BACHELOR OF EUROPEAN STUDIES (B.SC.)

Minority Protection in Europe

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"I know a minority when I see one"

HCNM Max van der Stoel (1999)

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Chapter 1

Introduction

"The expansion of the minority protection regime has occurred relatively quickly, but it has been uneven and unorganized, with a variety of motivations behind the steps taken and with the involvement of several international organizations"

Gudmundur Alredsson. Chairman/Rapporteur of the UN Working Group on Minorities at its twelfth and final session in 2006

CHAPTER 1

1. INTRODUCTION

Mahatma Gandhi stated:, *“Even if you are a minority of one, the truth is the truth.”* The truth of the existence of minority groups in Europe has been reticent for quite a long time. Although the principle of Europe implies the idea that different cultures, religions and languages deepen and enrich society, the issue of minorities has been regarded as problematic and threatening for society.

The twentieth century was characterized by many conflicts which involved the maltreatment of ethnic, linguistic or religious minority groups. The incidents in the Balkans which resulted to the WWI and in particular the Holocaust which transformed Europe totally can be seen as dramatic illustrations. Due to these historical changes, Europe developed into a continent with major ethnic conflicts. To cope with these situations, Europe is now known for developing the most comprehensive criteria for safeguarding minority groups. This reputation is the result of the performance of three international institutions: The Council of Europe, the Organization for Security and Co-operation in Europe (OSCE) and the related High Commissioner on National Minorities (HCNM) and the European Union (EU). Even though these institutions exist more or less independently of each other, specific co-operation led to major successes. Nevertheless, the influence and especially legal competences of these institutions are rather low. Recently the OSCE and the European Union were criticized for not being effective and present in the ethnic conflict of Kirgizstan.

This Bachelor thesis investigates how minorities in Europe are actually protected by these international institutions. A major focus will be on the competences as well as limitations of the institutions. This leads to the following research question:

To what extent are minority rights in Europe protected by relevant international institutions?

To answer this question, the focus will remain on the Council of Europe, the OSCE High Commissioner on National Minorities and the European Union. This Bachelor thesis will look how these institutions operate, how minority rights are actually protected by these institutions and what the legal provisions look like. Even though the United Nations (UN) plays a central role in the protection of minority rights on the global scale, this thesis is limited to these three institutions. The involvement of the UN would go beyond the scope of this thesis and could not be managed within the possible frame. In addition, the Council of Europe, the OSCE and the European Union are more regional and in particular the OSCE and the Council of Europe

have supplementary monitoring and supervising powers compared to the UN. However, comparisons are drawn to relevant UN provisions and documents because they also play a central role for minority protection in Europe.
This thesis focuses on groups in a non dominant position with ethnic, religious or linguistic attributes. Minority groups are limited to those groups that want to preserve their culture.
This thesis will not cover other minority groups i.e. indigenous people, migrants, people with disabilities, homosexuals, elderly people or women.

1.1.1 OUTLINE

The thesis is divided into five chapters. The first includes the introduction, the methodology and specific definitions. A sub-division into specific questions is necessary because the general research question is too broad to answer the empirical criterion (Punch, 2006, p. 22). Each group of sub-questions is handled in a single chapter, except the last one which is applied to all chapters. The final chapter answers the different sub-question with the special focus on the main research question.

Chapter 2: The Council of Europe
Sub question 1: What are the competences of the Council of Europe to protect minority rights in Europe?
This sub question consists of the following subdivisions

- What is the legal status of the Council of Europe regarding minority rights?
- How effective are the Council of Europe procedures?
- What has the Council of Europe achieve in the past?

These sub questions deal with the achievements and procedures of the Council of Europe. Previously, the Council of Europe was seen as the institution with the highest legal power regarding minority protection. It established two legally binding frameworks which are analyzed for efficiency.

Chapter 3: The Organization for Security and Co-operation in Europe
Sub question 2: What are the competences of the OSCE to protect minority rights in Europe?

- What actually is the OSCE High Commissioner on National Minorities?
- How does the institution operate?
- What does the co operational framework look like?
- What are the limitations of the OSCE High Commissioner on national minorities?

This chapter explores the achievements and procedures of the OSCE. The OSCE High Commissioner on National Minorities does not have legal binding powers, so how it actually works and what it can achieve with regard to minority protection is worth investigating. Conflict prevention and the limitations of the procedures are included.

Chapter 4: The European Union

Sub-question 3: What are the competences of the European Union to protect Minority Rights in Europe?

- What is the EU actually doing in the field of minority protection?
- Why is the EU limited in the protective procedures?
- What will the Treaty of Lisbon change?
- Would the internalization of the FCNM into the EU legal system promote the protection of national minorities?

Analyzing the European Union, the legal lack with regard to minority protection remains central. Minority rights as an accession criterion is relevant for the analysis of the competences of the EU as well as legal provisions against discrimination instead of direct legal provisions for minority protection. This analysis is essential because it shows the extensive way to the changes in Article 2 in the Treaty on the European Union which now includes the rights of persons belonging to minorities. This Chapter will be more intense than the others because new changes occurred in the realm of the EU in particular with regard to the new mode of governance.

Sub-question 4: What are the differences in minority protection with regard to the relevant international institutions?

- Which instruments are applied by the institutions?
- What kind of alternatives has been developed by the institutions?

The last sub-question is applied to all Chapters and tries to explain the differences in minority protection used by the international institutions.

1.2 Methodology

The Units of analysis are the major entity which was analyzed in this research. Often, the Units of analysis consist of a specific group of people. In this case, the three international institutions make up the unit of analysis. The operationalization process was based on to

what extent they try to protect minorities. It was interesting to see how minorities are defined by the institutions and to whom the minority rights actually apply.
To answer the overall research question, this thesis investigated the different instruments and achievements of the institutions. The main analytical part of the thesis compared the different working procedures of the international institutions. Even though the institutions are known for good cooperation, different strategies and concepts were defined and implemented. Some instrument could achieve a legal status as others function without a legal background. These differences are taken into account. To compare these differences, policies as well as legally binding documents were used to show how the institutions function.

The analysis of the research question is based upon desk research. As mentioned before, the legal texts which were already established regarding minority rights played a major role, as well as scientific articles and policy documents which were necessary for establishing a framework for minority protection.

1.2.1 Definition of variables

The variables of the research question are defined as it is an important aspect of every research. In this case, the independent variable is the international institutions. The dependent variable is therefore the protection of minority rights. As a result, the protection of minority rights is dependent on the independent variable of international institutions.
To answer the research question in an adequate mode, the concept of minority groups has to be defined. To define what minority rights actually are and to elucidate this, minority groups in general have to be clarified: however a common definition has not yet been identified. Even the Framework Convention on National Minorities did not publish a common definition. A difference in definition is between the Framework Convention and the UN Declaration on the Rights Belonging to Minorities from 1992. As the former one just applies to “national minorities” the latter one is relevant to “minorities” which include “national” and “ethnic, religious and linguistic” groups.

The most common but non-binding definition of minority groups is from the United Nations:

"Group numerically inferior to the rest of the population of the State, in a non dominant position, whose members being nationals of the State possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language” (Ahmed, 2010, p. 268).

Defining the concept of minority rights is consequently pretty difficult. On the one hand it seems unachievable to find a common definition of minority groups. To come across rights that would fit to every single minority group is appears impossible. Minority groups contain many different aspects, like religion, language or tradition which makes it difficult to find a fitting definition for all different minority groups.

On the other hand many states e.g. France or Turkey are even against a common definition of minority groups. A commonly agreed definition of a minority creates the fear of possible secessionist movements and could reinforce the regional claim of minority groups (Heintze, 2008, p. 46).

Alongside the general problem of the definition of minority groups is the significance of the difference between individual and collective rights because these two types of rights are relevant regarding minority rights and in particular regarding the working procedures of the different institutions.

1.3 Individual vs. Collective rights

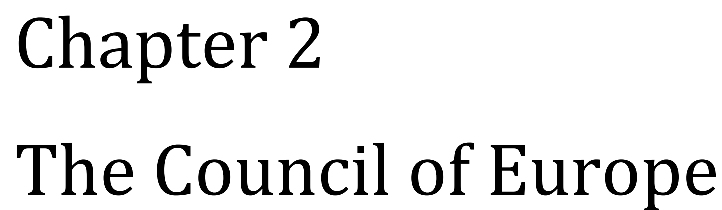
Even though human rights can be seen as individual rights, minority rights are handled differently. In terms of international law, a collective right describes that a group creates the subject of the right. The evolving focus on the new international system is on providing protection for categories of people. Relating this to minority groups, one can state that a minority group in general is enabled with rights and not just the single members. Group rights cannot be seen as a sole sum-up of the individuals. The protection of minorities entails the amalgamation of collective and group rights. An individual of a minority group can only carry on his or her identity if the specific minority group is able to exist and expand. Group rights are "*rights which are extended to an individual on account on his or her classification as a member of an identified group*" (Smith, 2007, p. 317).

Language is a good example to explain this phenomenon. The exercise of language is dependent on an institutional framework which bases on collectivity because language cannot be reduced to an individual right. This particular culture is related to a group of people and can therefore only develop in a group. This implies that individual rights can only be realized in the realm of group rights (Bowring, 2008, p. 418).

The recognition of group rights is not implemented to a very high extent. The Framework Convention on national Minorities for example prefers the idea of individual rights. Individual rights can be defined as rights held by individuals in spite of their group membership.

The FCNM Explanatory Report underlines Article 1 which describes the protection of national minorities and "*the rights and freedoms of persons belonging to those minorities*"(Weller, Blacklock, & Nobbs, 2008, p. 48). This article shows clearly that it does not support the idea

of collective but individual rights. Even though legal literature criticizes this *modus operandi*, the authors of the FCNM keep this approach to be attractive to signing countries. This aspect is quite relevant as many countries fear secessionist demands. To prevail this fear, the FCNM admit that the protection of national minorities could be realized due to the protection of the rights of the individuals that belong to that minority (Heintze, 2008, p. 48). This is one example which shows how the approach of collective and individual rights is applied. In this thesis, this differentiation of these rights appears regularly.



Chapter 2

The Council of Europe

“At the Council of Europe, our response has been to develop specific policy initiatives and Conventions to contribute to stability and linguistic diversity. In this respect, the European Charter for Regional or Minority Languages has been designed to manage the multiplicity of asymmetrical language situations in Europe. As the only binding legal instrument worldwide devoted to the protection and promotion of regional or minority languages, the Charter is clearly among our key Conventions”

Speech of the Secretary General of the Council of Europe Terry Davis at the Conference of "The European Charter for Regional or Minority Languages: Achievements and Challenges" - Bilbao (Spain), 20 April 2009

CHAPTER 2

2.1 INTRODUCTION TO THE COUNCIL OF EUROPE

Ten Western European States formed 1949 the Council of Europe (CoE). Now, 46 countries are part of the CoE and countries like the Federal Republic of Yugoslavia are among others Special Guest States to the Parliamentary Assembly. This regional intergovernmental organization established the European system for the protection of human rights and guaranteed with the Convention for the Protection of Human Rights and Fundamental Freedoms in 1950 principal civil and political rights. Economic and social rights have been amended by the CoE in 1961 with the European Social Charter and later protocols (Buergenthal, Shelton, & Stewart, 2002, pp. 133-136). With regard to human rights, the Council of Europe established next to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (1987), the Convention for the Protection of Human Rights and Biomedicine (1997) and the Additional Protocol on the Prohibition of Cloning Human Beings, two legal treaties with reference to national minorities. The subject of minorities turned out to be an important matter for the Council of Europe in the 1980s due to the emergence of new ethnic conflicts within the European territory. The Council of Europe is the first institution that designs two legal frameworks with regard to minority protection which are addressed in the following parts (Smith, 2007, pp. 92,93).

2.2 THE EUROPEAN CHARTER FOR REGIONAL OR MINORITY LANGUAGES

The European Charter for Regional or Minority Languages (ECRML) is responsible for international standard setting in the realm of language policy. The Charter was open for signature on 5 November 1992 and became effective on 1 March 1998. Today, the total number of ratifications is 24 and nine countries have signed but not ratified it. Countries i.e. Turkey or Greece did not consider signing it as they do not want to commit, having minority groups within their own territory (COE, 2010).

Already in the 1980s, the European Parliament (EP) tried to promote minority languages by posing demands on governments to permit and promote minority languages in official curricula. This enactment could not be fulfilled because the encouragement of minority languages was not in the scope of the European Community (EC).

The Council of Europe bases the Language Charter on the original proposal of the European Parliament and extended some articles. This shows that the ECRML is not like other minority provisions a result from Communism (Wright, 2000, pp. 114,115).

This charter differs to other international instruments with regard to minority protection. First of all, the Charter is a non minority specific instrument and therefore varies to the Framework Convention for the Protection of National Minorities (FCNM). Secondly, this charter does not provide any individual or group rights for minorities. The overall aim of the Charter is the preservation for the cultural diversity in Europe (Letschert, 2005, pp. 217,218). Nevertheless, the Charter creates a basis for indirect protection of minority rights. The Explanatory Report states that languages are spoken by people and with the protection of language, people would be protected at the same time (COE, 2004, paragraph 11). Even though the Charter focuses on cultural preservation, the implementation of the Charter can lead to the formation of a legislative framework and specific rights for minorities.

2.2.1 THE "*Á LA CARTE*" APPROACH OF THE LANGUAGE CHARTER

The most significant provisions of the Charter are defined in two parts. Part II only consists of Article 7. This article states general principles which affect all regional or minority languages of the state. The languages are determined objectively and cannot be influenced by the state. This part covers a non-discrimination provision. "*The mere prohibition of discrimination against their users is not a sufficient safeguard*" (COE, 2004, paragraph 27) and special measures of support are necessary to provide their preservations. The principle of substantive equality is therefore explicitly given in Part II.
Part III is an accumulation of very specific provisions and is divided into the following seven sub-groups of articles with regard to the use of regional or minority languages (COE, 1992):

- Education (Article 8)
- Judicial authorities (Article 9)
- Administrative Authorities and Public services (Article 10)
- Media (Article 11)
- Cultural activities and facilities (Article 12)
- Economic and Social life (Article 13)
- Transfrontier exchanges (Article 14)

These provisions are unique with reference to other minority instruments due to its specificity and detail in the above mentioned areas. Another aspect which differs to other international provision is the possibility of states to choose specific "menus" from the ECRNL. Part III encloses about 100 obligations from which a state has to select a minimum of 35 provisions (Dunbar, 2008, pp. 169,170). This flexibility is necessary because every state has different language situations regarding minorities and not all obligations would be suitable. However,

every state is committed to choose a minimum of three provisions in education and the cultural field, and one concerning the official use in administration, the economic and social life as well as before the courts and in the media (Oeter, 2004, p. 136). Although the paragraphs and sub-paragraphs are very specific, the state can choose between heavy obligations and easer ones. Media is a good example to show this phenomenon. States can decide whether they just want to focus on the establishment of one television channel in the regional or minority language or the broadcast of programs in this specific minority language (COE, 1992 Article 11(1)).

The choice for part III must be conducted responsible and according to the Explanatory Report paragraph 10, the core objective is "*to protect and promote regional or minority languages as a threatened aspect of Europe's cultural heritage."*

2.2.2 THE MONITORING PROCESS OF THE ECRNL

The monitoring process is described in Part IV of the Charter and consists of a state reporting system. Signing states are obliged to send periodical reports to the Secretary-General of the COE, even though the structure is imposed by the Committee of Ministers of the Council (COE, 1992, paragraph 15 (1)).

For the monitoring process, the ECRNL introduced innovative and significant elements. The Council of Europe and in particular the Committee of Experts put emphasis on the co-operation with non-governmental organizations (NGOs) which stand for regional or minority languages. In addition, to make the monitoring process more real, the Committee of Experts introduced 'on–the-spot visits'. The delegation which is compromised by the rapporteurs and two members of the Committee which are related to the specific situation, meet with government officials and relevant NGOs (Dunbar, 2008, pp. 174,175).

The monitoring process of the implementation of the ECRNL is complex because no pattern exists. Every country has chosen another "menu" which needs individual attention. Although the provisions are very clear and countries need less support with the interpretation, steady visits and co-operation with NGOs and regional governments are necessary to fulfill the monitoring process (Weller, 2008, p. 2).

2.2.3 RELATIONSHIP OF THE CHARTER WITH OTHER INSTRUMENTS

The structure of the Charter differs to other minorities and human rights instruments but according to the Charter and the Explanatory Report, it is still related to international instruments. The preamble for example refers to the work of the OSCE, especially to the Helsinki Final Act and the Copenhagen Meeting (COE, 1992, preamble). The Charter points

out that no provisions should limit the rights assured by the European Convention on Human Rights (COE, 1992, Article 4 (1)).

The Charter states that no provision has an effect on more favorable provisions established by domestic law or bilateral or multilateral treaties (COE, 1992, Article 4 (2)). The Charter indicates that none of its actions would counteract to the UN Charter or other provisions under international law (COE, 1992, Article 5). Even though the Explanatory Report makes references to other international provisions, i.e. the European Convention on Transfrontier Television by the Council of Europe (COE, 2004, Article 11 (112)), the references are rather limited. A reason could be that the provisions of the ECRML are more specific and detailed than other international instruments which cover minority rights. In the first periodical report of Croatia, the Committee of Experts noted that Article 9 (1)(a) which assures the use of regional or minority languages in criminal proceedings, even advanced ECHR by allowing speakers of a regional or minority language to use their minority language before court even though they are able to speak the official language (Cardi, 2007, pp. 10,20).

The FCNM is one of the random instruments which the Committee of Experts is referring to and will be described in detail in the next part.

2.3 The Framework Convention for the Protection of National Minorities

The Framework Convention for the Protection of National Minorities (FCNM) was open for signing in 1995 and entered into force on 01. Feb. 1998. It is the first legally binding multilateral instrument with regard to minority rights and state obligations. The total number of ratifications is 39 and 4 countries signed but did not ratify it (COE, 1995b).

Parties to this Convention agreed to the full equality of minorities with respect to economic, social, political and cultural life. The condition is granted, that persons belonging to minorities are able to preserve and develop their culture and identity (COE, 1995a, Article 4,5).

The FCNM has often the reputation of a *"weak first attempt"* (Craig, 2010, p. 308). The legally binding power is often doubted because the framework cannot be seen as a blueprint with a unique solution. Every country has its own minority situation and has another economic, social and cultural structure. It is not possible to find a 'one size fits all' answer. Therefore, the Convention offers primarily program-type provisions with reference to state obligations (Hofman & Friberg, 2004, p. 131).

It is important to differentiate between a 'normal' Convention and a Framework Convention. A convention indicates that it concerns a treaty. A Framework Convention instead implies that the principles of the instrument are not directly applicable in the national legal order and

has to be implemented with the support of national legislation and fitting governmental policies (Steketee, 2001, p. 4).
Another weak and often disputed aspect of the FCNM is the flexible and interpretive way of formulations. Wordings like 'as far as possible' or 'open-ended and maximum oriented' could lead to the situation that national governments could limit their obligations under the FCNM (Letschert, 2005, pp. 24,25).
The Explanatory Report of the FCNM states in provision 12 that the Convention does not contain a definition of "national minorities". In international law, a general agreement exists that the term 'minority' is restricted to persons who belong to a common group with a common culture, language and religion. Additional limitations can exist and depend on the overall interpretation of the convention (Eide, 2008, p. 121).
On the contrary to Article 27 of the International Covenant on Civil and Political Rights (ICCPR), which applies the wording of 'ethnic, religious and linguistic' minorities, the FCNM reduces the term to 'national minority'. This term does not imply a limitation rather a connection to the original use in the European context during the First World War. On the one hand, guidance with regard to the appliance of the FCNM can be related to Article 27, but on the other hand, the FCNM oblige more duties on states and increases the scope of rights for persons belonging to some minorities. This development explains why some states do want to regulate the range of recipients. The limitation is possible due to the lack of a common definition. This gives the signing states certain margin of discretion to decide which minority groups they actually want to include. Nevertheless, this scope is not unrestricted because states which restrict the application of the Convention formulate reservations. In the general law of treaties, reservation becomes unacceptable when it elides the objectives of the Convention (Eide, 2008, p. 126).
Article 1 of the Convention states that minority protection belongs to international human rights law and therefore, reservations are unlikely to become effective. This principle is reinforced by Article 19 of the Convention which states that states are only able to make such restrictions or derogations which are offered in international legal instruments like the European Convention on Human Rights and Fundamental Freedoms.

2.3.1 Structure and Monitoring of the FCNM

Section I of the Framework defines general principles on the protection on national minorities and points out in Article 3 that "*every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice*".

Section II is more detailed and focuses in particular on non-discrimination and the promotion of effective equality as these two principles create the most significant rights with regard to minority protection (Buergenthal, et al., 2002, p. 196). Article 4 of the Convention defines the prevention of discrimination and the measures which are necessary to guarantee effective equality. Article 5 obliges states to encourage conditions for diversity and Article 5(2) makes clear that the integration policy should be free of any assimilationist policies (COE, 1995a, Articles 4,5).

Even though the FCNM is often seen as a weak attempt for the protection of minorities it holds supplementary rights in comparison to the ECHR and the ICCPR. Article 11 formulates the right for the recognition and use of names in the particular minority language. The ICCPR and the ECHR do not fulfill the inclusion of this and other rights due to the lack of explicit provisions (Guliyeva, 2010, p. 301).

To investigate whether the provisions against discrimination is sufficiently implemented, the Advisory Committee of the Framework Convention (ACFC) regularly inspect the legislative framework on anti-discrimination of the signing states. In the first monitoring cycle a significant lack was explored in national law concerning equality. The ACFC formulated recommendations for these gaps in legislation (Rechel, 2009, pp. 46-49). Many states even adopted the Council of the European Union Directive 2000/43/EC into national law which includes the principle of equal treatment between persons irrespective or racial or ethnic origin (Council, 2000).

The improvements in the national legal system are mainly the result of the international monitoring system which will be described in the next part.

2.3.2 International Monitoring System

Section IV of the Framework Convention formulates the monitoring process of state compliance. The Committee of Ministers (CoM), which is made up of foreign ministers, is responsible for the supervisory action and is assisted by the Advisory Committee. The Advisory Committee consists of eighteen members which are assigned by the CoM. The monitoring system bases on a report system. States must submit periodic reports about the implementation process of the Framework Convention. The Advisory Committee is responsible for examining the reports and forms an opinion on the measures. The opinion of the ACFC is taken by the Committee of Ministers to construct recommendations to the state. In practice, the ACFC has the main part in the monitoring process of the Framework Convention (Buergenthal, et al., 2002, p. 196).

The CoM is a solely political body and the members are related to their national governments. The Convention delegates the power to the CoM to put a ceiling on the independent role of the AFCF. This power balance is often criticized but after the first monitoring round a positive relationship could already recognized. This development can be noticed with the entrusting of the Advisory Committee with expanded rules of procedures. The mutual trust of these institutions makes it possible that the system can deal with individual states which raise objections to the opinion and recommendations (Phillips, 2004, p. 118).

The monitoring system is similar to the already described system of the above mentioned Language Convention. Some aspects are worth describing more thoroughly. The FCNM created a basis for a dialogue between state authorities and national minorities. Article 15 of the Convention states the importance of including minority groups in the preparation of the state reports. The state visits are one of the most significant mechanisms of the monitoring system. In addition, the Working Group of the Advisory Committee sets up a meeting with representatives of minorities and NGOs without any governmental influence. The intense cooperation with minority groups and NGOs is unique within the international monitoring system and is similar to the practices of the High Commissioner on National Minorities (HCNM) (Eide, 2008, p. 147) which will be elaborated on in the next chapter.

The ACFC is not first and foremost responsible for identifying violations of the implementation process but to develop a dialogue between the affected parties. The ACFC's opinion does not have any legally binding function as well as the Committee of Minister's resolutions. After the first monitoring cycle, the FCNM build up on the basis of the opinions and resolutions an important source of 'soft law jurisprudence' (Hofman & Friberg, 2004, p. 130). Being effective depends on the international and national factors. A country is more interested in accepting the recommendations if it is more attracted to a European regional co-operation (Eide, 2008, p. 150).

The ACFC has guaranteed an expanded flow of information, a dialogue between the Council of Europe, the governments and in particular minority groups. The Committee points out the importance of the country visits and the follow-up seminars. The follow-up seminars developed to a common practice by the national governments. After the acceptance of the resolution by the CoM, a national follow-up seminar takes place. NGOs, Ombudsmen, representatives of minorities, legislative assembly and government are participants of these meetings. Representatives of the Advisory Committee are invited to be present at these meetings to respond to the recommendations. These follow-up meetings are an important contribution for an enhanced dialogue (Phillips, 2004, pp. 116, 119).

2.4 The legal effectiveness of the FCNM and ECRML

None of the two treaties is involved within the jurisdiction of the European Court of Human Rights. This implies that the provisions of the Conventions are not directly litigable at the European stage. For each Convention, an individual Advisory or Expert Committee was established with the softer way of implementation dialogue (Weller, 2008, p. 3). However, in the course of time, the opinions of for example the ACFC developed to an assistant status of the European Court of Human Rights and the European Court of Justice to figure out the circumstances of the particular minority situation before the judgment is made (Phillips, 2004, p. 126). The 'soft jurisprudence' of the FCNM can therefore form specific ways of inspiration to the ECJ judges. Even though the ECtHR refers to the FCNM as well, in reality, this indirect transfer of standards is rather limited. The main reason is that both treaties are not ratified by all members. In particular the FCNM has the reputation for not being suitable and not made for judicial enforcement. Both treaties can only have an indirect judicial impact (Hofman & Friberg, 2004, p. 138).

The Council of Europe has no formal sanctions which could force a government to implement the provisions or recommendations of the Convention or the Charter. More focus is laid on the maintenance of an on-going dialogue between state authorities and minorities (Council of Europe., 2002, p. 36). To make international monitoring and the protection of minority rights possible, the extent to which actors of civil society react to the outcomes of international monitoring is relevant. To achieve this outcome, the network of NGOs is important and needs to act upon the recommendations and criticism of the monitoring procedures and to apply pressure on the government to comply with the recommendations. The primary responsibility lays therefore with the NGOs (Oeter, 2004, pp. 148,149). This procedure shows clearly that the key goal of the contributions of the Council of Europe regarding minority protection lays in the promotion of interstate dialogue.

2.5 Conclusion

The Council of Europe is the first international organizations that established two legally binding treaties for the protection of minority rights. Even though they have the reputation of being weak, they could achieve more awareness of minority rights and an intense dialogue between governments and minority groups. The European Charter for Regional and Minority languages protects primarily the language of minorities and does not include any individual or group rights. Nevertheless, the concrete and detailed provisions of the treaty leaves little room for interpretation and the implementation of the provisions are quite successful. An

indirect protection of minority rights and an increase of rights in the language and cultural realm developed. The lack of a common definition makes it difficult for the Framework Convention on National Minorities to be effective in the protection of minority rights. The provisions of the treaty are vague and leave room for interpretation. Au contraire are the monitoring systems of these legal documents. An intense and co-operative organism has been established with a strong voice of the concerned minority groups.

Chapter 3

The Organization for Security and Cooperation in Europe

"National minorities in inter-State relations are not by definition a source of conflict. On the contrary, minority communities that span State frontiers often serve as a bridge between States. They contribute to prosperity and friendly relations, and foster a culture of pluralism and tolerance."

HCNM Knut Vollebaek. Bozen Recommendations 2008

CHAPTER 3

3.1 INTRODUCTION TO THE OSCE

This chapter addresses the development and involvement of the OSCE in minority issues. The standard setting procedures of the High Commissioner on National Minorities are highlighted and the co-operation with the Council of Europe is explored.
The Conference on Security and Co-operation in Europe (CSCE) was established during the Cold War. The CSCE tried to reduce tensions between the East and West by offering a basis for communication and co-operation. In 1994, after the tensions between East and West decreased, the CSCE was institutionalized and renamed to the Organization for Security and Co-operation in Europe (OSCE). The OSCE is not only a European organization as the United Nations and Canada are also taking part. This organization has no legally binding documents and works with the principle of consensus and solid political commitment (Smith, 2007, p. 100).
Even though the documents of the OSCE are not legally binding and cannot be enforced though legal mechanism, the binding force of these documents is not really put into question. The missing legal structure of the OSCE commitments does not weaken the actual efficiency of these instruments. Being signed by the highest political representatives of the participating states, an authority has been established that can be regarded as legal status which is applicable under international law. This situation can be reinforced by the consensus decision-making procedure by all participating states of the OSCE. This consensus principle implies that all OSCE commitments are equally binding on each member. This shows the sovereign equality of the States and reinforces next to the principle of consensus the legal value of the OSCE documents (Letschert, 2005, p. 22.26).

3.1.1 STANDARD SETTING BY THE OSCE

The first attempts with regard to human rights protection was in standard setting instead of monitoring the implementation process of standards, which is typical for the CSCE (Wright, 1996, p. 421). The OSCE or former CSCE laid an important foundation for minority protection with the following changes: In 1975, the Helsinki final Act defines ten basic principles for the relation of the members of the CSCE. Even though minority rights are mentioned in Principle VII, paragraph 4, the formulation "*on whose territory national minorities exist*" delegates the power to the states to define whether the national territory actually has minorities or not (Wright, 1996, p. 191).

Follow-up meetings were set up with the intention to review the former CSCE. The aim was to improve compliance and the negotiation of new standards.

The Vienna Follow-up Meeting is a good example for improvements and changes. This meeting introduced the idea of the “Conference on the Human Dimension and the CSCE”. The Human dimension contains human rights and fundamental freedoms which includes the protection of national minorities. It also covers the principle of democracy and rule of law. (A. Bloed & Rijksuniversiteit te Utrecht. Europa Instituut., 1993, p. 40).

The conference on Human dimension took place in three stages. As the first meeting in Paris 1989 did not bring in any documents, the Copenhagen and Moscow Meetings were more successful. Specifically the Copenhagen Meeting of the Conference on the Human Dimension in 1990 states that matters related to minorities are significant to international peace and stability in Europe (Letschert, 2005, p. 37).

The Meeting of Experts on National Minorities in Geneva in July 1991 points out that national minorities “*are matters of legitimate international concern and consequently do not constitute exclusively an internal affair of the respective state”* (OSCE, 1991 Chapter II). This statement is essential because it acknowledges the international dimension of human rights and goes up against the belief of non-intervention in internal affairs.

The Copenhagen document could achieve a new consensus regarding minority matters and can be seen as the key success for the progress of minority rights. The paragraph 32 states that it is not in the power of the state anymore to define which minorities actually live in the country and which persons belong to the minority group. “*To belong to a national minority is a matter of a person’s individual choice and no disadvantage may arise from the exercise as such”(CSCE, 1992 paragraph 32).* The provisions of the Copenhagen documents inspired other formulations of documents and created legally binding bilateral treaties.

In 1992, the international stage was threatened by the growing tensions in Yugoslavia. Mediation efforts have been conducted by the European Community (EC) and international organizations but the lack of knowledge and experiences were too extreme and the efforts failed (Zaagman, 1994, p. 104).

Elaborating the conflicts at that time, most of them were intra-rather than inter-state in nature. Documents from the OSCE demonstrate that the OSCE rarely interfered in minority tensions until the violence has already broken out (Letschert, 2005, p. 40).

The participating states of the OSCE became conscious that an institutional response is necessary. Even though, several attempts have been done before like the proposal of Sweden in 1990, the Helsinki realizes the establishment of the High Commissioner on National Minorities and the Long Term Missions with regard to minority protection.

The Long Term Missions (LTMs) are field activities by the OSCE. They are flexible and not restricted to the definition of national minorities. Nevertheless, the OSCE field activities can be seen as instruments which are not primarily established for the protection of minority groups. The instruments serve for the promotion of peace and in particular for the stability of the OSCE regions. To reach this aim, the focus is on democratization, mediation, conflict regulation and the set-up of institutions. Even though OSCE missions are sometimes concerned with individual cases, they give more attention to the structural aspects (Neukirch, 2004, p. 179). These missions are often combined with the work of the HCNM which is explored in the following part.

3.2 The High Commissioner on national Minorities

The principal function of the High Commissioner is to address minority problems before they deteriorate into critical conflicts (Buergenthal, Shelton, & Stewart, 2002, p. 217).

"The High Commissioner will provide "early warning" and, as appropriate, "early action", at the earliest possible stage in regard to tensions involving national minority issues which have not yet developed beyond an early warning stage, but in the judgment of the High Commissioner, have the potential to develop into a conflict with the CSCE area, affecting peace, stability or relations between participating States, requiring the attention of and action by the Council or the CSO [Committee of Senior Officials]"(CSCE, 1992 Section II, paragraph 3).

This paragraph shows that the concept of the HCNM implies a security-oriented approach with regard to minority rights. Therefore, the High Commissioner works as a conflict-prevention instrument and cannot be seen as an instrument for the monitoring of the implementation of minority rights provisions within the scope of the OSCE. In addition, the HCNM is not engaged in all minority related issues but only in those which threatens the security of the country (A. Bloed, Letschert, R., 2008, p. 88).
The High Commissioner is known for having a two-fold mission. On the one hand he tries to restrain and de-escalate tensions and on the other hand to function as a "tripwire". The HCNM is prepared to warn the OSCE when the minority situation should develop in a situation which the HCNM cannot manage anymore (Drzewicki, 2008, p. 155).
The High Commissioner is a High Commissioner on National Minorities instead of for national minorities. With this adjustment he loses the reputation of being an international ombudsman that only acts on the behalf of minorities. In addition, the HCNM cannot be seen as an instrument of the human dimension but as an instrument for handling tensions which are related to minority issues (Riedel, 2007, p. 48).
The HCNM can be regarded as an external third party and a non-state entity. It has the possibility to become engaged in a potential conflict at the earliest stage in time. The HCNM

can decide on its own judgment and does not even need the approval of the OSCE Permanent Council. Furthermore, the High Commissioner has the power to enter an OSCE country without any formal recognition of the state. This shows how far and flexible the mandate of the HCNM is. He is often referred to the "*legitimate intrusiveness*" of the OSCE. This term describes a development in which the OSCE slowly enters the internal affairs of the participating states. The process could only occur due to the consensus of the members. Unfortunately, the support decreased in the last years in particular in Russia. Russia invokes the non-intervention principle especially concerning the Chechen crisis. Even though this is an extreme infringement of the OSCE commitments, it shows clearly the limitations of enforcement mechanism by the OSCE as it bases on unanimity (A. Bloed, Letschert, R., 2008, p. 91).

3.2.1 Standard setting by the HCNM

Like the OSCE, the High Commissioner does not have the possibility to establish legally binding documents. However, he is able to design specific recommendations to governments or general recommendations (Neukirch, 2004, p. 165).

The general recommendations of the HCNM could achieve a high degree of attention and could contribute to the protection of minorities. The first High Commissioner Max van der Stoel developed the following three recommendations: in 1995, the Hague recommendations Regarding the Education Rights of National Minorities were set-up. They were approved in 1996. The Oslo recommendation on Linguistic Rights followed in 1998 as well as the Lund Recommendations on Participation Rights of 1999. The High Commissioner Rolf Ekéus established the Guidelines on the Use of Minority Languages in the Broadcast Media in 2003 and the Recommendations on Policing in Multi-Ethnic Societies (Council of Europe., Organization for Security and Co-operation in Europe., & OSCE High Commissioner on National Minorities., 2007, pp. 45-115).

These recommendations have been outlined by independent experts and supported by the personal experience of the former High Commissioner. The recommendations have not been adopted by the participating states of the OSCE but received high political support. Although the recommendations have only been established under the realm of expert recommendations, they could also be considered as 'soft law' (Hofman, 2008, p. 176). The recommendations have been set-up by a group of experts and are about a general issue that can be applied internationally. In addition, these recommendations are applied by the HCNM which can be categorized as an independent body and which is often referred to by international instruments. The UN Working Group on Minorities as well as the Council of Europe under the Framework Convention on National Minorities have referred to these

recommendations. "*These recommendations (…) meld hard law (the Council treaties) with soft law (the documents of the OSCE), especially the 1990 Copenhagen documents*" (Bowring, 2008, p. 421). These aspects are arguments for considering these recommendations as 'soft law[1]'.

The recommendations are build upon international standards and domestic legislation of the relevant countries. The international standards can vary from OSCE documents to international legal obligations defined by the Council of Europe, the United Nations or bilateral treaties. Even though the HCNM does not have legal obligations for the protection of minorities the advisory function towards governments is very valuable. It can be pointed out that *"by providing expertise, and by giving accurate and useful assessment, the High Commissioner came to be seen as an important standard-bearer regarding compliance with international standards in the field of minority rights protection."* (OSCE High Commissioner on National Minorities. & Kemp, 2001, p. 27)

To strengthen the recommendations even without a legal background, the HCNM developed the following working procedure: The High Commissioner refers his recommendations to already existing obligations of the participating states of the OSCE. By referring to instruments by further intergovernmental associations, the High Commissioner creates a foundation for a positive co-operation of norms and standard settings regarding the protection of national minorities (A. Bloed, Letschert, R., 2008, p. 98).

This procedure supports the co-operation between the Council of Europe and the HCNM. The Advisory Committee of the CoE and the HCNM came closer together as the differentiation of conflict prevention and the protection of minorities' decreases. The AC acts as a monitoring instrument concerning the FCNM. Owing to the fact the AC tries to strengthen the interchange of the concerned parties, this procedure can also lead to the prevention of conflicts. The originally preventive task of the High Commissioner has also an influence on the protection of minorities. This development enhances on the one hand the responsibilities of the two institutions but on the other hand it is not easy anymore to draw a line between the mechanisms of the original tasks of the institutions. The two aims of the institutions often correlate and should be used for further co-operation (Bowring, 2008, p. 414).

To guarantee a further co-operation, the international cooperation should realize that by supporting the actions of other institutions by referring to them in their own reports, the recommendations could become a higher degree of attention and the implementation would increase. This procedure is unfortunately not applied to a high extend. The High Commissioner supports the implementation of the FCNM and emphasizes the importance of

[1] On the distinction between 'soft law' and 'hard law' and their definition, see Chalmers, D., Davies, G. T., & Monti, G. (2010). *European Union law: cases and materials* (2nd ed.). Cambridge: Cambridge University Press pp. 102-104

the realization. The CoE instead hardly considers any recommendation of the HCNM even though they create similar ones. This way of co-operation has to be reinforced as the existence of different views between the international bodies can result in negative outcomes. Be deficient in co-ordination could be capitalized by governments. They can just chose the approaches of the international body which fits the best (A. Bloed, Letschert, R., 2008, pp. 102-104).

3.2.2 LIMITATIONS OF THE HCNM

Exploring the actions taken by the High Commissioner, it is obvious that he is mainly concerned with post-communist states (Neukirch, 2004, p. 169). Due to his mandate, he is restricted to minority situations which could jeopardize the stability of a country. Western countries are known for having a stable democracy and institutions which can solve possible minority conflicts. Nevertheless, countries like Great Britain and Turkey have major problems with minorities but the HCNM has no power to intervene. This is the result of a particular clause which states that the HCNM is not allowed to get in touch with any person or organization that has a terroristic background (CSCE, 1992 paragraph 25). This restriction makes it not possible for the High Commissioner to deal with minority problems drawn in violence. Owing to the fact that violence is often combined with ethnic conflicts, the legitimacy of this paragraph is questionable. In addition, a binding definition of terrorism is absence and makes it difficult to differentiate which minority group has actually a terrorist background (Heintze, 2000, p. 387).

A further criticism is the rejection of individual complaints. The High Commissioner cannot receive complaints due to his 'early warning' position. It should be noticed that enough international institutions exist, which are responsible for individual complaints i.e. members of the UN Covenant on Human Rights with regard to Article 27[2]. Therefore the area of responsibility of the HCNM is only on conflict prevention and early warning. A consequence of this limitation is that the opportunity of individual claims could increase the awareness of Western minority issues. Western Europeans are more familiar to have legal resources and to know how to apply them (Heintze, 2000, p. 389). This particular exclusion shows that the mandate of the HCNM implies no supervisory mechanism for the implementation of minority rights (Letschert, 2005, p. 53).

A further criticism is the position of the High Commissioner within the OSCE. Even though the High Commissioner has an independent status, he is still part of an intergovernmental organization and therefore related to governments, in this case mainly to the Foreign

[2] For more information with regard to Article 27 see Suksi, M. (2008). Personal Autonomy as Institutional Form – Focus on Europe Against the Background of Article 27 of the ICCPR. *International Journal on Minority and Group Rights*(15), 157-178.

Minister. "*Being part of an intergovernmental body puts also certain restraints on the way the High Commissioner functions*" (A. Bloed, Letschert, R., 2008, p. 96).

3.4 CONCLUSION

The OSCE and the High Commissioner on National Minorities could contribute to the protection of Minorities even without legally binding powers. The recommendations of the High Commissioner achieved such a status that they have been allocated as official documents by international organizations like the UN and the CoE. This development shows that the High Commissioner could have an impact on international standards as well as on national ones. At the international level, this is mostly related to the interpretation of specific norms. The detailed elaboration of these norms by the HCNM can often considered as a composition of new standards. Therefore one can conclude that the mandate of the High Commissioner is not limited to the conflict prevention aspect. He developed the power to influence international standard setting with regard to minority protection.

Chapter 4

The European Union

The general belief of the Commission is that the failure to develop an 'inclusive and tolerant society which enables different ethnic minorities to live in harmony with the local population of which they form a part' will lead to 'discrimination, social exclusion and the rise of racism and xenophobia'

European Commission: 'Communication: Open Method of Coordination for Community Immigration Policy 2001'

CHAPTER 4

4.1 INTRODUCTION TO THE EUROPEAN UNION

As stated in the Introduction, Europe has developed into global champion for the protection of minorities. The more striking is that the European Union has not developed any coherent policy or standards on minorities (Weller, 2008, p. 1).
The EU bases on the principle of consensus politics and is maybe not the best actor to from any standards, having in mind the critical position towards minorities by France or Greece (B. d. Witte, 2004, p. 110). Minority protection developed therefore in a more indirect way and is often referred to "backdoor legislation" (Hofman & Friberg, 2004, p. 140).
With the enlargement of 2004 and the inclusion of 10 new member states with major minority situation, the EU has to change its focus from external to internal policies as minority protection becomes increasingly an internal issue (Topidi, 2004, p. 198).
This chapter is divided into two main sections: the "old governance approach" is about the indirect legal protection of the European Union and the new development due to the Lisbon Treaty and the "new governance approach" shows the new involvement of the EU on the basis of soft law.
The external relations are dominant under the old legal governance and the chapter starts with this.

4.2 THE "OLD LEGAL GOVERNANCE" OF THE EUROPEAN UNION

4.2.1 EXTERNAL RELATIONS

The only sphere where minority rights are protected directly is in the external relations of the European Union. Famous examples are the Copenhagen Criteria of 1993 which states *"stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities"* (European Council, 1993, part 7 iii).
The Criteria are developed to formulate preconditions for the accession of new countries. Minority protection forms a significant part of human rights conditions which are compulsory for states that consider becoming a member of the EU or want to set up economic or political relations (Sasse, 2004, p. 61).
The enlargement of 2004 contributed to major changes in the external as well as internal protection policy. As the EU admission of for example Latvia could be realized without ratifying the FCNM, new candidates for the membership like Turkey, Croatia and Macedonia have stronger obligations with regard to minority protection standards (Hillion, 2008, p. 10).

Turkey is worth elaborating on: Although the Commission criticizes Turkey for the mistreatment of non-Muslim groups, the institution is quite reserved by putting pressure upon Turkey to ratify the FCNM. Given the situation that member states of the EU like Greece and France are still able to decide themselves to ratify the FCNM, the Commission is not in the position to exercise pressure, even though it has chosen this way in the 2004 enlargement (Onar, 2010, p. 10). This is a good example to show the relation between the EU and the FCNM. The EU pre-accession policies and instruments, specifically the Copenhagen criteria are based mainly on the provisions of the Framework Convention. Even though the Convention is strongly included in non-binding resolutions of EU enlargement policy, no corresponding obligation towards EU member states exist (Guliyeva, 2010, pp. 289-292).

The intensive focus on minority protection with regard to external relations can be seen in the monitoring procedure. Within the EU, no particular EU body exists for monitoring compliance for the fulfillment of minority standards, except for the Commission. The Commission examines the minority protection performance of states which are linked with EU conditionality on the basis of annular regular reports. In these reports, the Commission refers to the ECHR, the Framework Conventions and the related monitoring body and instruments of the OSCE and UN. These reports are often criticized for being too vague and partial. Even though they have been improved they still do not fulfill the formulation of detailed legal commentaries. They can be seen more as policy documents (B. d. Witte, Horvath, E, 2008, p. 381).

A major criticism that arises from the external relation policy is the development of double standards. The EU obliges third states to fulfill standards, which on the other hand does not belong to the responsibilities of the Member States (B. d. Witte, 2004, p. 113).

The next part starts to elaborate the indirect legal protection by the EU with regard to minority protection.

4.2.2 Can Article 19 TFEU be considered as a container provision?

The free movement of EU citizens can be considered as one element of minority policy. European citizens represent minorities in their state of residence. The European Court of Justice widened the scope specifically to welfare and education benefits. The arising legal status of European citizenship creates a foundation for equal treatment between EU residents and the host state`s own nationals. This development embraces the right of minority protection which was originally only meant for the host state's own nationals (B. d. Witte, Horvath, E, 2008, pp. 368,369).

With the ratification of the Amsterdam Treaty on 1 May 1999, the included Article 13 (now Article 19 TFEU) became effective. This article gives power to the European Community to

adopt measures against discrimination based *inter alia* on racial or ethnic origin ("Treaty of Amsterdam," 1997, Article 13). Other articles which are worth mentioning for the indirect protection of national minorities are Article 167 TFEU (ex Article 151 TEC), which permits the Community to support the developing of cultures of the Member States while valuing their national and regional diversity, Article 56 (ex Article 49 TEC) with regard to the freedom to provide services or Article 114 (ex Article 95 TEC) on the performance of the internal market. The case law of the European Court of Human Rights shows that for example Article 10 (freedom of expression) of the ECHR can lead to the protection of minorities (Hillion, 2008, p. 12).

4.2.3 Race Directive

Article 19 TFEU (ex. Article 13 TEC) can be regarded as the most effective legal provision to minority protection. It adopted the Council Directive 2000/43 of June 29 in 2000, also known as the Race Equality Directive. This Directive guarantees the *"equal treatment between persons irrespective of racial or ethnic origin"* (European Council, 2000)

Even though it is not directly mentioned, one can interpret that the prohibition of discrimination with respect to ethnicity, can also be applied to the discrimination of cultural or linguistic minorities (B. d. Witte, 2004, p. 116).

The Race Directive has the reputation of being radical and the most capable protection tool within the European Union. The Directive forbids direct and indirect discrimination and the scope of the Directive can be applied vertically, an obligation for public authorities as well as horizontally, to private legal relations. The provisions are not only bounded to employment but also expanded its scope to discrimination with regard to social protection, education and housing. The Directive is motivated by the EEC Regulation 1612/68 on the free movement of workers (B. d. Witte, Horvath, E, 2008, p. 371).

The most common short-coming which also has an impact on the limitation of this Directive is the lack of systematic monitoring of member states compliance. The Directive cannot be considered as a functional replacement for the monitoring process conducted by the Commission with regard to accession. The Directive has a stronger effect on the daily life and is more perceptive compared to the former monitoring practice. Additionally, the issue of double-standard decreases because the Directive has the same impact on old and new member states (Topidi, 2004, p. 197). Due to the missing monitoring system, the implementation level differs between the member states and an unequal implementation of this Directive occurs.

Primary law offers under Article 19 TFEU a good basis for the protection of minorities. However, this basis is still vague and would need further specifications. It is unclear whether group rights are applicable and to what degree affirmative actions are considered under this

Article. The Article leaves much room for the interpretation of equality. One can get the impression that the fight against discrimination is more dominant than the establishment of equality. This situation can be regarded as a "double accessory" provision. First of all it can only be applied "*within the limits of the power conferred on the Community*" and secondly no single interpretation exists on how far legislative intervention can be applied with regard to equality. These circumstances lead to the label of Article 19 TFEU as 'container provision' because the definition of equality is not self-sustaining (Toggenburg, 2008, pp. 99,100).

4.2.4 THE TREATY OF LISBON: A STEP FURTHER TOWARDS LEGAL MINORITY PROTECTION?

With the ratification of the Lisbon Treaty in 2009, also known as the Reform treaty, a historic step towards minority protection within EU constitutional law was taken. This was the first time during European integration that the term "minorities" was included in a text of EU primary law. From a minority point of view, the Reform treaty implies a contradiction. On the one hand, the treaty agrees to a strong symbolic minority message, but on the other hand the policy relevance is quite weak (Hillion, 2008, pp. 17,18).
Article 2 of the Treaty on European Union:

"The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." ("Consolidated Version of the Treaty on European Union," 2008, Article 2)

The Treaty on the European Union did not provide any policy following this provision. The provision is therefore considered as a *"foundation on which it would be difficult to build a solid edifice"* (B. d. Witte, 2004, p. 111). The Article does not elucidate which rights minorities can apply and under what circumstances they appeal. Similar to Article 19 TFEU, this Article can be considered as a 'container provision'. The article forms a basis on which minority rights can be developed through case law of the ECJ and the legislative trialogue of certain European institutions (Toggenburg, 2008, p. 101).
The Treaty on European Union realizes in Article 6(1) that the EU Charter on Fundamental Rights (CFR) can develop into a legally binding document ("Consolidated Version of the Treaty on European Union," 2008, Aricle 6(1)). Article 21 and 22 of the Charter with regard to non-discrimination and the respect for *inter alia* cultural diversity become effective.

"Any discrimination based on any grounds such as sex, race, color, ethnic or social origin, genetic features, language religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."("Charter of Fundamental Rights of the European Union," 2000, Article 21)

Compared to Article 19 TFEU, this article is directly applicable to prohibition and can be seen as open due to the formulation of '*any ground such as*". Nevertheless, it does not offer a 'clear' mandate for the EU 'to act' against discrimination (Topidi, 2004, p. 197). Article 19 TFEU (ex. Article 13 TEC) has a closed catalogue of discriminations and only applies to 9 of the 17 forbidden grounds defined by Article 21 of the Charter. A situation arises in which the Treaty on European Union does not provide competences for anti-discrimination with regard to language or membership of a national minority even if it would be forbidden by EU law (B. d. Witte, Horvath, E, 2008, pp. 366,367).
Under Article 22 of the Charter the Union is forced to "*respect cultural, religious and linguistic diversity*" ("Charter of Fundamental Rights of the European Union," 2000, Article 22). This approach contains an internal divergence because on the one hand it defines a strong minority provision but on the other hand without a solid legal background. The right should serve for the protection of minorities but due to its vagueness it can only be considered as a policy aim that does not include any individual or group right (Schutter O, 2006, pp. 16-20).
Even though the CFR is adopted by the Treaty on European Union, Article 6 states that the Charter *"shall not extend in any way the competences of the Union as defined in the Treaties"* ("Consolidated Version of the Treaty on European Union," 2008, Article 6(1)). As a result, the CFR does not give competences to the Union for the protection of minority rights.
Even though the provisions with regard to minority protection in the Lisbon Treaty looked so promising at the first sight, it did not form any provisions for stand-alone policy instruments. Clarifications are missing which could introduce these legal principles into daily procedures (Ahmed, 2010, pp. 284,285).

The following part investigates the possible internalization of the FCNM in the EU legal system. It is worth elaborating on because it shows what an increased cooperation between the EU and the CoE may achieve and how minority protection could be reinforced.

4.2.5 The adoption of the FCNM in the EU legal system

This Chapter has already shown that the protection of minorities through the European Union is quite weak compared to the OSCE and the Council of Europe. To strengthen the situation

within the EU, the following idea developed: The Union could increase the co-operation with the Council of Europe and internalize or even accede to the FCNM (Guliyeva, 2010, p. 287).

The European Parliament supported this idea already in the 1980s and put special emphasis on the co-operation with CoE bodies with regard to languages of minorities within the EU. In 2003 a report including recommendations to the Commission have been formulated (European Parliament, 2003, paragraph 6, 7, 27 and 28). In 2005 the EP formulated a resolution to the member states and the Commission to deal with linguistic minorities in the EU on the basis of the FCNM. The EP tries to encourage member states to guarantee national minorities effective participation in public life which is stated in Article 15 FCNM (European Parliament, 2005/2008, paragraph 48). Furthermore, the Parliament advised the Commission to set up a policy standard with regard to Article 4(2) of the Framework Convention for the protection of national minorities. This policy should imply the principle of full equality between a national minority and the majority of the particular country (European Parliament, 2005/2008, paragraph 6).

The strong support by the European Parliament with regard to the co-operation with the CoE shows that the EP treats the FCNM as a benchmark for minority protection in the EU (Guliyeva, 2010, p. 289).

As already mentioned in the part of the external relations, the Commission relies on the standards of the Convention in particular with regard to the enlargement process. The standards serve as yardstick to measure the compliance of possible candidate countries. With internalizing the FCNM in the EU legal system, the monitoring system could be reinforced. With this realization, a consistency of standards could be ensured and the elimination of double standards between 'new' and 'old' member states may be resolved (Weller, 2008, pp. 4,5). The FCNM may also be strengthened due to the EU enforcement mechanism. Article 7(2) and (3) TEU define political sanctions on a member state if there is *"a clear risk of a serious breach"* of Article 2 TEU ("Consolidated Version of the Treaty on European Union," 2008, Articles 2, 7(2)(3)). In such a case, recommendations may be referred to the particular member state and some rights, like voting rights in the Council, may be put on hold (Schutter O, 2006, p. 21). Nevertheless, in practice Article 7 is only used in a serious and persistent breach because of its political sensitivity. Permanent monitoring of Member states is always a difficult issue and even the EP states with regard to Article 7 TEU that permanent monitoring of the member states cannot be accomplished (European Parliament, 2004, paragraph 11(a)). In general, the FCNM can only be internalized with a ratification of all member states. The fact that France did not ratify the Convention and Belgium, Greece and Luxemburg signed but did not ratify it could already lead to a failure of this idea (COE, 1995b).

However, the Commission states in the pre-accession monitoring reports that the application of CoE rules on minority protection is successful in those states that ratified the FCNM. The weakness of such a process is the possible duplication of efforts. Monitoring by the EU and the CoE could lead to different interpretations of relevant standards and in the worst case the authority of the CoE could be undermined (Schutter O, 2006, p. 26).

The Venice Commission, an advisory body of the Council of Europe and also known under the name "European Commission for Democracy through law" supports the co-existence of two legally binding mechanism on human rights in Europe. The Venice Commission states that the internalizing of the FCNM into the EU legal system *"would maintain and even reinforce the ECHR mechanism, avoid the creation of new dividing lines within Europe and enhance the credibility of the EU`s policies in the field of human rights"* (VeniceCommission, 2003, paragraph 86). The involvement of the Union in minority protection may not automatically conflict with the CoE's attempts if strong institutional cooperation exists and the competences are clearly divided (Hillion, 2008, pp. 17,18).

Nonetheless, whether the FCNM is really applicable within EU law is still controversial. The foundation for this discussion creates for example Article 12(1) FCNM:

"The Parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion on ***<u>their national</u>*** *minorities and of the majority"* (COE, 1995a, paragraph 12(1)).

The formulation of 'their national minorities' could create the impression that the Union has actually its own minorities. Due to the lack of a common definition, the application of this Article could be difficult to realize. Additionally, some treaty amendments are necessary to increase the competences of the European Union as the accession to the Framework Convention did not in itself extend the power of the EU. The accession to the Convention requires a valid legal basis and Article 2 TEU may not be enough in this regard (Guliyeva, 2010, p. 298).

In the Part of the Old Legal Governance one could get the feeling, that the European Union is not very supportive in the protection of minorities. Under the pillar of old governance, the Union has difficulties mainly due to the principle of consensus which can also be seen with regard to the possible internalization of the FCNM.

The Union developed more indirect protection procedures for minority protection which will be elaborated on the next part. The part is relevant to include as it shows the actual direct protection of minorities within the EU.

4.3 The "New Legal Governance" of the European Union

It is surprisingly to see that despite the weak legal framework the support regarding minority protection increases within the EU. This growth can be explained due to the application of new forms of governance. The new modes of governance are not required to create legally binding outcomes. The new modes of governance can exist in the form of guidelines, recommendations or benchmarking for the promotion of policies (Ahmed, 2010, pp. 275, 276). The recommendations can be compared with, for example the recommendations of the HCNM in Chapter 3.

The European Employment Strategy (EES) is a good example to show this phenomenon. The EES concentrates on groups which are in particular affected by unemployment and established the 2008-2010 integrated guidelines. These guidelines emphasize the importance for the integration of minorities as they form a large group of the unemployed people.

Even though the targets decided on by the new governance are not binding, they can still be effective. They cause awareness of the minority situation in this case with reference to the inclusion in the labor market (European Council, 2010, pp. 6,7), (Begg, 2010, p. 104).

The special point of this new mode of governance is that the measures are not solely established by the Commission, EP and the Council. A change occurred from supranational to multilevel governance. Representation is replaced by participation and the involvement of private actors is of relevance (Ahmed, 2010, p. 280).

The development of such a process categorizes the EU as a multi-level governance system. This system is essential for the impact on minorities within the EU. Due to the bottom up-approach, minorities or civil society which can speak for specific minority groups can contribute to EU projects or to policies at the EU level (Pospíšil, 2006, pp. 8,9). This procedure is quite similar to the monitoring practice of the Council of Europe regarding the Framework Convention and the Language Charter in Chapter 2.

This approach is mainly used by projects in the areas of social and education policy as well as cultural policy, which are supported by the EU. It is strengthened by Article 11 and 12 of the Race Directive, which demand from member states to carry out dialogues with NGOs and the general population (Council, 2000, Article 11, 12).

4.3.1 New Modes of Governance – Two different approaches

The new modes of governance can be divided into two main concepts. As the concept of "mainstreaming" develops and implements policies at either the European or domestic level, the Open Method of Coordination (OMC) establishes a dialogue between the European and national level of governance (Toggenburg, 2008, pp. 105,106).

Even though the concept of mainstreaming was mainly used in relation to gender equality, it can also be applied to other ways of discrimination which are included under the provision of Article 19 TFEU (B. d. Witte, Horvath, E, 2008, pp. 367,368). The idea behind mainstreaming is the fight against discrimination or even the setting up of equality which consists of a cross-cutting and essential part of all public interventions. To realize minority protection under the concept of mainstreaming, the interest of minorities has to be central in the wording and implementation of all EU policies. To reach this situation, all actors have to apply a minority standpoint (Toggenburg, 2008, p. 103).

A lack of definition with regard to the scope and procedures is missing and the most debatable issue is to what extent mainstreaming should be applied to the bottom-up approach. With the ratification of the Lisbon Treaty, a legal obligation is formulated which states that all areas under Article 19 TFEU are mainstreamed. This development strengthens the current legal structure in particular with regard to policy making and the increased involvement of e.g. NGOs (Zahn, 2009, p. 25).

The Open-Method for Co-ordination is a unique approach of the European Union. The OMC supports the member states by developing their own policies step by step. Fixing guidelines and timetables for realizing the policy were defined in the short, medium and long term. Quantitative and qualitative standards are set to create a basis for comparison. The European guidelines are translated into national politics with regard to their domestic differences. The carrying out of the states is monitored on the basis of periodical report by the states and European evaluations. This whole process can be considered as mutual learning (Commission, 2008, pp. 1-3).

The OMC is an attractive and flexible tool for member states as well as the European Union. The EU has the opportunity to coordinate and inspire national policies and the member states can keep a certain degree of autonomy, especially with respect to 'sensitive' policies like the protection of minorities. *"OMC as a* modus *for member states to expose their treasured and highly divergent approaches to minority protection to a multilateral policy-shaping process" (Toggenburg, 2008, p. 106)*. Minorities are in particular affected by the OMC in the areas of employment policy, social and migration policy (Commission, 2008, pp. 3,4).

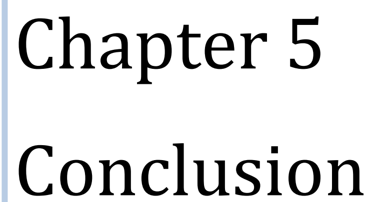
Nevertheless, the OMC can barely be seen as supremacy of legal rules. Consequently, mistrust between the EU and the state can develop. The state could feel disempowered in areas which originally fall under the scope of national responsibility. At the same time, the EU could worry that the OMC is used for avoiding traditional hard law. In these cases, the Commission points out that the OMC cannot be used when a legislative proceeding under the realm of the Community method is possible (Commission, 2001, pp. 21,22).

Nonetheless that every concept of the new governance approach has its weak points, one can conclude that they can be considered as the most appropriate measures for the enforcement of the rights of the Lisbon treaty.

4.6 CONCLUSION

The variety of legal and political sources within the EU regarding minority protection can be regarded as multi-faceted but at the same time as very indirect. Even though the EU introduces the term national minorities within primary law, the Lisbon treaty does not provide the necessary legal background to actually protect minorities. Although Article 19 TFEU and the related Race Directive create a good basis for indirect protection of minority rights, the new mode of governance developed to an effective alternative.

The internalization of the FCNM within the EU legal system could be seen as a prospect for a reinforced co-operation between the CoE and the EU. The adoption could lead to a decrease in double-standards and a stronger and equal protection of minorities. However, the principle of consensus within the Union makes it rather impossible to find a common position.



Chapter 5
Conclusion

"Establishing good cooperation and avoiding overlapping between the international organizations in this particular field is important for the international organizations themselves to better advance the integration of minorities and their effective participation in decision-making, each of them contributing to this end within their own mandate."

Speech of MFA-Miloshoski at the Conference on the Integration of National Minorities in Europe, 2010

CHAPTER 5

5.1 CONCLUSION

This thesis tries to answer to what extent minority rights in Europe are protected by relevant international institutions. The Council of Europe, the OSCE and the related High Commissioner on national Minorities and the European Union formed the main basis of analysis.

The collapse of the Soviet Union led to an intense set-up of minority standard by these institutions. This development occurred in different ways which is first shown in the following table and elaborated afterwards.

	COUNCIL OF EUROPE	OSCE HCNM	EUROPEAN UNION
Instruments / Standard-Setting	*ECRML* • indirect protection • strict and detailed provisions • 'menu' possibility *FCNM* • program-type provisions • vague formulations	*OSCE* • Copenhagen Doc. *HCNM* • Recommendations • Conflict-Prevention • Security oriented • Advisory position	*Old Legal Gov.:* • Copenhagen Criteria • Free Movement of citizen • Art. 19 TFEU • Race Equality Directive • Art. 2 TEU • Art. 21, 22 CFR *New Legal Gov.:* • Multi-level Gov. • Mainstreaming • OMC
Outcome	• not directly litigable at the European Stage • no ratification by all states • **soft jurisprudence** • no formal sanctions • **strong monitoring system** • focus on an on-going dialogue between state-authorities and minorities	• no legally binding documents/obligations • **no monitoring mandate** • consensus • **soft jurisprudence** • high pol. support • focus on post-communist states • rejection of individual complaints	• no coherent standards or policies • except external rel. • backdoor legislation • consensus • **lack of systematic monitoring** • double standards • 'container provisions' • Strength: 'New legal Gov.' → **soft jurisprudence**

The Council of Europe has the reputation of being the only institution which established legally binding documents with regard to minority protection.

The European Charter for Regional or Minority Languages does not provide any individual or group rights for minorities. The preservation for the cultural diversity in Europe is the major goal of this Charter and therefore only leads to an indirect protection of minority rights. The

Framework Convention for the Protection of National Minorities can be considered as the first legally binding multilateral instrument with regard to minority rights but offers primarily program-type provisions. None of the two treaties is involved within the jurisdiction of the European Court of Human Rights, specifically due to the missing ratifications of all members. Even though the Council of Europe has no formal sanctions which could force the national governments to implement the obligations, it could create an on-going dialogue between state-authorities and minorities. This co operational framework could be established due to the effective monitoring system which is not primarily responsible for identifying violations of the implementation process but to develop an ongoing dialogue. The instruments do not have any legal obligations for the signing states but can be regarded as quite sufficient. The strong bottom-up approach which is in particular reinforced by the monitoring procedures and the 'on-the spot' visits involves minorities and arises the awareness of the rights they could apply to. The direct contact with the government and the increased involvement of NGOs promote minority rights and strengthen the involvement of minorities within society. Nevertheless shows the ECRML the weaknesses of the FCNM: The Language Charter is characterized by strict and detailed provisions which leave hardly any room for interpretation. The states have the possibility to choose certain 'menus' from the Charter and do not have to implement all provisions. The provisions they have selected must be realized with regard to a strict pattern. The FCNM, in contrast is known for its weak and interpretive provisions. States can fulfill obligations in a broad way and could argue objectively against possible lacks. The FCNM should use the ECRML as a model to transform its vague provision to stricter and more detailed ones to decrease the interpretive dimension.

The non-ratification by some members limits the legal power of these two documents. If all participating states would have ratified either the ECRML or FCNM, the documents could even be directly litigable at the European stage and formal sanctions could be developed. However, the soft jurisprudence of these documents and the intense interstate dialogue could achieve the promotion and protection of minorities mainly due to the involvement of the concerned groups.

The Organization for Co-operation and Security in Europe established the High Commissioner on National Minorities as a conflict-prevention instrument. The HCNM has a security-oriented approach and is only engaged in those minority related issues which threatens the security of the country. Although the High Commissioner does not have the power to establish legally binding documents he could create on the basis of expert recommendations, a source of 'soft law'. It is important to note that opposed to the Council of Europe, the OSCE did not intend to establish legally binding obligations. Therefore, it is interesting to see that in particular the High Commissioner could perform powerful international standards regarding minority protection which are sufficient in itself. The

recommendations could gain relevance due to other international institutions e.g. the UN Working Group on National Minorities which refers to the recommendations.

Although the recommendations can be considered as adequate, the last and current High Commissioner does not use, without any known reason, this procedure anymore. The advisory position and the interpretation of norms are dominant and one can state that the HCNM is not restricted to the conflict-prevention anymore but develop the power to influence international standard setting.

A major criticism of the HCNM is the primary focus on post-communist states. Due to his mandate, he is constrained to minority situations which could jeopardize the stability of a country. Nevertheless, one should keep in mind that a shift occurred in which some of the former communist states now belong to the European Union. Therefore, the HCNM should also consider widening his scope of target countries.

The rejection of individual claims is quite disputed. Even though other instruments exist for individual claims, the HCNM should not hide under its "early warning" curtain. The HCNM developed his mandate further and can contribute to international standards. With this process he should provide a platform for individual complaints which would strengthen the interaction with minority groups. This procedure would make it easier for minorities to highlight possible infringements of their rights even at an early stage. However, despite this critical approach it is significant to point out that the HCNM focuses on a strong cooperation with minority groups and NGOs that represent minority groups. The information gathering of the HCNM can be regarded as the most sufficient one as it gathers neutral and objective information.

The European Union is a very controversial institution on the subject of minority protection. Even though minority rights are protected under the scope of external relations and indirect under Article 19 TFEU, the internal dimension of the EU has weak legal and political sources. With the ratification of the Lisbon treaty, the term of national minorities is introduced in primary law. On the one hand, this development seems like a historical change, but on the other hand the Reform treaty does not provide the necessary legal background to actually protect minorities. The Treaty on European Union realizes in article 6(1) that the EU Charter on Fundamental Rights can develop into a legally binding document. The restriction of this Article not to extend the competences of the Union limits the scope of the Charter and no rights with regard to minorities can be applied sufficiently. This development represents the fear of the Member States that the EU will get to much power in particular in sensitive topics like minority protection.

To lose the reputation of being a weak institution with regard to minority protection, the EU developed a new mode of governance. Guidelines, recommendations or benchmarking are defined to promote relevant minority policies. Although this new mode cannot bind national

governments, they cause awareness of the minority situation. A change occurred from the supranational to the multi-level governance. The "Open-Method of Co-ordination" is an approach which shows the delegation of decision and powers back to the national level and an in-depth collaboration between civic society, national governments and European institutions.

This thesis elaborates how difficult the establishment of legal norms is, in particular due to the lack of a common definition of minorities and the will of the nation states to actually acknowledge them. The instruments of the institutions show that they do not give clear obligations to the states to implement the instruments. They rather ask states to take into account the application of proposed norms and policies. Having a look at the table, one can see that every institution tries to protect minority rights on the basis of **soft jurisprudence**.
The table shows as well that an international **monitoring system** is of relevance. The monitoring system of the Council of Europe is a good example to highlight how the monitoring mechanism could lead to an increased dialogue between the relevant parties. Even though the Commission also monitors minority rights with regard to the enlargement process, compared to the Council of Europe it seems rather weak. Cooperation between the three institutions to improve an international monitoring system could be significant to increase the protection of minority rights. Nonetheless the HCNM does not have a monitoring mandate; the collection of sufficient information with regard to the minority situation could contribute to the international monitoring.
The general cooperation between these institutions should be intensified. As the High Commissioner steadily refers to the importance of the FCNM, the reference by the CoE is rather weak. The EU regards the FCNM as guidelines but do not promote them consistently. The internalization of the Framework Convention into the European Legal System could lead to a promotion of minority protection and an elimination of double standards within the European Union. It could strengthen the legal structure of the Framework Convention and the monitoring system of the EU. With the non-ratification of the Framework Convention by some Member States of the EU, this realization is rather impossible but should be kept in mind.

This thesis shows that minority rights do not only have to be protected within a legal framework. Even though this would be of course beneficial, the international standards with regard to minority rights show that in particular "soft-law" provisions can form a good alternative. The closer relationship with the nation state and even the delegation back to the Member States could not only result in awareness but in an increase in protection as well. The strengthening of the bottom-up approach and the inclusion of those groups that are directly concerned should be extended.

Overall, a general awareness should be set-up that clarifies that minority groups are in its origin not the source of conflict rather the way states treat these groups. *“Minorities often bear the weight of a society’s frustration, all the more so when domestic problems, like an economic downturn, combine with the external pressures of a perceived threat. This is when solidarity is needed most”* (Jonathan Gharrie, 2010)

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