tests.[76] More generally, it noted that, notwithstanding commendable efforts to improve the situation, shortages of available textbooks in minority languages and of qualified teachers still persist in some countries.[77]

With respect to the right to instruction of, or instruction in, the mother tongue as provided for by Article 14 of the Framework Convention, the Advisory Committee stressed that, when decisions are taken concerning the continuation or closure of schools, particular attention must be paid to the fact that schools with instruction in, or of, a minority language contribute by their very existence to

---

[73] On Articles 12 and 13 FCNM see the commentaries by P. Thornberry, in: Weller (*supra* note 24), 365 ff. and 395 ff., respectively; and on Article 14 FCNM see the commentary by P.Thornberry/ F. de Varennes, in: Weller, *ibid*., 407 ff.; see also D. Wilson, Educational Rights of Persons Belonging to National Minorities, International Journal on Minority and Group Rights 10 (2003), 315 ff.

[74] The noteworthy exception was the judgment in the *Case relating to certain Aspects of the Laws on the Use of Languages in Education* in Belgium of 23 July 1968, ECtHR Series A Vol. 6 where the Court held that States have a right to determine the official languages of instruction on public schools and denied that there was a right to instruction in the language of one's choice.

[75] See, e.g., paras. 88-89 of the Opinion Bosnia and Herzegovina; para. 90 of the Opinion on Bulgaria; para. 55 of the (first) and para. 114 of the (second) Opinion on Italy; para. 118 of the (second) Opinion on Moldova, para. 91 of the Opinion on Serbia and Montenegro; para. 98 of the (second) Opinion on Slovakia; para. 70 of the Opinion on Spain; para. 78 of the Opinion on the Former Yugoslav Republic of Macedonia; and paras. 81-83 of the Opinion on the United Kingdom. See also paras. 89-90 of the Opinion on Kosovo.

[76] See, e.g., para. 97 of the Opinion on Bulgaria; para. 49 of the (first) Opinion on Croatia, but see para. 129 of the (second) Opinion on Croatia strongly welcoming the discontinuation of such practices; paras. 61-63 of the (first) and paras. 145-149 of the (second) Opinion on the Czech Republic; para. 41 of the (first) and paras. 90-96 of the (second) Opinion on Hungary (welcoming considerable improvements while calling for additional efforts on the local level); para. 77 of the Opinion on Poland, paras. 57-59 of the (first) and paras. 153-159 of the (second) Opinion on Romania (welcoming considerable improvements while calling for additional efforts to fully integrate Roma pupils into the educational system); paras. 89-90 of the Opinion on Serbia and Montenegro; paras. 39-40 of the (first) and paras. 94-97 of the (second) Opinion on Slovakia (welcoming certain improvements as concerns legislation but strongly criticizing the factual situation); and paras. 63-65 of the (first) Opinion on Slovenia. On this issue see also the recent judgment of 7 February 2006 of the Second Section of the ECtHR (*D.H. and Others v the Czech Republic*, Application N° 57325/00) where it was noted that several organizations, including Council of Europe bodies, had expressed concern about the placement of Roma children in special schools; however, the ECtHR held that, while the relevant statistics disclosed worrying figures, the pertinent measures did not amount to discrimination and, thus, found no violation of Article 14 ECHR taken together with Article 2 of Protocol N° 1. On 19 July 2006, the case has been accepted for referral to the Grand Chamber. See also para. 91 of the Opinion on Kosovo (strongly welcoming the absence of such a policy).

[77] See, e.g., paras. 63-65 of the (first) Opinion on Armenia; paras. 86-87 of the Opinion on Bulgaria; para. 48 of the (first) and para. 126 of the (second) Opinion on Croatia; para. 117 of the (second) Opinion on Estonia; para. 110 of the (second) Opinion on Italy; para. 74 of the (first) and para. 117 of the (second) Opinion on Moldova; para. 74 of the Opinion on Poland; paras. 148 of the (second) Opinion on Romania; para. 87-88 of the Opinion on Serbia and Montenegro; para. 62 of the (first) and para. 141 of the (second) Opinion on Slovenia; paras. 76-77 of the Opinion on the Former Yugoslav Republic of Macedonia; and para. 59 of the Opinion on Ukraine. See also paras. 99-100 of the Opinion on Kosovo.

preserving the distinct identity of the national minority concerned.[78] It also emphasized that, when embarking on a far-reaching reform of their educational system resulting in a decrease of instruction in minority languages, states parties should introduce detailed guarantees as to how persons belonging to national minorities will be provided with adequate opportunities for being taught the minority language or for receiving instruction in that language. It also recommended that such reforms should always be planned and implemented in close consultation with those primarily concerned.[79]

Moreover, from a more general perspective, it should be mentioned that the Advisory Committee indicated, in some instances, that it considered a truly bilingual education to be a most appropriate way to implement the obligations flowing from Article 14 of the Framework Convention.[80] This leads to one issue with which the Advisory Committee has been thoroughly concerned in the recent past, i.e. the formulation of its general approach to educational rights. One aspect concerned the question as to whether the fundamental approach which was implicitly – and sometimes explicitly – followed during the first cycle of monitoring, and which was based on the assumption that pupils belonging to national minorities should be integrated as far and as rapidly as possible into the general educational system while providing for sufficient possibilities to learn, or to be instructed in, the mother tongue, should be continued or modified. Indeed, it was felt that there might be situations where separate schools (or classes) constitute a viable option, provided such a system is established in accordance with the wishes of those concerned and is organized so as to guarantee sufficient knowledge of the languages of both the majority and minority and does not result in segregation. The second aspect to be discussed related to the question of whether the article-by-article approach so far followed by the Advisory Committee should be replaced by the so-called 4-A scheme as developed by *Katarina Tomaszewski* in her capacity as Special Rapporteur on the right to education of the United Nations Commission on Human Rights and subsequently adopted by the United Nations Committee on Economic, Social and Cultural Rights in General Comment N° 13. Under this scheme, the right to education comprises four elements: availability, accessibility, acceptability and adaptability.[81] In any case, there could be no doubt that standard setting in the field of educational rights is of utmost importance for the future of national minorities and the existing monitoring systems alike.

Now it is important to note that, on 2 March 2006, the Advisory Committee adopted its *Commentary on Education under the Framework Convention for the Protection of National Minorities*[82] – the first thematic comment which is expected to be followed by additional such comments. This quite extensive document the drafting of which owns considerably to the efforts of *Athanasia Spiliopoulou Åkermark*, the then Second Vice-president of the Advisory Committee, is based on the experiences and practice of the Advisory Committee and identifies three core considerations that need to be taken into account when discussing educational policies concerning minorities and intercultural education. In the opinion of the Advisory Committee, all minority policies need to address the following three core questions:

- Why? Or: Which are the precise goals of educational policies? It is stressed that the Framework Convention requires not only the protection of minority cultures and languages, but also the dissemination and development of intercultural contacts and dialogue, the encouragement of a spirit of tolerance in all educational efforts and even an ethos of bilingualism and plurilingualism. It is also stated that different situations and different groups might need to be treated differently in order to ensure effective equality and access to good quality education for all persons.

- Who? Or: Who are the involved and concerned actors? It is stressed that States Parties need to have access to adequate basic information concerning the situation of different minority groups, their need

[78] See, e.g., para. 63 of the Opinion on Austria; paras. 59-81 of the (first) Opinion on Germany; and para. 73 of the Opinion on Lithuania.

[79] See, e.g., paras. 50-52 of the (first) and paras. 138-140 of the (second) Opinion on Estonia welcoming certain positive amendments to the applicable legislation; paras. 70-72 of the Opinion on Lithuania; paras. 81-83 of the (first) and paras. 132-134 of the (second) Opinion on Moldova; and paras. 63-65 of the Opinion on Ukraine.

[80] See, e.g., paras. 61-65 of the Opinion on Austria; para. 51 of the (first) Opinion on Estonia; and para. 72 of the Opinion on Switzerland.

[81] See Wilson (*supra* note 73), 317 ff.

[82] Council of Europe Document ACFC/25DOC(2006)002.

and aspirations. It is further stated that differences in geographic concentration, historical status and experience, kin-state support, level of organisation, gender disparities require different responses from the state and local and regional authorities. It is also said that the particularly disadvantaged position of the Roma and Travellers needs to be taken into account in all States Parties to the Framework Convention. Furthermore, it is stressed that many other actors influence the availability and quality of education: Decision-makers at central and local level, teachers and school heads are among the most important while parents and those receiving education are other crucial actors. It is underlined that the wishes of those groups and persons need to be heard and the right of effective participation as enshrined in Article 15 of the Framework Convention should be kept in mind in all decision-making processes, including in the field of education.

- How? Or: What tools are available and feasible? It is stressed that the form and content of education need to be adapted to the aims identified. Here, the introduction of multicultural and intercultural elements in all countries is considered as one step while different types of schools and classes constitute another method to address the varying needs. Also the training of bilingual and plurilingual teachers with expertise in working in multicultural environments is seen as another important step. While acknowledging that these aspects are not exhaustive, it is underlined that they are crucial in offering access to good quality education to all persons living in a country in a way which supports a climate of tolerance and intercultural dialogue.

To conclude, it seems justified to state that discrimination in the field of educational rights constitutes one of the major issues addressed by the Advisory Committee whereas the ECtHR continues to be rather reluctant in finding violations of Article 14 of the ECHR taken together with Article 2 of Protocol N° 1 as witnessed by the above-mentioned judgment of the second Chamber.[83] So, the field of educational rights might be considered as that area of minority rights where the added value of the Framework Convention is most clearly to assess.[84]

f) Participation of national minorities in public, social and economic life

The right to effective participation in cultural, economic and social life and in public affairs is another principle essential for any democratic society. In view of the potentially vulnerable situation of national minorities, it is crucial for the survival of their distinct cultures and identities. This principle seems to be generally accepted, as is reflected by its guarantee in Article 15 of the Framework Convention.[85] The importance of the issue of effective participation results from the correct understanding that only those national minorities whose members feel that the state in which they reside is also "their" State, that it also "belongs to them", 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. To achieve this end, effective participation is clearly another *conditio sine qua non.*

In its pertinent practice, the Advisory Committee noted that in some countries, the representation of national minorities on local, regional and central level legislative bodies was low, and recommended that governments examine ways to improve this situation.[86] In particular, they should ensure that, if advisory or consultative bodies are established, they represent national minorities in an adequate

[83] See *supra* note 76.
[84] See also text accompanying note 99.
[85] On Article 15 FCNM see the commentary by M. Weller, in: Weller (*supra* note 24), 429 ff.; see also J.A. Frowein/ R. Bank, The Participation of Persons belonging to National Minorities in Decision-Making processes, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 61 (2001), 1 ff.; and M. Weller, Creating the Conditions Necessary for the Effective Participation of Persons Belonging to National Minorities, International Journal on Minority and Group Rights 10 (2003), 265 ff.
[86] See, e.g., paras. 69-70 of the Opinion on Albania; paras. 76-77 of the Opinion on Azerbaijan; paras. 58-62 of the (first) and paras. 161-163 of the (second) Opinion on Croatia welcoming significant improvements in this sphere; paras. 110-112 of the (second) Opinion on Hungary (calling for an improved implementation of the applicable legislation); and paras. 69-70 of the Opinion on Ukraine. See also paras. 110-113 of the Opinion on Kosovo.

manner.[87] More generally, the Advisory Committee underlined the importance of territorial autonomy for preserving and promoting the distinct identity of national minorities[88] which means that changes to the administrative structures of a country that might have detrimental effects on the situation of national minorities must be avoided.[89] Furthermore, the Advisory Committee found that, in a number of countries, persons belonging to national minorities were clearly under-represented in a wide range of public sector services,[90] and that unemployment rates are often higher among persons belonging to national minorities.[91] Finally, it stressed that language proficiency requirements should be carefully restricted to situations where they are necessary to protect a specific public interest; the same considerations applied to candidates running for elections.[92]

Finally, the Advisory Committee expressed its concern at the shortcomings that remain, notwithstanding a number of commendable efforts made by the governments concerned, as regards the effective participation of the Roma in social and economic life, and the negative impact that these shortcomings have on the social and economic living conditions of this minority in general and of Roma women in particular.[93]

Again, it seems justified to conclude that the system provided for by the Framework Convention allows better to address issues of discrimination as concerns the effective participation of persons belonging to national minorities in the economic, political and social life than the system provided for under the ECHR based on individual applications.

3. Monitoring of the Implementation of the Obligations Flowing from the Framework Convention

According to Articles 24 and 26 of the Framework Convention, the ultimate evaluation of the implementation of the Framework Convention by the States Parties is entrusted to the Committee of Ministers, assisted by an Advisory Committee. Under Article 25 of the Framework Convention, the States Parties are required to submit a report giving full information on legislative and other measures taken to give effect to the principles of the Framework Convention, within one year of its entry into force for the respective State Party. Further reports are due on a five-yearly basis or at the Committee of Ministers' request.

---

[87] See, e.g., paras. 71-74 of the Opinion on Albania; paras 77-80 of the (first) Opinion on Armenia; paras. 102-106 of the Opinion on Bulgaria; paras. 57-58 of the (first) and para. 154 of the (second) Opinion on Estonia; paras. 77-79 of the Opinion on Lithuania; paras. 85-89 of the (first) and paras. 136-139 of the (second) Opinion on Moldova; paras. 101-108 of the (first) Opinion on the Russian Federation, and paras. 105-109 of the Opinion on Serbia and Montenegro.

[88] See, e.g., para. 36 of the (first) Opinion on Denmark; para. 47 of the (first) Opinion on Finland; paras. 61-62 of the (first) Opinion on Italy, para. 91 of the (first) Opinion on Moldova, paras. 111-112 of the Opinion on Serbia and Montenegro; para. 75 of the Opinion on Spain; and para. 74 of the Opinion on Switzerland.

[89] See paras. 158-168 of the (second) Opinion on Denmark.

[90] See, e.g., para. 75 of the Opinion on Albania; para. 117 of the Opinion on Bosnia and Herzegovina; para. 88 of the Opinion on Bulgaria; para. 55-57 of the (first) and paras. 156-159 of the (second) Opinion on Croatia; para. 66 of the (first) Opinion on Italy; para. 103 of the Opinion on Serbia and Montenegro; para. 99 of the Opinion on the Former Yugoslav Republic of Macedonia; and para. 96 of the Opinion on the United Kingdom.

[91] See, e.g., para. 79 of the Opinion on Azerbaijan; para. 59 of the (first) Opinion on Estonia; para. 109 of the (first) Opinion on the Russian Federation; para. 118 of the Opinion on Serbia and Montenegro; and paras. 74-75 of the Opinion on Ukraine.

[92] See, e.g., paras. 55-60 of the (first) and paras. 163-166 of the (second) Opinion on Estonia welcoming legislation removing such language proficiency requirement with respect to elections and, at the same time, calling for a review of the still existing requirement in the private employment sector; and para. 106 of the (first) Opinion on the Russian Federation.

[93] See, e.g., para. 75 of the Opinion on Albania; para. 71 of the Opinion on Austria; paras. 108-110 of the Opinion on Bosnia and Herzegovina; para. 109 of the Opinion on Bulgaria; para. 65 of the (first) and para. 146-147 of the (second) Opinion on Croatia; para. 71 of the (first) and para. 182 of the (second) Opinion on the Czech Republic; paras. 145-146 of the (second) Opinion on Finland; para. 66 of the (first) Opinion on Germany; para. 54 of the (first) and para. 51 of the (second) Opinion on Hungary; para. 65 of the (first) Opinion on Italy; para. 63 of the Opinion on Norway, para. 69 of the (first) and para. 55 of the (second) Opinion on Romania; para. 47 of the (first) and paras. 120-125 of the (second) Opinion on Slovakia; para. 76 of the (first) and para. 176 of the (second) Opinion on Slovenia; para. 79 of the Opinion on Spain; para. 77 of the Opinion on Switzerland; and para. 102 of the Opinion on the Former Yugoslav Republic of Macedonia. See also paras. 114-115 of the Opinion on Kosovo.

Immediately after receipt of a state report[94] by the Secretariat of the Council of Europe, it is transmitted to all members of the Advisory Committee. Based on information contained in the state report and received from other sources before and during a visit to the respective country,[95] the Advisory Committee adopts its Opinions.[96] The Opinions are then transmitted to the governments concerned and the Committee of Ministers, which, in fact, means the Ministries of Foreign Affairs of all member states of the Council of Europe. The actual discussion of the Opinions of the Advisory Committee as well as of the comments which both the government of the respective State Party and other governments wish to submit, takes place in the Rapporteur Group on Human Rights (GR-H), a sub-body of the Committee of Ministers. The Opinions are introduced by representatives of the Advisory Committee, who are also invited to be available for an ensuing exchange of views with the members of GR-H.

It is clear from the Conclusions and Recommendations in the Resolutions finally adopted that the Committee of Ministers was – and continues to be - particularly guided by the Opinions of the Advisory Committee. Thus, it is important to stress that all country-specific Resolutions[97] so far adopted by the Committee of Ministers clearly reflect the pertinent findings of the Advisory Committee. In fact, it must be emphasized that all the issues which the Advisory Committee has identified in the concluding remarks of its Opinions as being most relevant are also addressed in the Conclusions of the Committee of Ministers. This, taken together with the fact that the Committee of Ministers consistently recommends to states that they take appropriate account of the various findings

---

[94] All state reports are available at http://www.coe.int/minorities/.

[95] During the first cycle of monitoring, such visits have been conducted to the following States Parties (in chronological order): in 1999, to Finland and Hungary; in 2000, to Slovakia, Denmark, Romania, the Czech Republic, Croatia, Cyprus, and Italy; in 2001, to Estonia, the United Kingdom, Germany, Moldova, Ukraine, Armenia and Austria; in 2002, to Slovenia, the Russian Federation, Norway, Albania, Switzerland, Lithuania and Sweden; in 2003, to Ireland, Azerbaijan, Poland, Serbia and Montenegro, the Former Yugoslav Republic of Macedonia, and Bulgaria; the visit to Bosnia-Herzegovina took place in 2004. Only the government of Spain regrettably did not invite the relevant working group to conduct a visit. In view of the specific situation in Liechtenstein, Malta and San Marino and the information available, the relevant working groups felt that their work on the state reports could be completed without country visits. Moreover, in September 2005, the Advisory Committee visited Kosovo under the specific Agreement concluded between UNMIK and the Council of Europe. As concerns the second cycle of monitoring which started for some countries in spring 2004, country visits to the following States Parties had been conducted as of 1 July 2006: Croatia, Hungary, Moldova, the Czech Republic and Estonia in 2004; Italy, Slovenia, Finland and Romania in 2005; Germany, Norway, Armenia, the Russian Federation and Ireland in 2006.

[96] As of 1 July 2006, the Advisory Committee had adopted the following 34 Opinions during the first cycle of monitoring: on 22 September 2000 on Denmark, Finland, Hungary and Slovakia; on 30 November 2000 on Liechtenstein, Malta and San Marino; on 6 April 2001 on Croatia, Cyprus, the Czech Republic and Romania; on 14 September 2001 on Estonia and Italy; on 30 November 2001 on the United Kingdom; on 1 March 2002 on Germany, Moldova and Ukraine; on 16 May 2002 on Armenia and Austria; on 12 September 2002 on Albania, Norway, the Russian Federation and Slovenia; on 21 February 2003 on Poland, Serbia and Montenegro and Spain; on 28 May 2004 on Bosnia and Herzegovina, Bulgaria and the Former Yugoslav Republic of Macedonia. Thus, the Advisory Committee has, as concerns the first cycle of monitoring, concluded its work on 34 of the 39 States Parties – the state report by Portugal which was due on 1 September 2003, was received on 23 December 2004 whereas the first state reports of the Netherlands, Latvia, Georgia and Montenegro are due on 1 June 2006, 1 October 2006, 1 April 2007 and 6 June 2007, respectively. It should also be mentioned that, on 24 November 2006, the Advisory Committee adopted its Opinion on Kosovo. On 1 October 2004, the Advisory Committee adopted its first Opinions under the second cycle of monitoring, namely on Croatia and Liechtenstein; they were followed by Opinions on Denmark, Hungary and Moldova (on 9 December 2004); on the Czech Republic, Estonia and Italy (on 24 February 2005); on Slovakia and Slovenia (on 25 May 2005); on Malta and Romania (on 24 November 2005); on Finland, Germany and San Marino (on 2 March 2006); and on Armenia and the Russian Federation (on 12 May 2006). All opinions are available at http:://www.coe.int/minorities/.

[97] As of 1 July 2006, the Committee of Ministers had adopted Resolutions, as concerns the first cycle of monitoring, with respect to the following States Parties: Denmark and Finland 8on 31 October 2001); Hungary and Slovakia (on 21 November 2001); Liechtenstein, Malta and San Marino (on 27 November 2001); Croatia and the Czech Republic (on 6 February 2002); Cyprus (on 21 February 2002); Romania (on 13 March 2002); Estonia and the United Kingdom (on 13 June 2002); Italy (on 3 July 2002); Armenia, Germany and Moldova (on 15 January 2003); Ukraine (on 5 February 2002); Norway (on 8 April 2003); the Russian Federation (on 10 July 2003); Lithuania, Sweden and Switzerland (on 10 December 2003); Austria (on 4 February 2004); Ireland (on 5 May 2004); Azerbaijan (on 13 July 2004); Poland and Spain (on 30 September 2004); Serbia and Montenegro (on 17 November 2004); Albania and Bosnia and Herzegovina (on 11 May 2005); the Former Yugoslav Republic of Macedonia (on 15 June 2005); Slovenia (28 September 2005); and Bulgaria (on 5 April 2006). Moreover, on 21 June 2006, it adopted its Resolution on Kosovo. As concerns the second cycle of monitoring, the Committee of Ministers adopted Resolutions with respect to Croatia (28 September 2005); Liechtenstein and Moldova (on 7 December 2005); Denmark and Hungary (on 14 December 2005); Estonia (on 15 February 2006); the Czech Republic (on 15 March 2006); Italy and Slovenia (on 14 June 2006); and on Slovakia (on 21 June 2006). All Resolutions are available at http:// coe.int/minorities/.

of the Advisory Committee, continue their dialogue in progress with it and keep it regularly informed of new developments, in particular about the measures taken to implement the conclusions and recommendations set out in the Resolutions,[98] not only shows the importance that the Committee of Ministers attaches to the Advisory Committee in the context of the monitoring of the implementation of the state obligations flowing from the Framework Convention, but also justifies the conclusion that the findings of the Advisory Committee might be regarded as being central in interpreting the substantive provisions of the Framework Convention. They might, indeed, be considered as soft jurisprudence based on hard law.

A final point which clearly needs to be stressed is the constant – and quite successful - endeavour of the Advisory Committee to enhance the access of representatives of national minorities to the monitoring process with the ultimate aim to ensure their "co-ownership" of this process. This approach has been fully and consistently supported by the Committee of Ministers and by practically all States Parties. From a legal point of view, it is founded on the character of the monitoring system as a system based on, and seeking to establish, a constructive dialogue between governments, representatives of national minorities and domestic civil societies, on the one hand, and the Advisory Committee, on the other hand. In order to achieve such a dialogue and, thus, to include representatives of national minorities in the monitoring process, the Advisory Committee has consistently called upon States Parties to integrate the position of representatives of national minorities into their respective States Parties, and has strongly commended States Parties which have done so. It has also greatly benefited from the decision of the Committee of Ministers enabling the Advisory Committee, in drafting its Opinions, to consider not only the information supplied in the respective state reports and contained in generally accessible documents, but also to actively seek and receive additional information "from other sources"; in many instances, the pertinent "alternative reports" authored by independent experts or persons related to national minorities have been - and continue to be – of most considerable relevance for the final drafting of the Opinions of the Advisory Committee. This inclusive approach is also reflected in the established practice, upon prior invitation by the governments concerned, to conduct country-visits, including to areas where national minorities reside, which consist not only of meetings with representatives of the executive, the legislative and the judicial powers, but also provide for the opportunity to exchange views with members of civil society and, in particular, representatives of national minorities. However, the participation of national minorities is not limited to this first stage of the monitoring process but is a continuous aspect of it: States Parties have been, and continue to be, invited to contact representatives of national minorities in the preparation of their comments on the respective Opinion of the Advisory Committee and to reflect their position in such comments – and it is important to note that most governments have agreed to do so and that some have even attached the pertinent statements of organisations representing national minorities to their comments. Finally, the inclusiveness of the monitoring process is further increased by the fact that the participants of the above-mentioned follow-up seminars, as an important feature of the monitoring system, include also representatives of the national minorities concerned. So, while it would surely be incorrect to maintain that the monitoring process under the Framework Convention has developed in such a way as to be characterized by a kind of *equality of arms* between governments and national minorities – which is clearly not foreseen in the text of the Framework Convention – it seems to be correct to state that this monitoring process is indeed characterized by quite a strong factual involvement of representatives of national minorities as those who should ultimately benefit from a *bona fide* implementation of the obligations of States flowing from their membership to the Framework Convention. This strong involvement of the ultimate beneficiaries of the Framework Convention in its monitoring system clearly distinguishes this system from those existing under most,

[98] In this context, mention should be made of another feature of the monitoring process under the FCNM, the so-called follow-up procedure which consists of follow-up seminars organised by the Council of Europe and the State Party concerned some time after the adoption of the pertinent Resolution by the Committee of Ministers. They serve as a forum to discuss, including with representatives of national minorities, the measures taken in response to the Opinion of the Advisory Committee and on the Conclusions and Recommendations of the Committee of Ministers as well as concerns current developments. As of 1 July 2006, the following follow-up seminars had taken place (in chronological order): in 2002, in Finland, Croatia, Estonia, Romania and Hungary; in 2003, in Armenia, Germany, Slovakia, Ukraine, Moldova and the Czech Republic; in 2004, in Cyprus, Italy, the Russian Federation, Norway and Lithuania; in 2005, in Ireland, Sweden, Croatia, Albania, Poland, the Former Yugoslav Republic of Macedonia, Serbia and Montenegro and Bosnia and Herzegovina; and in 2006, in Moldova.

if not all, other international human rights instruments based on regular state reports and constitutes another most relevant added value of the Framework Convention.

V. Concluding Remarks

Based upon the foregoing, it seems justified to conclude that the goal of adequately protecting the rights of persons belonging to national minorities cannot be achieved solely by operation of the right to non-discrimination but requires the existence of additional rights. At the outset, it must be stressed that all human beings are, as such, holders of the right not to be discriminated against. Since persons belonging to national minorities are, of course, human beings, they share this right, this protection resulting from the prohibition against discrimination, with all persons belonging to the "majority". And it seems that for persons belonging to that "majority", to be protected by the generally applicable human rights, including the right to non-discrimination, is sufficient in order to safeguard their individual right to preserve and develop their identity. However, in order to assure to persons belonging to national minorities their individual right to maintain and develop their distinct identity, more is needed: A set of specific human rights, a set of human rights protecting the specific rights which such persons need in order not to be assimilated against their will into the majority population and to preserve and develop their distinct identity.

This assessment can be aptly illustrated by discussing the issue of an apparently still rather widespread phenomenon: The placement of Roma pupils into separate schools. This phenomenon the existence of which has been confirmed by a large number of independent and reliable observers and sources, has also been addressed by the Advisory Committee. Throughout its activities, both in its opinions adopted in the first and second cycle of monitoring, the Advisory Committee consistently expressed its deep concern about this widespread practice of placing Roma children in special educational groups or even schools designated for mentally disabled or retarded children, due to either real or perceived linguistic and cultural differences between the Roma and the "majority" population. The Advisory Committee consistently stressed that such placing should only occur when absolutely necessary on the basis of consistent, objective and comprehensive tests.[99] The pertinent findings have been equally consistently backed by the respective Resolutions of the Committee of Ministers which, while they were relatively general in their formulations during the first cycle of monitoring[100], have become quite specific during the second cycle: So, e.g., in its Resolution on the Czech Republic, adopted on 15 March 2006[101], the Committee of Ministers concluded that "… the situation of the Roma is still a matter for concern in terms of both their equality and their effective participation in public life. The Roma continue to be discriminated against in a number of fields … The many governmental initiatives to improve their situation in various respects have brought limited results. The difficulties they encounter in the sphere of employment and housing, the continuing isolation of Roma children with the education system … should all be dealt with as a matter of priority …". Based on this conclusion, the Committee of Ministers recommended to "… provide more appropriate solutions to the difficulties encountered by Roma in a number of fields, in consultation with them" and to "take further steps to eradicate the practice of isolation of Roma children within the education system …" Similar language can be found in the recent Resolutions on the Slovak Republic[102] and Slovenia[103], respectively.

---

[99] See *supra* text accompanying note 76.

[100] See, e.g., Resolution ResCMN(2002) of 6 February 2002 on the Czech Republic where the Committee of Ministers limited itself to conclude that "despite … the determination of the Czech authorities to improve significantly the situation of the Roma through a long-term policy, real problems remain, notably as regards the discrimination encountered by persons belonging to this minority in various fields …" and recommended only "that the Czech Republic takes appropriate account of the conclusions set out above … together with the various comments in the Advisory Committee opinion …" Similar wording can be found in Resolution ResCNM(2001)5 of 21 November 2001 concerning Slovakia.

[101] Resolution Res CMN(2006)2 of 15 March 2006.

[102] Resolution Res CMN(2006)8 of 21 June 2006 where the Committee of Ministers concluded that „… in the field of education, the persistence of various forms of exclusion and segregation which mainly affect Roma children is a source of concern … and recommended to "take further steps to put an end to isolation practices affecting Roma pupils …".

[103] Resolution ResCMN(2006)6 of 14 June 2006 where the Committee of Ministers concluded that „ … notwithstanding the measures taken by the authorities, the situation of the Roma is still a cause of concern … Concerns about equality for Roma children in education persist since the practice of segregating these children in Slovene schools … has not yet been completely abolished …" and recommended to " … take all necessary measures to eradicate completely the practice of

This approach differs considerably from the one taken by the ECtHR. In its recent judgment in the case of *D.H. and Others v The Czech Republic*[104], handed down on 7 February 2006, the Second Section of the ECtHR dealt – apparently for the first time – with applications in which the applicants alleged, *inter alia*, 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, a discrimination constituting a violation of their right under Article 14 taken together with Article 2 of Protocol N° 1. It is essential to stress that the ECtHR explicitly noted 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". Notwithstanding this statement, the ECtHR continued to point out "that 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 special schools was their ethnic or racial origin." Having then analyzed the facts as they resulted from the applications and the statement by the responding government, the ECtHR concluded: "Thus, while acknowledging that these statistics disclose figures that are worrying and that the general situation in the Czech Republic concerning the education of Roma children is by no means perfect, the Court cannot in the circumstances find that the measures taken against the applicants were discriminatory. Although the applicants may have lacked information about the national education system or found themselves in a climate of mistrust, the concrete evidence before the Court in the present case does not enable it to conclude that the applicants' placement or, in some instances, continued placement in special schools was the result of racial prejudice, as they have alleged." Consequently, the ECtHR found that no violation of Article 14 of the ECHR, taken together with Article 2 of Protocol N° 1, had been established.

This is not the appropriate place to embark upon a discussion as to the well-foundedness, or persuasiveness, of this judgement or its consistency with the established jurisprudence as concerns the determination of whether there was discrimination in the sense of Article 14 of the ECHR.[105] However, this judgement clearly shows that the right to non-discrimination, even if protected by the most effective international system in the field of human rights, is not sufficient to effectively protect the rights of persons belonging to national minorities, in the present case the right of access to education as provided for in Article 12 of the Framework Convention. This judgment also confirms the opinion that the monitoring system established under the Framework Convention is better equipped to achieve the ultimate *raîson d' être* of international minority rights protection, namely to contribute, by means of protecting and promoting the distinct identity of persons belonging to national minorities, to the prevention of tensions between majority and minority populations with a risk to develop into a threat to peace and security, than judicial procedures based upon individual applications. The monitoring system as now established under the Framework Convention offers an ideal possibility for the Advisory Committee, with the continuous support of the Committee of Ministers, to act as a catalyst, as a facilitator for a constructive dialogue between majority and minority populations with a view to early identifying situations with a considerable potential for inter-ethnic conflict or to successfully addressing systemic shortcomings which constitute violations of the rights of persons belonging to national minorities. Such an effect cannot – or not that easily – be achieved by means of individual applications which, by their very nature, can only result in findings on individual cases. To put it differently: The discrimination of persons belonging to national minorities which results in the violation of their rights and which is the result of societal structures having discriminatory effects, can – in my opinion - better be addressed by means of an internal dialogue initiated and facilitated by competent external actors than by way of an external judicial decision in a single individual case.

---

segregating Roma children in the school system and ensure that they enjoy equal opportunities in access to quality education at all levels …".

[104] Appl. N°. 57325/00.

[105] As mentioned above, this case has been referred to the Grand Chamber by decision of 19 July 2006. It is to be hoped that the Grand Chamber will use this opportunity to develop its jurisprudence as concerns alleged violations of Article 14 ECHR, taken together with Article 2 of Protocol N°1.

To conclude it seems justified to state that the Framework Convention and, in particular, its monitoring system do not only constitute most considerable added value as compared to the protection offered to persons belonging to national minorities by the right to non-discrimination alone; even more important is the conclusion that a non-judicial approach – or if one is prepared to accept the idea that the Resolutions of the Committee of Ministers taken together with the Opinions of the Advisory Committee might be considered as "soft jurisprudence based on hard law" – constitutes a better – if not the only – way to adequately protect, by means of international law, the rights of persons belonging to national minorities.