The Inter-relationship between International and National Minority-Rights Law in Selected Western Balkan States

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Abstract

The violent conflicts that erupted after the breakup of communist regimes (especially in the former Socialist Federal Republic of Yugoslavia) have gradually changed the standing of minority rights and minority protection: first, the differential treatment of minority groups has become a legitimate—if not necessary—instrument to guarantee equality and stability, and, second, minority-rights legislation and minority protection are increasingly regarded as a responsibility shared among national and international actors.

This inter-relationship between international instruments and national legal provisions can be usefully observed particularly in the states that emerged from the breakup of Yugoslavia. Due to the necessity of ensuring peace and stability, the constitutions of these emerging states have been increasingly influenced by international norms and standards for minority protection—a process that can be characterized as the ‘internationalization of constitutional law’.

This article assesses these developments, at both the national and international levels, in order to shed light on the particular inter-relationship among these different layers, by looking at the example of selected Western Balkan states.

Keywords

Ethnic conflict, international norms, minority rights, security policy, stability, Western Balkans

1. Introduction

Practically all Western Balkan states\(^1\) have an ethnically diverse population\(^2\) and are, thus, home to national minorities. Although the minority

\(^1\) Within this article, the term ‘Western Balkan’ refers to the countries that emerged from the breakup of Yugoslavia. The geographic and conceptual demarcation of Southeast Europe is not commonly defined, since different approaches exist among the various academic branches (such as political science, linguistics, etc.). See Edgar Hösch, *Geschichte des Balkans* (C.H. Beck, Munich, 2004), 8 et seq.

\(^2\) For instance, Bosnia is a very illustrative example with regard to ethnic diversity. It is composed of three constituent peoples (Bosniaks, Croats and Serbs), as well as other minority groups such as Albanians, Montenegrins, Roma and Rusyns. For a discussion of the minorities in the Balkans, see Emma Lantschner, Joseph Marko and Antonija Petričušić (eds.), *European Integration and its
groups in the Balkan countries (as well as in other European states) are (more or less) clearly defined and commonly known, the academic community has found it hard to reach a common legal definition of the term ‘minority’: “There is no clearly formulated definition contained in an international treaty which is generally accepted, due to the difficulty in identifying common elements which could grasp the plurality of existing relevant communities living within the states.” It has therefore proven impossible to find a universally applicable definition of a ‘minority’. The former OSCE High Commissioner on National Minorities, Max van der Stoel, spoke vividly about this dilemma of identifying minorities: even though he did not believe that he could characterize a minority in abstract terms, he nevertheless believed that he could ‘spot one when he saw one’. Nevertheless, it is possible to delimit certain characteristics that designate a minority. A minority consists of a group of people who possess citizenship of their country of residence; who share ethnic, linguistic or religious similarities; who are numerically inferior compared to the majority population; and who have a common will to preserve these collective characteristics. Furthermore, one can distinguish between minorities with a kin-state and minorities without a kin-state. Minorities with a kin-state are those that share certain characteristics—such as language—with a community that represents the national majority in another state (e.g., the Armenian minority in Georgia, the Russian minority in the Baltic


4 “Even though I may not have a definition of what constitutes a minority, I would dare to say that I know a minority when I see one.” Max van der Stoel, “Case Studies on National Minority Issues: Positive Results”, Address to the CSCE Human Dimension Seminar, Warsaw, 24 May 1993, available at <http://www.osce.org/item/3879.html>.

states or the Hungarian minority in Serbia), whereas minorities without a kin-state are communities that do not constitute the majority in any state and, therefore, lack a traditional kinship link to another state (e.g., the Crimean Tatars in Ukraine, the Ossetes in Russia, etc.). However, this does not necessarily mean that they have absolutely no kinship with other countries. Many of them share cultural and linguistic similarities with other, sometimes adjacent, states: this holds true for the Gagauz minority in Moldova and the Avars in the Autonomous Republic of Dagestan (Russia) in their linguistic affinity to Turkey.

In Europe, the rights of these minorities—such as rights related to language and education or rights to political representation and participation—are today enshrined at different normative levels—i.e., the international, national and sub-national levels. This multi-level legal mechanism for the protection of minority rights has developed over recent decades and is characterized by a mutual interplay between the different levels. Both of these aspects will be assessed throughout this article by looking at selected Western Balkan countries.

Such an analysis is particularly interesting because, within the domain of national law, a recent tendency can be observed: minority rights are increasingly perceived as an integral part of the protection of human rights and the principle of equality, since minority rights are considered to be a specific means for the implementation of human rights in line with the norms derived from international law. This trend can be seen as a modified approach, since, until about ten years ago—from the perspective of the legislator—minority rights were treated as a deviation or exception from the principle of formal equality (which represents a basic human-rights principle). This is evidenced by recent constitutional developments: many recently adopted constitutions have instituted cer-

6 For a typology of minorities, see Benedikter, op.cit. note 3, 11 et seq.
7 It should be noted, however, that the ‘kin-state’ concept is partly contested, since it lacks an agreed academic or legal definition. See High Commissioner on National Minorities, The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations, June 2008, available at <http://www.osce.org/publications/hcnm/2008/10/33388_1189_en.pdf>, 3.
tain group rights. For instance, the 2008 Constitution of Kosovo can be seen as being perfectly in line with this development: not only was any reminiscence upon competing historical accounts of Serbs and Albanians avoided, the symbolic character of taking ethnic diversity into account was emphasized at the very beginning of the document under Chapter I, Article 2: “The Republic of Kosovo is a multi-ethnic society consisting of Albanian and other Communities, governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions.” Furthermore, the equality of both the Albanian and Serbian languages is guaranteed (together with the Turkish, Bosnian and Roma languages at the municipal level (see Art.5)), and the far-reaching rights of minority communities (as listed under Chapter II of the Constitution) mark—despite the discrepancy between law and practice on the ground—a major development in European constitutionalization processes.\(^{10}\) In comparison, still earlier constitutions (of which there are many more) tend to be limited to adherence to the principle of equality and prohibition of discrimination on the grounds of language, religion or ethnicity as the sole means of minority protection.\(^{11}\) The most prominent example is probably the French Constitution and its blindness to ethnic diversity: not only has France not joined the Framework Convention on the Protection of National Minorities, the Constitutional Council of France has declared that the implementation of the Council of Europe’s Charter for Regional or Minority Languages in France would be unconstitutional and would violate Article 2 of the Constitution, according to which the language of France shall be French.\(^{12}\)

These differing attitudes towards ethnic or national minorities can be ascribed to two different constitutional models: the liberal agnostic model versus the promotional model.\(^{13}\)

The ‘liberal agnostic model’—to which the French Constitution may, for instance, be assigned—is based purely on an individual approach that seeks to protect the fundamental freedoms of the individual but, as

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\(^{11}\) Palermo and Woelk, op.cit. note 9, 29. It must, however, be taken into account that these earlier constitutions emerged in a different historical context with differing underlying social and economic circumstances and problems (for instance, the cleavage between nobility and under-classes).


\(^{13}\) See Roberto Toniatti, “Minoranze e minoranze protette. Modelli costituzionali comparati”, in Tiziano Bonazzi and Michael Dunne (eds.), Cittadinanza e diritti nelle società multiculturali (Il Mulino, Bologna, 1994); Palermo and Woelk, op.cit. note 9, 39 et seq.
a consequence, is indifferent to the collective rights of certain groups or—to put it differently—to the collective dimension of ethnic diversity. This model presupposes congruence between nationality and citizenship and is, thus, blind towards citizens with an ethnically or culturally diverse background.

‘Promotional models’ are found in states that are characterized by a national majority but where national or ethnic minorities are constitutionally recognized and protected and, thus, enjoy certain collective rights, such as special provisions regarding their political representation (e.g., reserved seats) or the use of their language (e.g., bi- or multilingual place names, use of the minority language in the public sphere, etc.). Examples of such promotional systems include Croatia and Serbia, but also Italy and Hungary.¹⁴

Apart from these two models, there also exist states that are composed of several constituent peoples, so-called ‘multinational systems’. According to this approach, the constituent peoples share governing powers and are represented equally within the state structure (e.g., political organs, etc.). Examples include Belgium, Switzerland and Bosnia and Herzegovina.

The new constitutions of the Western Balkan states are characterized by the promotional or multinational approach. In comparison with earlier constitutions, which initially pursued an agnostic approach, this change of perspective can be explained by a number of factors. First, the prevention (or resolution) of ethnic conflicts within states has become crucial for maintaining stability and peace, and minority rights are regarded as a possible instrument for avoiding or resolving ethnic conflicts. Second, minority rights have been increasingly codified in international law as a response to the violent conflicts that erupted after the breakup of the Soviet Union and the Socialist Federal Republic of Yugoslavia.¹⁵ On the one hand, these international norms represent standards for securing minority rights and should, therefore, be implemented at the national level. On the other hand, the states ‘emerging’ from these collapsed socialist federations (partly) are trying to integrate themselves into international and supranational European organizations. This particular reciprocal effect allows international organizations to exert considerable influence on these new states such that international law is partly replicated in the newly adopted national constitutions. In particular, the EU is trying to leverage the

¹⁴ Looking at constitutional developments from a historical perspective, it can be noticed that most constitutions developed their promotional attitudes towards minorities gradually and often due to international pressure. A prominent example is Italy, which changed its approach—among other reasons, due to commitments delivered in the context of the peace negotiations after World War II—from an agnostic into a promotional one.

¹⁵ Examples are principles, conventions and recommendations adopted by the European Union, the Council of Europe and the Organization for Security and Co-operation in Europe, which will be briefly assessed in the second part of this article.
potential effectiveness of this process by operationalizing conditionality as an instrument to generate political and economic stabilization, as well as various reform programs. Regarding the compliance of minority-rights standards, the EU has also developed, through the realm of the Stabilization and Association Process (SAP) (see section 2.3.), a means of offering a clearly designed path to the final goal: EU accession.

This process triggers a shift of paradigms, first and foremost with regard to old conceptions of the nation-state: the principle of formal equality before the law is no longer seen as a sufficient protection mechanism for minority groups. To the contrary, formal equality might easily lead to factual inequality, so that in some cases only preferential treatment can guarantee substantial equality. Likewise, minority-related politics are no longer exclusively part of a state’s national sovereignty; instead, they are increasingly becoming subjected to international mechanisms.

2. International Mechanisms for Minority Protection in Europe and the Influence of the Yugoslav Wars

The collapse of the Soviet Union in 1991 and the end of the Cold War led to a fundamental change in the nature of security threats. The main threat during the Cold War was the danger of international war or a military confrontation between ideologically opposed blocs. Now, however, potential threats are seen, to a large extent, in intrastate conflicts. Weak states that witnessed ethnic tensions and violent clashes following the end of the Cold War have become the new security challenge. The security concept of the European states, which was adapted to a possible conflict between both Cold War blocs, was not equipped, at the time, to handle these new threats quickly or adequately. Above all, the Yugoslav wars demonstrated to international organizations their own inability to successfully intervene in such conflicts and, therefore, also the need to adapt their own policies and instruments to these new challenges.16

The sometimes violent transformation processes triggered by the breakup of the communist bloc, in general17—and the wars on the territory of the former Socialist Federal Republic of Yugoslavia, in particular—drew the attention of the international community to the question of how to create the conditions necessary for different ethnic, cultural, religious or linguistic groups to co-exist. Ironically enough, the Yugoslav state guaranteed self-determination and autonomy to nations and nationalities and


17 For example, the civil war in Tajikistan following the demise of the Soviet Union.
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even further developed its attempts to find an ethnic balance in the course of its existence by granting substantial rights of self-rule to its constituent groups. But it was exactly this kind of federation that became prone to conflict and ruthless power-seeking because:

“In reality, the order in Yugoslavia was based entirely on political decisions, made in concrete centers of power within the Party. The self-governing myth made every thought of limiting political power pointless given that the system's sustainable functioning is, according to that myth, based exclusively on deliberation, agreement and a never-ending search for equilibrium and balance.”

The breakup of Yugoslavia saw unease turn quickly into ethnic conflict, with all the well-known consequences of massacres, ethnic cleansing and displacement. The international community reacted to the above-mentioned new security challenges by, among other things, creating new sub-institutions and adopting instruments in order to settle and prevent ethnic conflicts by canonizing and accommodating minority rights and minority protection.

“[The Yugoslavian war also spurred the general conviction that minority issues were of fundamental importance in Europe; if aspirations and grievances of long-forgotten national and ethnic minorities were not tackled, they could burst out with major violence later. Peace, stability and prosperous co-operation could not be achieved without a stable accommodation of minority rights. Thus the strategic events in the Balkans and Caucasus helped to set up a number of international conferences focused on minority rights and eventually to the elaboration and the approval of a ‘new generation’ of instruments for the protection of national minorities and minority languages.”

Following these ideas, one of the first instruments established to prevent conflict was the Arbitration Commission of the Peace Conference on the former Yugoslavia, more commonly known as the ‘Badinter Commission’.

Even though the Badinter Commission failed in the end to prevent a conflict, it laid down a series of opinions in which it addressed criteria for recognition and questions raised by Yugoslavia, as well as by the Chair of the Conference, Lord Carrington. In its opinions, it recommended that the Yugoslav successor states be recognized depending on their national compliance with standards of minority protection. This shift of paradigms could also be seen in the 1991 EC Declaration on the “Guidelines on the recognition of new states in Eastern Europe and in the Soviet Union” in which minority protection as a precondition for the establishment of diplomatic relations was vested with crucial importance: “[the EC states] adopt a common position on the process of recognition of these new

18 Bojan Kovacevic, “The Experience of Yugoslavia’s Federalism as Warning for Europe’s Unfinished Federation”, article published by the IFF Summer University (2008), 11.

19 Benedikter op.cit. note 3, 26.

20 A French university professor, Robert Badinter, was appointed as President of this five-member commission consisting of presidents of constitutional courts of the EEC.
states which requires [...] guarantees for the rights of ethnic and national
groups and minorities in accordance with the commitments subscribed
to in the framework of the CSCE民用.

The international norms on minority rights in Europe that exist
today, which evolved during, or in the aftermath of, the wars in former
Yugoslavia, can be illustrated in terms of three concentric bands. The in-
nermost band—being the narrowest one in terms of geographic extension
and number of member states—is represented by the European Union;
the middle band is constituted by the Council of Europe (CoE); whereas
the outermost and largest band houses the Organization for Security and
Co-operation in Europe (OSCE).民用

These bands reflect the membership constellations of these organiza-
tions: all member states of the European Union are members of the CoE
and the OSCE, but not all parties to the Council of Europe are members
of the EU (the same applies obviously to the OSCE, which has again a
larger geographic scope than the other two organizations). In addition,
the promotion of minority rights is part of the EU’s foreign-policy agenda,
whereas both OSCE and CoE mechanisms are only applicable in terms
of each organization’s internal regulations. Thus, the latter mechanisms
can only and exclusively be addressed to these organizations’ respective
member states. And, finally, the legal nature of international mechanisms
differs greatly in all three cases: (a) the EU seeks to stabilize its periphery
in the Balkans by stimulating future membership ambitions through a
set of contractual relations. Even though the EU’s approach to minority
protection within the framework of stabilization and association agree-
ments (SAAs) has been narrow, and largely concentrated on refugee returns,
minorities can get at least some indirect protection through enhanced
regional cooperation; (b) the CoE operates in the field of minority rights
on the basis of various conventions that have been signed and ratified
by most of its member states (therefore, CoE norms are legally binding);
and, last but not least, (c) the mechanisms within the OSCE framework
are first and foremost marked by moderation, consultation and mediation
(they, therefore, have a politically binding character).

324; as well as 31 International Legal Materials (1992), 1485.
22 Palermo and Woelk, op. cit. note 9, 101.
2.1. The OSCE and its High Commissioner on National Minorities

As early as 1990, the OSCE\(^{23}\) had formulated within the Copenhagen Document a new starting point for the incorporation of minority rights into the field of human rights and, furthermore, into its own strategic institutionalization process:

“[The participating States] further reaffirm that respect for the rights of persons belonging to national minorities as part of universally recognized human rights is an essential factor for peace, justice, stability and democracy in the participating States. [...] The participating States will adopt, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms.”\(^{24}\)

The Copenhagen Document enumerates a number of crucial minority rights such as the free use of one’s mother tongue both in private and in public (Art.32(1)); the right of minorities to establish and maintain their own educational, cultural and religious institutions, organizations or associations (Art.32(2)); as well as the right to effective participation in public affairs (Art.35). Furthermore, the Copenhagen Document was the first international agreement to recognize the establishment of appropriate local or autonomous administrations as possible means for the protection and promotion of minorities (Art.35). Therefore, the Copenhagen Document included the widest-ranging material declarations regarding minority protection of the time, which helped to determine the future development of instruments within both the OSCE and the Council of Europe.\(^{25}\)

In 1992, the OSCE established the post of High Commissioner on National Minorities (HCNM), which has become the most significant OSCE tool in the field of minority protection.\(^{26}\) The HCNM’s mandate

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\(^{23}\) The OSCE has its roots in the Conference on Security and Co-operation in Europe (CSCE), which was opened in Helsinki in 1973 and aimed at improving relations between the Communist bloc and the West. After the end of the Cold War, the CSCE was transformed into an intergovernmental organization and renamed the Organization for Security and Co-operation in Europe.


was established largely in reaction to the situation in the former Yugoslavia, which some feared might be repeated elsewhere in Europe, especially in the post-Soviet space. The HCNM is conceptualized as an instrument for early warning and conflict prevention, with the identification and early resolution of ethnic tensions that could possibly threaten peace and stability among the office’s main functions. For that purpose, the HCNM is mainly engaged in on-the-spot visits, maintaining ongoing dialogue with national governments (mostly on an informal basis behind closed doors, often referred to as ‘quiet diplomacy’) and making recommendations.\(^{27}\) In addition to recommendations addressed to specific states, the HCNM has also created a series of thematic guidelines that tackle specific issues (for example, the educational rights of minorities, the linguistic rights of minorities or the participation of minorities in public life) and are addressed to all OSCE member states. Even though the HCNM as an institution works on an exclusively informal basis with non-coercive methods, these thematic recommendations are nevertheless subjected to intensified review in debates in both diplomatic and scholarly circles. Throughout the course of his activities, the HCNM has continuously identified certain specific themes in which he tries to clarify existing standards from the perspective of minority protection in compliance with public international law. For each set of recommendations,\(^{28}\) he commissions a group of international experts to formulate a set of guidelines.\(^{29}\) Although they are not legally binding, the HCNM treats these recommendations as groundbreaking standards for international minority protection, thus putting some political weight behind his attempts to induce state compliance. But even beyond that, there has been at least one example where the HCNM’s recommendations have been made legally binding by other means: upon the HCNM’s request, the EU linked Latvia’s accession process to the HCNM’s recommendations on language and citizenship.\(^{30}\)

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\(^{27}\) These recommendations can include, for example, proposals for new legislative acts, legislative amendments or institutional reforms.


\(^{30}\) Li-Ann Thio, Managing Babel: The International Legal Protection of Minorities in the Twentieth Century (Martinus Nijhoff, Leiden, 2005), 285.
Likewise, the Council of Europe is active in trying to calm ethnic tensions and resolve minority questions and has elaborated two major international conventions: the European Charter for Regional and Minority Languages (EChRML), which was adopted in 1992, and the Framework Convention for the Protection of National Minorities (FCNM), adopted in 1995. In both cases, a sufficient number of ratifications (five for the EChRML and twelve for the FCNM) was reached in 1998, and both conventions entered into force that same year.

2.2.1. The European Charter for Regional and Minority Languages

The main purpose of the EChRML is to protect and promote regional or minority languages, since they have become a rather marginalized aspect of Europe’s cultural heritage. For that purpose, a non-discrimination clause on the use of these languages is flanked by measures aimed at securing active support for their preservation. For example, the EChRML calls on states to ensure the reasonable use of regional or minority languages in the fields of education and the media, as well as in judicial and administrative settings. However, it does not generate any individual or collective rights for linguistic minorities; instead, it sets out standards and guidelines for governmental measures in order to preserve and promote such rights. In this respect, the EChRML legitimizes differential treatment: “The adoption of special measures in favour of regional or minority languages aimed at promoting equality between the users of these languages and the rest...
of the population or which take due account of their specific conditions is not considered to be an act of discrimination against the users of more widely-used languages.”

At the moment of ratification, each contracting state has two opportunities to determine the scope of the EChRML. First, the state can select which measures (included in Part III of the EChRML) will be adopted in order to promote the use of regional or minority languages in public life (meaning that the state is not obliged to enact all the measures contained in the EChRML). Second, the state can define to which regional or minority languages the chosen provisions will be applied. This “à la carte system” ensures that states retain the final control over the definition of languages that are entitled to protection in line with the EChRML, and over the scope of the protection even after the ratification of this instrument. Moreover, this flexibility is conditioned by the considerably differing context and situation of regional or minority languages, which makes it impossible to agree upon one single set of minimum standards.

In terms of supervising the implementation of the EChRML’s provisions, it has to be noted that—since the Charter does not assure any justiciable rights for linguistic groups—there is no judicial control of its application. To compensate for this, a system of political control has been developed that includes the following steps:

(a) Each state that has ratified the EChRML has to compile a report every three years on the national measures taken to implement the Charter’s provisions;

(b) These reports are examined by a Committee of Experts;

Art.7(2), EChRML.

Art.2(2), EChRML. It has to be noted that the state has to choose a minimum of 35 out of around 100 paragraphs or sub-paragraphs of Part III of the Charter, including at least three chosen from each of the sub-paragraphs of Art.8 (on education) and Art.12 (on cultural activities and facilities) and one from each of the sub-paragraphs of Art.9 (on judicial authorities), Art.10 (on administrative authorities and public services), Art.11 (on media) and Art.13 (economic and social life).

Art.3(1), EChRML.

The possibility for states to define the scope of protection can be evidenced by the following example: according to Art.2(2), the state has to choose three paragraphs or sub-paragraphs listed under Art.8 on education. These paragraphs or sub-paragraphs differ very much in terms of intensity and range—for example, from “make available primary education in the relevant regional or minority languages” (Art.8(1)(b)(i)) (i.e., entire primary education in the respective regional minority language) to “provide, within primary education, for the teaching of the relevant regional or minority languages as an integral part of the curriculum” (Art.8(1)(b)(iii)) (i.e., the regional or minority languages are taught as a subject at least once per week).

The membership of the Committee of Experts as of 2009 is provided at <http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/3_Co mmittee_of_Experts/Contact_Co mmittee_of_Experts.asp#TopOfPage>.
The Committee of Experts submits to the CoE Committee of Ministers an assessment of the state, which includes proposals for recommendations to the respective state;

The state has the opportunity to comment upon the report of the Committee of Experts;

The CoE Council of Ministers delivers recommendations (for instance, proposals on how to improve the implementation of the EChRML) to the respective states. The extent to which these comments are taken into account by national legislators is then examined in the course of the following reporting cycle.\(^41\)

The Charter’s monitoring process has revealed the following two major problems. \textit{First}, state authorities have not always involved the respective linguistic communities—for instance, through negotiation and consultation processes—when deciding which obligations should be implemented. \textit{Second}, many of the states that ratified the EChRML have rather followed a minimalistic approach by selecting the least extensive provisions (see footnote 39).\(^42\) Moreover, the approach of the Committee of Experts has been criticized as being inconsistent since, for instance, in its first approach on the application of the EChRML in Germany, the Committee of Experts said that a specific law related to the Sorbian language was needed, whereas in the respective report on the UK, it did not request such specific legislation for Irish in Northern Ireland (although there exist specific laws regarding the two other minority languages in the UK: Scottish Gaelic and Welsh).\(^43\)

In order to cope with these challenges, the Committee of Experts is trying to improve and streamline its working methods, for instance, by involving NGOs and experts to review the performance of the Committee, and by organizing working groups that focus on specific countries. This should enable the Committee to act as a policy adviser and to assist


\(^43\) \textit{Ibid.}, 30-31. When the UK ratified the EChRML, it declared that the Charter provisions would be applied to Welsh, Scottish Gaelic and Irish.
states parties with specific and consistent suggestions on how to improve their implementation.\textsuperscript{44}

2.2.2. The Framework Convention for the Protection of National Minorities

The Framework Convention for the Protection of National Minorities is the Council of Europe’s most important instrument in the field of minority-rights protection. Adopted in 1995, the FCNM was the first multilateral instrument concluded among European countries that is dedicated to the general protection of minorities and that clearly states that minority rights are considered human rights and fall, therefore, under the scope of international cooperation.\textsuperscript{45}

The most important principles and objectives of the FCNM can be summarized as follows:

— Promoting conditions for maintaining and developing the religions, languages, traditions and cultural heritage of minorities (Art.5);
— Assuring respect for the right of every person belonging to a national minority to freedom of peaceful assembly, freedom of association, freedom of expression and freedom of thought, conscience and religion (Arts.7 and 8);
— Guaranteeing access to, and use of, the media (Art.9);
— Recognizing the right to use minority languages in the private and public spheres, as well as—if a substantial number of people belonging to a minority and living in a certain territory of a state request it and if such a request corresponds to a real need—in relations with administrative authorities (Art.10);
— Recognizing the right of a person belonging to a national minority to use his or her surname (patronym) and first names in the minority language and the right to official recognition of them (Art.11);
— Displaying traditional local names, street names and other topographical indications in the minority language in areas traditionally inhabited by a substantial number of people belonging to a minority and when there is a sufficient demand for such indications (Art.11);
— Educational rights (teacher training, access to text books, right to learn the minority language or receive instruction in this language) (Arts.12-14);

\textsuperscript{44} Ibid., 31-32; as well as Robert Dunbar, “Definitively Interpreting the European Charter for Regional or Minority Languages: The Legal Challenges”, in Dunbar, Parry and Klinge (eds.), \textit{op.cit.} note 35, 37-61, at 59-61. For an assessment of the implementation of the EChRML in selected countries, see Dunbar, Parry and Klinge (eds.), \textit{op.cit.} note 35.

\textsuperscript{45} See Art.1, FCNM.
— Providing for the effective participation of people belonging to national minorities in cultural, social and economic life and in public affairs (Art.15);
— Allowing for cross-border contacts, in particular with people with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage (Art.17).

As in the case of the EChRML, there is also a specific mechanism for monitoring implementation of the FCNM. Within one year after ratifying the FCNM, each state has to deliver a report about national measures targeted at implementing the Convention. This national report is then examined by a committee of independent experts—called the Advisory Committee (AC)—which adopts an opinion on the respective report. The states have the possibility to comment on the AC’s opinion before these documents (AC opinion and eventual comment by the state) are transmitted to the CoE Committee of Ministers, which, subsequently, adopts a resolution containing conclusions and recommendations concerning the status of the FCNM’s implementation. After this first reporting cycle, the states are required to submit national reports every five years. The Balkan states are already in the third cycle of monitoring. Therefore, they can be considered the avant-garde among FCNM member states, since other—by no means less-conflict-ridden—states like Georgia have still not even provided their comments to the AC opinions of the first cycle. The decision by what was then Serbia and Montenegro to make the AC’s opinion publicly available before the latter had drafted its comments—the first country ever to do so—seems to be a further sign

46 The Advisory Committee is composed of twelve to eighteen independent experts with recognized expertise in the field of minority protection and appointed for four years by the CoE Committee of Ministers. The membership of the Advisory Committee as of April 2009 is provided at <http://www.coe.int/t/dghl/monitoring/minorities/2_Monitoring/PDF_Composition_ACFC_en.pdf>.


48 For an overview in a cross-country approach, see <http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/Table_en.asp>.
of cooperation, which enhances the transparency and the speed of the monitoring process.\footnote{Pekari, op.cit. note 47, 351.}

Furthermore, the FCNM is characterized by two peculiar aspects. \textit{First}, it does not contain a definition of the term ‘national minority’, since it was not possible to agree upon a common definition supported by all the CoE member states. Thus, the states parties must examine the scope of application to be given to the Framework Convention within their country, which concedes them a certain margin of appreciation\footnote{The term ‘margin of appreciation’ refers to the room for manoeuvre that the Council of Europe is willing to grant national authorities in fulfilling their obligations under the CoE’s charters and conventions. For more information, see “Margin of Appreciation” on the Council of Europe’s website at <http://www.coe.int/t/dghl/cooperation/lisbonnetwork/Themis/ECHR/ Paper2_en.asp>.} in order to take into account specific domestic circumstances. However, the FCNM’s Advisory Committee constantly scrutinizes whether or not this margin of appreciation is exercised in accordance with general principles of international law and the fundamental principles set out in Article 3 of the FCNM in order to ensure that the implementation of the Framework Convention is not a source of arbitrary or unjustified distinctions. For that purpose, the AC follows an inclusive approach\footnote{See Rainer Hofmann, “The Framework Convention for the Protection of National Minorities: An Introduction”, in Weller, op.cit. note 8, 1-24, at 16.} and often suggests, in its opinions, that states parties extend the application of the FCNM to minority groups that had been excluded from the scope of application.\footnote{See, for instance, the AC’s First Opinion on Denmark, ACFC/INF/OP/I(2001)005, adopted 22 September 2000, in which the AC recommends that the Danish authorities examine whether the FCNM should also be applied to the Greenlanders and Far Oese minorities, as well as to people belonging to the Roma community. Such an inclusive approach can also be seen, among others, in the AC’s First Opinion on Croatia, ACFC/INF/OP/I(2002)003, adopted 6 April 2001, para.17; in its Second Opinion on Croatia, ACFC/INF/OP/I(2004)002, adopted 1 October 2004, paras.27-30; as well as in its First Opinion on Azerbaijan, ACFC/INF/OP/I(2004)001, adopted 22 May 2003, para.20. See Rainer Hofmann, “Political Participation of Minorities”, 6 \textit{European Yearbook of Minority Issues} (2006/07), 5-17, at 8.}

\textit{Second}, the provisions are not directly applicable; instead, they set out certain objectives that the states are required to pursue. Specific measures to accomplish these objectives can take two forms: on the one hand, states can make direct use of the legal provisions of the FCNM as such, or, on the other hand, may simply refer to the normative principles of the FCNM in their legislation. This enables them to take into account particular conditions; thus, also leaving a certain measure of discretion to national legislation.\footnote{Joseph Marko, “The Council of Europe Framework Convention on the Protection of National Minorities and the Advisory Committee Thematic Commentary on Effective Participation”, in Marc Weller (ed.), \textit{The Political Participation of Minorities: A Commentary on International Standards and Practice} (Oxford University Press, Oxford, forthcoming).}
Although both the FCNM itself and its monitoring mechanism can be (and often are) criticized as too weak and as leaving too much flexibility to the states in determining the Convention’s implementation, they have succeeded in, first, improving the conditions in which minorities live and, second, identifying European standards of minority protection.

2.3. The European Union and its ‘Minority Policies’

The European Union—the third layer of international mechanisms for minority protection in Europe—was incentivized by the prospective Eastern enlargement (which was, likewise, conditioned by the breakup of the communist bloc) to develop “more pronounced minority policies”. These evolving policies can be characterized as ‘more pronounced’ compared to earlier activities because of the following features. First, the EU’s engagement is motivated by an external factor (i.e., the prospective accession of new member states). Second, the Council (deciding on accession and its criteria) and the Commission (monitoring the candidate states) have begun to dedicate themselves to the issue of minority protection (whereas prior activities were predominantly launched by the European Parliament). Third, the issue of minority rights seems to be perceived from a broader perspective, also including—in addition to linguistic and cultural aspects—the issue of political participation of minorities. Fourth, the evolving policies are focused on minorities living outside the EU. And, finally, the method of conditionality is applied in order to incentivize minority-related reforms in the applicant states.

The decisive step to link the Eastern enlargement process with the issue of minority-rights protection was taken at a meeting of the Euro-

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55 See Benedikter, *op.cit.* note 3, 115.


57 Gabriel Toggenburg describes the activities undertaken before the launch of the Eastern enlargement process as an “idealistic phase”, in which mainly the European Parliament dedicated itself to the issue of minority protection, whereas “neither the Commission nor the Council affiliated with the Parliament in identifying the protection of minorities and their cultures as an EU priority”. Moreover, “minority protection was in this first phase articulated only in non-legally binding documents and never reached the level of legal norms and obligations. Finally this first phase of European involvement in minority issues finds its motivation not in external pressure but rather in a value-oriented role of the European Parliament.” *Ibid.*, 3.

58 See *ibid.*, 5.
European Council in June 1993 in Copenhagen, where the heads of state and government decided upon the conditions that had to be fulfilled by the applicant states prior to accession.

“The European Council today agreed that the associated countries in Central and Eastern Europe that so desire shall become members of the European Union. Accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required.

Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate’s ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.”

As an attempt to move from reactive crisis management to a comprehensive long-term stabilization policy vis-à-vis the Balkan states, the so-called EU-led Stability Pact for South Eastern Europe was launched in 1999. One of the Pact’s aims was to elaborate a conflict-prevention strategy for the war-ridden Balkan region by fostering democracy, human rights, the rule of law and economic prosperity, or, to put it differently, the Stability Pact was created according to the spirit of the ‘Copenhagen trinity’ of Article 49 of the Treaty on the European Union (consisting of democracy, human rights and the rule of law). The region was supposed to be stabilized by a two-fold approach. On the one hand, EU legislation was to be adopted in the states of the region in a way that would facilitate an eventual approximation of Euro-Atlantic economic and security structures. On the other hand, much attention was also accorded to the factor of regional cooperation through programs of reconstruction and reconciliation.

It should be said, however, that the multitude of regional activities conducted under the umbrella of the Stability Pact did not always produce the desired outcome. The overall performance of the Pact was often hindered by differing interpretations of how the regional approach should be conceptualized, by delayed disbursements of project funds and—equally important—by political instability and unpredictability on the ground. Likewise, the notion of ‘stability’ was not clearly defined, which created


60 While the Stability Pact was replaced by the Regional Cooperation Council in February 2008, information about the Stability Pact can still be found on its website at <http://www.stabilitypact.org/>.

room for uncertainty about the field of application of the Pact. It is exactly for this reason that the EU started to shift to bilateral ties with the respective Balkan states in the form of SAAs, providing each country with a tailor-made ‘road map’ towards EU accession. This approach is functionally equivalent to the so-called ‘Europe agreements’, which were concluded with the bloc of Central and Eastern European countries in the 1990s and served as specific preparation for their candidate status in a bilateral manner. In 2008, the Stability Pact was finally transformed into the Regional Cooperation Council, which will nevertheless continue to work on the regional level in the Balkans by completing the bilateral string of the SAAs. Hence, the EU’s stabilization philosophy for the Balkan states can be seen through the prism of a two-fold strategy: whereas the bilateral tie in the form of SAAs encourages competition among Balkan states and can therefore be seen as a race, the regional approach of the Stability Pact is much more like a convoy, where the slowest one sets the speed for the whole group. This dichotomy between race and convoy can be translated into political practice: conditionality requires each country as an individual actor to meet a set of certain criteria on a bilateral basis, whereas regionality requires the states to create synergies in regional cooperation, making progress toward EU accession in the form of one collective endeavor.

In 2000, the European Commission introduced the new Stabilization and Association Process, which was (as with the Stability Pact) to embrace Albania, Bosnia and Herzegovina, Croatia, Macedonia, and Serbia and Montenegro. This new process resulted in the conclusion of SAAs, which were regarded as an additional institutional contribution to the Stability Pact in bilateral clothing. However, the pathbreaking feature of the SAP is that—for the very first time in the history of recent EU-Balkan relations—a clear membership perspective for the region was announced. Therefore, the SAP closely follows, from a structural dimension, the model of the accession process of those Central and East European states that joined

\[62\] The progress of negotiations between the EU and any SAP state is unaffected by any lack of progress in negotiations with another state.

\[63\] Iris Kempe and Wim van Meurs, “Europe Beyond EU Enlargement”, in Iris Kempe (ed.), Prospects and Risks Beyond EU Enlargement/Eastern Europe: Challenges of a Pan-European Policy (Leske und Budrich, Opladen, 2003), 11-75, at 29.

the EU in 2004 and 2007.\textsuperscript{65} This EU initiative was essentially motivated by the recognition of three things:

(a) The ‘carrot and stick’ philosophy encapsulated in the broader terminology of conditionality could serve as a strong driver for reform in the region;

(b) In order to achieve sustainable success, the open, broad—and, therefore, only politically binding—approach of the Stability Pact had to be turned into bilateral, legally binding agreements;

(c) Only contractual relations in a country-by-country approach are flexible enough to generate reconstruction and approximation to the EU.

In this new SAP context in 1997, the EU Council issued “Conclusions on the Application of Conditionality” that make clear that financial assistance requires “respect for human and minority rights” and the offer of “real opportunities to displaced persons”.\textsuperscript{66} Hence, on the level of application instruments, the important status of minority rights was confirmed as an indispensable condition; yet, when it comes to the specific formulation and wording of the respective SAA, this legal standing of minorities becomes less clear. Minority rights are mentioned in Article 3 of the SAA, stipulating that human rights and the respect for, and protection of, minorities “are central to the Stabilisation and Association process”. However, minority rights are not listed as “essential elements” in the sense of Article 2 of the agreements. Therefore, the Council cannot, from a purely legal point of view, suspend the agreement in the case of violation of minority rights.\textsuperscript{67}

Even though the European Partnerships \textit{vis-à-vis} the Balkan states refer to the Copenhagen criteria, and the power asymmetry between Brussels and the Balkan states could not be greater, the legal standing of minority rights within the SAP leaves a lot to be desired and illustrates how reluctant international organizations are when it comes to a clear definition of a delicate issue.\textsuperscript{68}


\textsuperscript{67} On suspension, see, for example, Art.133 of the SAA concluded with Serbia. However, what remains is the instrument of ‘appropriate measures’ (compare, for example, Art.129, para.4).

3. The Internationalization of Constitutional Law or the Constitutionalization of International Law

Due to the necessity of ensuring stability in the conflict-ridden Western Balkan region, the emerging states are running through two processes in parallel. On the one hand, they want to secure their national sovereignty and, thereby, assert themselves as national states. This dilemma, which accompanied the decline of Yugoslavia, is problematic insofar as no single ethnic group was able to play the role of Staatsvolk due to the degree of ethnic diversity in the region.69 On the other hand, the successor states of Yugoslavia have an interest in securing their integration into existing international structures in order to enter into relations with other states and international organizations.70 This particular constellation (i.e., emerging states seeking international inclusion and international organizations developing norms for conflict settlement and prevention) allows international organizations to exert pressure on these emerging states to codify international norms within their national legal systems.

As the previous section on international mechanisms for minority protection in Europe has shown, one can describe the influence that the international community (i.e., the OSCE, the CoE and the EU) can exert as following certain patterns: at the outset of the process, these international organizations seek to set certain legal standards by launching a public discourse through diplomacy and negotiations with the states. As a result, these standards are codified within the framework of internationally recognized instruments, such as the above-mentioned recommendations of the HCNM and the Council of Europe’s FCNM or the 1950 European Convention on Human Rights (regardless of whether or not they are politically or legally binding).71 This standard-setting procedure failing-in-the-western-balkans>; as well as Lara Appicciafuoco, “Integrazione dei Balcani occidentali nell’Unione europea e principio di condizionalità”, 2 Diritto Pubblico Comparato ed Europeo (2007), 547-582.


70 This desire for integration is motivated by the expectation that inclusion leads to political, social and economic stability and prosperity.

71 A close analysis of these instruments and their review mechanisms reveals that the standards may be subdivided into three qualitatively different types, namely: (a) minimum standards; (b) emerging standards; and (c) best practices. Minimum standards are those that a state would have to fulfill in order not to violate an instrument. Emerging standards are identified when a certain situation in one state is appreciated, but when other states are (for the time being) not necessarily requested to perform in the same manner. Best practices are, finally, those provisions that create an ideal, and mostly represent the specific solutions of individual states (such as systems of territorial autonomy). Due to a lack of consensus, the majority of states will, however, not accept such practices as the normal case. See Lantschner, op.cit. note 24, in particular at 27; as well as id., “Emerging European Standards of Minority Protection through Soft Jurisprudence?”; in Lantschner, Marko and Petričušić, op.cit. note 2, 53-82.
is essential in two respects: on the one hand, standards are supposed to generate individual rights while, on the other hand, minority rights are thereby anchored as legally binding elements of the respective state’s national legislation.

In order to ensure that states incorporate these standards into their domestic legislation, it is necessary to develop certain review or monitoring mechanisms. The conception of the monitoring procedures depends on the legal design of the instrument to which they are attached. Compliance with the European Convention on Human Rights is, for instance, overseen by a supranational judicial mechanism, the European Court of Human Rights, which issues legally binding judgments. The implementation of the FCNM is, as already mentioned above, reviewed by a political oversight mechanism, the CoE Committee of Ministers with the assistance of an Advisory Committee. The opinions and recommendations of these bodies are not legally binding and may, according to scholars, be classified as ‘soft jurisprudence’ based on hard law.

This interplay between international mechanisms and national law puts into operation a process that can be described, on the one hand, as the ‘internationalization of constitutional law’, since constitutional law related to human rights in general and minority rights in particular is increasingly conditioned by international norms, or, on the other hand, as the ‘constitutionalization of international law’, because international law has started to assume certain characteristics that so far have only marked national constitutions, such as supranational judicial review (this can be particularly well observed using the example of the Western Balkan countries).

Minority protection has, thus, become a responsibility that is shared among national states and international institutions, with the predominant approach being that: “Issues concerning the rights of persons belonging to national minorities are matters of legitimate international concern and consequently do not constitute exclusively an internal affair of the respective State.”

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72 Marko, op.cit. note 53.
74 Palermo and Woelk, op.cit. note 9, 78.
Due to the pressure of international organizations and the influence of international mechanisms for minority protection, the emerging Western Balkan states follow a promotional approach in their attitude towards ethnic or national minorities (except for Bosnia and Herzegovina, which is, as already mentioned, a multinational system).

In Croatia, the constitutionally recognized minorities\footnote{The minorities listed in the preamble of the 1992 Croatian Constitution (including subsequent amendments) are: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians and Ruthenians.} have, for instance, the right to be represented in the Croatian Parliament, as well as in local and regional governing institutions; to obtain education in the respective minority language; to have access to media (such as radio or television broadcasts) in the minority language; and to be proportionally represented in the state administration and the judiciary.\footnote{For more information on minority rights in Croatia and their practical implementation (e.g., problems related to the implementation of the right to education and economic participation of the Serb minority and the Roma), see Antonija Petričušić, “Croatia”, in Lantschner, Marko and Petričušić, \textit{op.cit.} note 2, 167-187.}

Minority groups in Albania include Greeks, Macedonians, Montenegrins, Vlachs and Roma, and, according to the 1998 Albanian Constitution, they have the right to preserve and develop their ethnic, cultural, religious and linguistic belonging; to study and to be taught in their mother tongue; and to unite in organizations and societies for the protection of their interests and identity (Art.20). However, the European Parliament, the European Commission and the FCNM Advisory Committee have criticized the Albanian legislation related to minority protection as not being extensive enough.\footnote{See Michaela Salamun, “Albania”, in Lantschner, Marko and Petričušić, \textit{op.cit.} note 2, 211-251. It has been observed, for instance, that the access of minorities to the media and to education in minority languages needs to be improved, since, in certain areas, where there is a demand, it is not yet available (\textit{ibid.}, 228) and since no mother-tongue instruction exists yet for the Montenegrin, the Vlach or Roma minorities (\textit{ibid.}, 229).}

The preamble to the 2007 Constitution of Montenegro identifies Serbs, Bosniaks, Albanians, Muslims and Croats as nations or national minorities and states that their rights and liberties shall be exercised on the basis of the Constitution and ratified international agreements (Art.17). Minority rights are further enshrined in Article 79 of the Constitution and include, for instance, the right to education in the minority language; the right to have local self-government authorities; the right to have state and judicial authorities carry out proceedings in the minority language; the right to establish educational, cultural and religious associations, with the material support of the state; the right to authentic representation in the Parliament of the Republic of Montenegro; as well as the right to

\begin{itemize}
\item represent minorities in the Croatian Parliament;
\item have access to media in their minority language;
\item have proportionate representation in the state administration and judiciary;
\item have the right to education in their minority language;
\item have the right to local self-government authorities;
\item have the right to have state and judicial authorities conduct proceedings in their minority language;
\item have the right to establish educational, cultural and religious associations with state support;
\item have the right to authentic representation in the Parliament of Montenegro;
\end{itemize}
proportionate representation in public services, state authorities and local self-government bodies. However, the FCNM Advisory Committee stated in its first 2008 opinion on Montenegro that certain aspects—such as the provision regarding proportionate representation, the participation of minorities in economic life or legal provisions regarding the use of minority languages in relations with the administrative authorities—need to be made more specific and operational.  

In Serbian legislation, a national minority is any group of citizens that is sufficiently large, has a long and firm bond with the territory and possesses common characteristics—such as language, culture or religion—that differ from the majority of the population.  

Regarding the specific rights to which minorities are entitled, Serbia’s 2006 Constitution also follows the same approach as the examples cited above, since it guarantees minorities numerous rights, including the right to education in their languages; the right to establish their own media; and the right to have proceedings conducted in their languages before state bodies, organizations with delegated public powers, bodies of autonomous provinces and local self-government units (Art. 79). However, Serbia’s minority legislation still lacks specificity (for instance, regarding minority media) and faces a number of practical obstacles (such as the ongoing privatization of media, which threatens those broadcasting in a minority language, since they are mostly financed by municipalities).  

In addition to this, the open character of the constitutions adopted after the Yugoslav wars in the Western Balkan states towards the influence of international instruments and standards is, to an even greater extent, evidenced by certain articles of the constitutions of Bosnia and Herzegovina and Kosovo, which provide for the direct applicability of certain international instruments. The 1995 Constitution of Bosnia and Herzegovina (hereinafter the ‘1995 BiH Constitution’) foresees, for instance, direct applicability and even supremacy of fundamental rights as retained in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) over all other legal sources—including the Constitution.  

For further information on minority rights in Montenegro, see Marko Kmezić, “Montenegro”, in Lantschner, Marko and Petričušić, op.cit. note 2, 253-273.  


See ibid. (A specific law for minority media could eventually remedy both problems.)  

The Inter-relationship between International and National Minority Rights Law

includes a list of fifteen international conventions regarding the protection of human and minority rights that have to be applied in Bosnia and Herzegovina (among others, both the EChRML and the FCNM). Likewise, the 2008 Constitution of Kosovo also stipulates the direct applicability of certain specified international agreements and instruments (including the FCNM).

Macedonia is another good example demonstrating that the formal aspects of constitutional minority protection driven by the dimension of public international law can be achieved. The Ohrid Framework Agreement further developed the constitutional and legal position of national minorities in Macedonia. Although occasional incidents and police abuse were still being noted in the reports of the international community, the position of the Albanian ethnic group improved considerably in 2004, e.g., the university in Tetovo was officially recognized and, as a consequence, educational opportunities for minority members in the country were broadened. By adopting a national action plan on gender equality, the government was making an effort to improve the socio-economic and political positions of women.

However, in a recent decision, the Bosnian Constitutional Court left untouched the strict ethnic determination of top-level positions in the legislature and executive. By arguing that the ECHR does not enjoy supremacy over the Dayton Constitution, the majority of judges

In general, the provisions contained in the FCNM—being ‘framework provisions’—are not directly applicable, and it is up to states to decide how to incorporate these provisions into domestic legislation. Therefore, each state determines its own modality to implement the FCNM; the result is that, in some states, the FCNM even has supremacy over the constitution (as in Bosnia and Herzegovina), whereas in other states the constitution prescribes that ratified and published international agreements and generally accepted rules of international law shall make an integral part of the internal legal order and that they shall have supremacy over national legislation (Art.9 of the 2007 Constitution of Montenegro) or that such ratified international treaties are an integral part of the legal system and, as such, apply directly (Art.16 of the 2006 Constitution of Serbia). This article of the 2006 Serbian Constitution emphasizes, however, that ratified international treaties must be in accordance with the Serbian Constitution.

Art.22 of the 2008 Constitution of Kosovo. “Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions: (1) Universal Declaration of Human Rights; (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; (3) International Covenant on Civil and Political Rights and its Protocols; (4) Council of Europe Framework Convention for the Protection of National Minorities; (5) Convention on the Elimination of All Forms of Racial Discrimination; (6) Convention on the Elimination of All Forms of Discrimination against Women; (7) Convention on the Rights of the Child; (8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.”

were not willing to break up the ethnic homogenization on the level of the entities. The Court had to review whether Articles 4 and 5 of the 1995 BiH Constitution—which determines the ethnically exclusive (i.e., Bosniak, Croat and Serb) composition of the House of Peoples and the presidency—violate Article 3 of the First Protocol to the ECHR and Article 14 of the ECHR, since “Others” are by definition excluded from the right to stand as candidates in these elections.

“The Court, however, declared the request inadmissible. The majority opinion argued that the ECHR would—in the hierarchy of legal norms—not enjoy a rank above the Dayton Constitution since the ECHR became legally valid in BiH only through its incorporation by the Dayton Constitution itself. Thus, the Court has no jurisdiction to review the Dayton Constitution in the light of the ECHR.”

The Court’s reasoning reveals two important aspects: first, it demarcates the limitations of the influence of international law if it is contrary to national interests or preferences (something that will be assessed further in the conclusion); and, second, it indicates the gap between legal theory, on the one hand, and judicial and political practice, on the other hand (which is, however, not assessed in the framework of this analysis).


The institutionalization of minority rights and their application in the Balkan region shows that awareness of the need to accommodate cultural and linguistic diversity has become a constant in international affairs.

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86 The state of Bosnia and Herzegovina is divided into two entities: Republika Srpska and the Federation of Bosnia and Herzegovina.

87 The Parliamentary Assembly consists of two houses: the House of Peoples and the House of Representatives. The House of Peoples includes 15 delegates, two-thirds of whom come from the Federation (five Croats and five Bosniaks) and one-third from the Republika Srpska (five Serbs). The House of Representatives is composed of 42 members, two-thirds elected from the Federation and one-third from the Republika Srpska.

88 Art.3 of the First Protocol to the ECHR guarantees free elections under conditions that will ensure the free expression of the opinion of the people in the choice of the legislature.

89 Art.14 states that the rights and freedoms set forth in the ECHR shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

90 Joseph Marko, “Politics and Constitutional Reform in Bosnia-Herzegovina” (unpublished manuscript on file with the authors).

91 This article does not aim to analyze and evaluate the quality and practice of minority protection in the countries concerned. To characterize the direct application of international mechanisms as a success and as a guarantee of extensive minority protection in practice is premature. For an assessment of the practical situation of minority protection on the ground, see Dino Abažovic, “Bosnia and Herzegovina: Ten Years after Dayton”, 5 European Yearbook of Minority Issues (2005/06), 196–206; Marko, op.cit. note 2; Bieber, op.cit. note 2.
However, a single narrow legal analysis—albeit dealing extensively with the various instruments of minority protection—cannot hide the fact that an abstract internationally recognized and accepted model concept for minority protection is missing, such that its implementation remains a very controversial issue in the political discourse. Moreover, moving beyond the geographic scope of the Balkans, it can be argued that—where there are only low levels of international guidance and mediation in ethnic conflicts—divided societies tend not to become stabilized. However, does the opposite approach of major international interference have a better record? Bosnia and Herzegovina and Macedonia are, for instance, particular cases of internationally orchestrated diversity-management efforts featuring the intensive involvement of the international community. Likewise, in both cases, different, tailor-made concepts of state formation in ethnic diversity were applied. But even this enormous financial and technical commitment did not result in political unification processes in either of the states. The low level of local identification with the state in both cases, as well as the undermining policies of adjacent kin-states, illustrates that the realm of international minority protection is by no means an abstract *deus ex machina*, only waiting to become successfully implemented. To the contrary, a lack of legal conformity and consistency combined with a ‘realist’ local attitude embedded in a poorly developed local political culture makes it clear that international minority protection still remains weak in its very essence.

This becomes even more obvious when taking the notion of law into account: international law remains a difficult instrument for providing minority protection, since it operates through the medium of usually self-interested states in a legal environment in which the category of the respective state is still the most important connecting factor for the implementation process. This dilemma is exemplified by the lack of a definition of a ‘minority’ in the context of the FCNM, as mentioned above. It is, of course, easy to understand that—in order to reach the lowest common denominator—the definition of how a national minority is constituted was deliberately left open. Nevertheless, at the same time, one can rightly argue that—given the ambiguities of the definition of a ‘minority’—a reasonable debate on substantive minority rights can hardly be meaningful without working with a legal definition of how a ‘minority’ is characterized. It must be taken into account that a number of states have taken advantage of these weaknesses in order to actually protract the granting of minority rights. For example, even though Estonia adopted a law on cultural autonomy for national minorities in 1993, autonomy is only given to ‘citizens’—*i.e.*, to those members of minority groups who
have passed the restrictive procedure to obtain Estonian citizenship. By
doing so, this law is deprived of its substance, since it thereby effectively
excludes large parts of the Russian-speaking minority. Nevertheless,
the lack of a definition of the concept ‘national minority’ must not be
exaggerated, since any restrictive national application of the FCNM to
cover only a narrow definition of beneficiaries is counter-balanced by the
above-mentioned inclusive approach of the Advisory Committee. Thus,
the lack of a definition has not hampered the effectiveness of minority-
rights promotion through international actors (including the OSCE and
the EU).

It is rather only certain elements of the FCNM’s monitoring proce-
dure that need to be considered. For instance, it has become a common
practice for states to delay—without being subjected to any sanctions—the
publication of AC opinions, something that could render the instrument
toothless. It is clear that speedy publication of the AC’s findings are more
likely to set in motion public debates on actual problems than in cases
where the opinions have remained confidential for a long period. The
real litmus test of the ultimate value of the Framework Convention and its
monitoring mechanism is their impact on actual practice. Indeed, the AC
regularly provides opinions that have been diluted through diplomacy. And,
even if rights are established, it is clear that enforcement mechanisms—
especially with regard to minorities—are either too weak to keep what
they promise, or are simply non-existent. These and other weaknesses of
international minority protection are often—understandably enough—
interpreted by ethnic and national minorities as protraction tactics to
silently but steadily put their claims aside. A dilemma in the field of inter-
national minority protection is that states usually tolerate intrusion into
a sensitive area only because instruments like the FCNM or the HCNM
work on the basis of soft law and only exercise non-coercive methods. It
is exactly for these reasons that the way in which international minority
protection may appear to an observer is likely to depend on which theory
of international relations one applies. Liberal approaches suggest that the
possibilities of international cooperation have increased over time due to
industrialization and modernization so that “international relations are
gradually becoming transformed such that they promote greater human
freedom by establishing conditions of peace, prosperity, and justice”. And
indeed, it is true that minority protection has become a recurring

92 Karl Kossler and Karina Zabielska, “Cultural Autonomy in Estonia”, in Thomas Benedikter
(ed.), Solving Ethnic Conflict through Self-Government—A Short Guide to Autonomy in Europe and
South Asia (Bozen/Bolzano, European Academy Bozen/Bolzano, 2009), 56-60, at 59.
93 Korkeakivi, op.cit. note 47, 258.
94 Jennifer Sterling-Folker (ed.), Making Sense of International Relations Theory (Lynne Rienner
feature of international affairs. However, one might equally ask how international minority protection appears to a person advocating a realist approach, suggesting that powerful state actors set the stage for all other actors and interpret international regulations exclusively according to their interests. Such a theory fits this realm as well: even though the Badinter Commission found that Croatia failed, without reservation, to qualify for EC recognition under the EC guidelines, only the promise of Franjo Tudjman to correct this problem satisfied the EC member states sufficiently that Croatia won recognition on 15 January 1992. Concurrent with the issuance of the Badinter Commission opinion regarding Croatia, German Foreign Minister Hans-Dietrich Genscher proclaimed that it did not have legally binding effect for EC member states because it was a device of arbitration, not of international law. And this obviously ironic situation—in which the findings of the Badinter Commission were met with very little consistency by the very same states that had set up this Commission—may strengthen the interpretation capability of structural realism in this context.

Nonetheless, recognizing the collective dimension of minority rights and contributing to their implementation vis-à-vis the Balkans is the best, if not the only, path to preventing ethnically rooted conflicts over power and resources. Despite the important need for further exploration of how international awareness of national and ethnic diversity can be enhanced, the path that has been chosen by the international community has proven to be the right one. The chaotic, reactive and incoherent operational scheme that guided the international community’s management of the crises in the Balkans during the 1990s would hardly repeat itself today. This seems to be, not least of all, because of the fact that minority rights represent core agendas in the realms of the EU, the CoE and the OSCE.
