

# **Measuring the security of persons belonging to National Minorities: Indicators for assessing the impact of the FCNM in its State Parties**

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## Introduction

Security in Europe is intrinsically linked to the protection of persons belonging to national minorities. Thus, when the heads of state and government of the member states of the Council of Europe (CoE) adopted their final declaration of the Vienna Summit in October 1993, they confirmed their commitment to Europe's security by determining 'to implement fully the commitments concerning the protection of national minorities contained in the Copenhagen and other documents of the CSCE.' As a consequence, they instructed the Committee of Ministers to draft a framework convention which should lay down the principles that states would commit to respect. The drafters of the resulting Framework Convention for the Protection of National Minorities (FCNM) were thus guided in their work by the existing documents within the realm of the (then) CSCE, in particular the Copenhagen Document of June 1990.<sup>1</sup> However, the interplay between the OSCE and FCNM went much beyond the drafting stage. The various recommendations elaborated under the auspices of the OSCE High Commissioner on National Minorities (HCNM) refer often to the text of the FCNM. The HCNM himself stated that in addressing the various situations he is faced with, the most important document for him is the FCNM.<sup>2</sup> On the other hand, the Advisory Committee (AC) to the FCNM has regard to the documents and recommendations issued by the OSCE, in particular the HCNM's Office when interpreting the Convention during its monitoring. This shows that there is a close link between the texts and the implementation of OSCE commitments and the FCNM. The implementation of the FCNM can therefore be considered, at least partly, as implementation of OSCE commitments. Consequently, it is of interest to both organizations to assess which impact the implementation of the FCNM has had in its state parties in terms of security and the protection of persons belonging to national minorities.

The FCNM celebrated its 10th anniversary in 2008. In the course of 2009, 23 states are entering their third monitoring cycle. It was considered a good moment to evaluate which effect the FCNM has had on the behaviour of governments and the political discourse involving protection of persons belonging to national minorities. The present article summarizes the results of a study commissioned by the Secretariat of the FCNM.<sup>3</sup> The aim of the study was not to carry out an empirical impact assessment but to lay the groundwork for such an exercise by designing indicators on the process of FCNM adaptation. An initial draft of the study has been circulated for consultation among minority groups and experts and has been integrated with the resulting comments. The indicators are divided into three main areas corresponding to the fields political discourse (II), legislation (III) and the judiciary (IV).<sup>4</sup> It should be stressed that in the empirical application of the identified indicators, these three areas cannot be considered separately but need to be seen as a continuum or process and be linked with each other. This combined reading and application of the indicators will help the user to focus on the assessment of the impact of the FCNM in the stricter sense rather than assessing the state of implementation of minority rights in a specific country, without any link to the FCNM.

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1 See Preamble to the FCNM.

2 HCNM, 'Status of International Protection of National Minorities: Where Do We Stand?', address to the seminar on International Legal Guarantees for the Protection of National Minorities and Problems in their Implementation, Strasbourg, 18 October 2006, at <[http://www.osce.org/documents/hcnm/2006/10/22581\\_en.pdf](http://www.osce.org/documents/hcnm/2006/10/22581_en.pdf)>, 3.

3 Tove Malloy, Roberta Medda-Windischer, Emma Lantschner and Joseph Marko, Indicators for Assessing the Impact of the FCNM in its State Parties. Study prepared by the European Academy, Bolzano/Bozen for the FCNM Secretariat in connection with the Council of Europe Impact-Assessment Conference 'Enhancing the Impact of the FCNM past experience, present achievements and future challenges' 9-10 October 2009 available online at [http://www.coe.int/t/dghl/monitoring/minorities/6\\_Resources/PDF\\_IACConf\\_Report\\_Bolzano\\_en\\_12nov08.pdf](http://www.coe.int/t/dghl/monitoring/minorities/6_Resources/PDF_IACConf_Report_Bolzano_en_12nov08.pdf).

4 Tove Malloy was mainly responsible for the section on Political Discourse Indicators, Roberta Medda-Windischer for the section on Legislative Indicators and Emma Lantschner for the section on Judiciary Indicators.

## Political discourse indicators

Political discourse is not only a matter of articulations in public debates; it is also a function of institutional behaviour. The notion of discourse cuts across the distinction between thought and reality and includes both semantic and pragmatic aspects.<sup>5</sup> The relational aspect of the actions, events and debates informed by the FCNM thus constitute its political discourse. Indicators measuring the influence of the FCNM on the political discourse in states party to the instrument must inform us about the instrument's normative influence on policies, its normative affect on the behaviour of government agencies and officials as well as on actors in political discourses, especially politicians but also interest organizations.

The indicators described in this section pertain to two thematic domains, (1) government actions and practices, and (2) public debates (articulations). Government agencies are arguably the core actors in implementing the provisions of the FCNM. In practice, institutionalized tools available to government agencies to implement international provisions include but are not restricted to establishing new departments or special sections with separate budget lines, and non-institutionalized tools include specific strategies, directives, programmes and projects with special budget lines or ad hoc budgets. Some of these would involve activities that ideally also would include members of national minorities. Once tools have been selected, government agencies can operationalize these through actions and practices that may or may not have targets and objectives. Such actions and practices can be monitored with the help of performance indicators. In addition to and in support of tools selected by government agencies, individual members of agencies, such as members of cabinet, dignitaries and high ranking officials may take individual action which can also be monitored. Finally, ad hoc circumstances can warrant certain actions.

Indicators for government actions and practices were identified in four areas, (1) institutionalized inter-cultural dialogue, (2) dissemination efforts, (3) funding behaviour, and (4) mainstreaming efforts. Measuring improved government support for institutionalized inter-cultural dialogue requires an index describing the changes in adoption of various specific government mechanisms, including innovative models, tools, practices and functions that government agencies can establish to further the joint implementation of the FCNM.<sup>6</sup> The index compiled for this indicator describes governments' actions in terms of inter alia creating new permanent consultation mechanisms, new departments within government agencies to deal with national minorities, establishment of Ombudsperson functions, appointment of National Minority Commissioner, adoption of decrees and executive orders/letters pertaining to any provision in the FCNM as well as adoption of development plans and new or improved monitoring practices, including efficiency control.<sup>7</sup> Measuring increased and improved dissemination efforts requires an index describing the various specific tools that government agencies can use to improve the knowledge of the FCNM among the general public.<sup>8</sup> The index for this indicator includes inter alia the rate of conferences pertaining directly to dissemination of the FCNM

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

6 There is no specific provision in the FCNM placing obligations on States parties to create institutionalized support for inter-cultural dialogue. However, there are several references to inter-cultural dialogue in the text of the FCNM, and promotion of dialogue is a distinct obligation of States parties. AC opinions continue to stress the need for improved dialogue in States parties. Institutionalized inter-cultural dialogue may enhance the possibility of participation of national minorities in the public affairs of the state. As such, it supports the aim of the HCNM's Recommendations Regarding the Effective Participation of National Minorities in Public Life.

7 See further, Tove Malloy et al., *Indicators for Assessing the Impact of the FCNM in its State Parties*, Section B, Indicator A.

8 There is no specific provision in the FCNM placing obligations on States parties to disseminate information about the instrument and its implementation. Awareness among the general public as well as among politicians and the media remains low. The AC has pointed out many times that governments need to broaden the awareness and knowledge about the FCNM.

and national minority issues, of seminars and workshops dealing with improving dissemination, of sub-committees and ad hoc committees specifically aimed at dissemination, of awareness campaigns, of press releases addressing the FCNM as well as national minority or related issues, of new government publications, pamphlets, posters and other info material, of direct references to the FCNM in official documents, of new government web-sites about national minority rights, of new web links or information boxes on existing government web-sites about the FCNM as well as initiating of newsletters about minorities.<sup>9</sup> Measuring increased funding for implementation programmes requires an index describing not only an increase in actual funds allocated to specific programmes but also describing an expansion of budget lines as per the scope of thematic provisions enshrined in the FCNM.<sup>10</sup> The index for measuring increased funding describes inter alia the rate of new programmes with budget lines adopted, of new projects with budget descriptions approved, of new project applications with budget proposals received compared to approved, and of new personnel allocated to dealing with issues of implementation of the FCNM.<sup>11</sup> Measuring improved mainstreaming efforts requires an index describing actions and practices related to ensuring equal representation of persons belonging to national minorities in all spheres of life.<sup>12</sup> The index for mainstreaming describes in addition to official adoption of monitoring practices inter alia improved data collection by proxy or pilot project as well as innovative positive action measures, establishment of periodic review of membership and decreeing permanent membership in relevant commissions and boards as well as incentives to private companies and organizations, number of outreach campaigns to public service providers, number of directives related to mainstreaming, including directives to prohibit gerrymandering in connection with redrawing of districting legislation, and letters from cabinet ministers to public service providers.<sup>13</sup>

Public debates on human and minority rights are likely to involve first and foremost articulations by central and local politicians but also by major NGOs and other civil society and interest organizations.<sup>14</sup> Moreover, the involvement of independent monitoring institutions, such as academic institutes is also important for the assessment of the FCNM in public debates. International actors may also play a role in the domestic debate,

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9 See further, Tove Malloy et al., Indicators for Assessing the Impact of the FCNM in its State Parties, Section B, Indicator B.

10 There is no specific provision in the FCNM placing obligations on States parties to fund programmes aimed at implementing the various thematic provisions of the instrument. Moreover, there are no provisions for direct funding of national minority institutions and organizations. However, numerous expressions used in the instrument encourage States parties to take adequate measures to ensure the implementation of the provisions of the FCNM. Measuring the funding behaviour of government agencies is arguably one of the more tangible evidences of willingness and readiness to implement the provisions of the FCNM in practice. Of course, direct funding to national minority institutions remains the most normative approach. In a broader perspective it is also evidence that a State is moving toward a higher level of human security and human dignity as well as a developed stage of democracy. The rationale for this indicator is thus clearly in step with the final declaration of the Vienna Summit 1993 and the various OSCE documents.

11 See further, Tove Malloy et al., Indicators for Assessing the Impact of the FCNM in its State Parties, Section B, Indicator C.

12 The FCNM imposes several obligations on States parties to ensure full and effective equality between persons belonging to national minorities and those belonging to the majority. Indeed, the ideological spirit of the entire instrument is to obtain full and effective equality for persons belonging to national minorities. Mainstreaming is nowadays a common tool in the implementation of the principle of equality. It is also a fundamental requirement if governments want all members of society to participate in political discourse. The indicator speaks thus directly to the aim of the FCNM's Recommendations Regarding the Effective Participation of National Minorities in Public Life.

13 See further, Tove Malloy et al., Indicators for Assessing the Impact of the FCNM in its State Parties, Section B, Indicator D.

14 Of course, the participation of national minorities in public debates is considered a normative right and promoted by the FCNM's Recommendations Regarding the Effective Participation of National Minorities in Public Life. As indicators here are designed to monitor governments and public actors in the public sphere, the definition of the indicator does not refer to national minorities.

especially in the ratification stage but also in the efforts to implement the FCNM.<sup>15</sup> Spaces for such public debates include the floor of parliaments, the public media, public narratives and public spaces. Depending on the degree of knowledge of the FCNM among these actors, the attention to national minority rights will vary in public debates. The stronger the knowledge of the FCNM is among actors, the more likely that they will refer to the instrument and to minority rights in public debates. The nature of the articulations is also very important. The normative force of the instrument is likely to inform debates in a positive sense, whereas a perceived interference with domestic affairs is likely to inform the debates in a negative sense.<sup>16</sup> In addition, a prevailing environment of prejudice and xenophobia is likely to result in the FCNM being portrayed negatively.

Five indicators were identified for monitoring public debates, (1) parliamentary politics, (2) local politics, (3) racism and xenophobia, (4) non-institutionalized inter-cultural dialogue, and (5) public spaces. Measuring increased attention to FCNM provisions in parliamentary politics requires an index of activities and actions initiated directly by members of parliament (MPs) as well as institutions attached to parliaments.<sup>17</sup> The index for parliamentary politics is rather large. It includes inter alia the rate of ratification hearings/debates, of debates and votes with regard to possible constitutional amendments/changes to achieve recognition of national minorities, of debates in committees with regard to recognition of specific minority groups as well as of debates or non-debates on recognition of specific minorities known to exist within territory of the state. Debates on the concept of 'national minority' as well as debates on adopting Declarations to the FCNM, as well as votes taken on Declarations to the FCNM are also important. Hearings pertaining to the FCNM and/or national minority issues as well as speeches given by majority MPs on national minority issues signify the degree to which the political discourse is taking into consideration the FCNM. Finally, the rate of projects and studies initiated and funded by parliamentary budgets as well as study visits to national minority regions by majority MPs and official apologies by majority MPs can be of significance.<sup>18</sup> Measuring increased attention to FCNM provisions in local politics requires an index of activities and events of various institutions, including civil society institutions addressing national minority issues as well as national minority representation in

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

16 A list of relevant wording to look for in the analysis of public debates include recognition, group rights, definition of minorities, non-recognition of minorities, cultural pluralism, value pluralism, ethical pluralism, inter-cultural dialogue, diversity, tolerance and respect, effective participation, full and effective equality, good governance, transparency, gender equality, social inclusion, flexibility and inclusiveness, citizenship and citizens rights, threshold exception, social cohesion, good neighbourly relations, cross border co-operation, European values, added value to society.

17 Debates on the floor of national or local parliaments are arguably the most representative activity of the state of affairs and the health of a democracy. The ratification of the FCNM is usually enacted by votes in the Council of Europe's member states parliaments. With a few exceptions, the FCNM has thus been the topic of parliamentary discussions at one point in the last decade. Members of parliaments therefore have little excuse for not knowing about the existence of the instrument and the normative standards that it represents. However, normative debates about more inclusiveness seldom happen. Instead, attempts to exploit inter-ethnic tensions for political purposes, be it locally, nationally or internationally, appear to happen more often in some countries. Essentially, there is no evidence in the AC's monitoring that normative activities of parliaments are increasing. This is of great concern since parliamentarians are the custodians of democracy and thus should be the first to sound the alarm when provisions of the FCNM are not implemented. Although the overall aim of the OSCE is to bring comprehensive and co-operative security to the region rather than democratization as such, democracy is clearly linked to security as argued in our Introduction.

18 See further, Tove Malloy et al., Indicators for Assessing the Impact of the FCNM in its State Parties, Section B, Indicator E.

local government and institutions.<sup>19</sup> The index describing attention to the FCNM at the local level includes inter alia the rate of representatives of national minorities involved in local government (sub-national, district, municipal) as well as in local commissions/committees (trade and economic development, environment, INTERREG). Representation of national minorities on local boards (schools, media, church affairs, etc.) is also significant as is the rate of public events addressing the FCNM and national minority rights.<sup>20</sup> Measuring increased attention to combating racism and xenophobia requires an index describing initiatives to record acts of racism as well as monitor hate speech.<sup>21</sup> This includes inter alia monitoring the adoption of new initiatives on data collection, especially new ethnicity sensitive initiatives on criminal data collection.<sup>22</sup> Measuring improved non-institutionalized inter-cultural dialogue requires an index describing ad hoc and unofficial efforts to promote dialogue.<sup>23</sup> This index includes inter alia the rate of events and activities pertaining specifically to inter-cultural dialogue, the establishment of new inter-cultural commissions, joint minority-majority participation in local and national festivals as well as joint minority-majority celebrations of historic (reconciliatory) commemorations. The rate of honorary titles and medals awarded to members of national minorities are also significant. Increased minority participation in planning of visits by kin-state dignitaries and the rate of official visits by dignitaries to national minority regions as well as increased inclusion of members of national minorities in delegations and high-level meetings.<sup>24</sup> Measuring increased attention to FCNM provisions in public spaces requires an index describing actions, events, and practices applied when representing national minority presence and issues to the general public.<sup>25</sup> The index compiled was quite large. It included inter alia the rate of new national minority cultural centres, national minority libraries and museums as well as the rate of TV and radio stations owned/run by national minorities, of minority newspapers in national minority languages as well as hours in public TV and radio dedicated to national minority programmes. The hours within public programming dedicated to national minorities' own programmes, the time of the day that programmes about national minorities are broadcast as well as national

19 The level where members of national minorities require the most protection is arguably the local level. Most national minorities reside in peripheral areas and border regions, and conditions in these regions are often inferior to those of the capital regions. The high degree of decentralisation on many key issues pertaining to the implementation of the FCNM means that the local authorities have a central responsibility in monitoring and addressing problems in this respect. The reach of the provisions of the FCNM to ensure minority rights at the local level is therefore of particular importance if full and effective equality is to be achieved. The HCNM's most recent document, the Recommendations on National Minorities in Inter-State Relations speak to this indicator.

20 See further, Tove Malloy et al., Indicators for Assessing the Impact of the FCNM in its State Parties, Section B, Indicator F.

21 The FCNM calls several times upon States parties to create a climate of tolerance. Xenophobic rhetoric is still used by politicians and is also at times fuelled by media reports disseminating negative stereotypes about persons belonging to minorities and immigrants. Legislation, such as reforming immigration acts to limit immigration also invite intolerance and xenophobia, including in the political arena. During the monitoring the AC has remarked numerous times that efforts to improve tolerance and dialogue need to be expanded. Likewise, the HCNM's Recommendations on Policing in Multi-Ethnic Societies calls for tolerance.

22 See further, Tove Malloy et al., Indicators for Assessing the Impact of the FCNM in its State Parties, Section B, Indicator G

23 During the monitoring the AC has remarked numerous times that efforts to improve tolerance and dialogue need to be expanded. While institutionalized mechanisms of inter-cultural dialogue do contribute to promoting inter-cultural dialogue, non-institutionalized and informal efforts are likely to evidence the true improvement of the inter-cultural environment. Public discourse applying the phrases and concepts noted above will also evidence improved inter-cultural environment. But actions are equally as important. This is why this indicator speaks to the aim of the HCNM's Recommendations on Policing in Multi-Ethnic Societies.

24 See further, Tove Malloy et al., Indicators for Assessing the Impact of the FCNM in its State Parties, Section B, Indicator H.

25 There are a number of provisions of the FCNM which suggest that infringement of the freedom of expression, peaceful assembly and association of national minorities must be prohibited. In particular national minority representation in public spaces is considered a requirement where a sizeable proportion of the population belongs to a national minority. However, the visibility of national minority cultures in public spaces is limited in many States parties to the FCNM. This indicator thus speaks directly to the HCNM's Recommendations Regarding the Effective Participation of National Minorities in Public Life.

minority articles in prominent spaces in mainstream press are also significant to this indicator.<sup>26</sup>

## Legislative indicators

The non-self executing character of the provisions of the FCNM (the so-called 'programme-type' provisions) leaves to States Members a broad margin of discretion as to the way the norms of the FCNM are to be implemented in their domestic legal orders, and this to enable them to take particular circumstances into account.<sup>27</sup> The proper transposition of the provisions contained in the FCNM in the domestic legal orders of the Member States is crucial for determining whether and to what extent public authorities shall respect the FCNM and persons belonging to national minorities can rely on these provisions in dealing with administrative or judicial authorities. The task of assessing how and to what extent the FCNM's system has an impact on the domestic legislation of the Member States<sup>28</sup> — the so-called 'vertical interpenetration' of the international and national systems,<sup>29</sup> is thus of primary importance.

The Legislative Indicators illustrated in this section are divided into four main categories of minority issues, which correspond to the historical development of international minority protection.<sup>30</sup> During the initial stage of this development, legal protection was principally focused on the protection from destruction (Right to existence) and from discrimination on account of ethnic, linguistic, cultural or religious distinctiveness (Equal treatment and non-discrimination). Later on, it was recognised that minorities must also be given the space to maintain and develop their linguistic, ethnic and religious identity within a diverse society (Right to identity and diversity). Full and effective participation in cultural, social and economic life and in public affairs is at times considered to be a so-called 'fourth generation' minority entitlement (Participation in cultural, social and economic life and in public affairs).

The Right to Existence and the Recognition of Minority Groups has been analysed along three set of indicators: (1) Status of the FCNM in the domestic legal system, (2) Scope of application FCNM and (3) Definition of minorities and Data collection. Assessing the status of the FCNM in the domestic legal system refers to an

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26 See further, Tove Malloy et al., Indicators for Assessing the Impact of the FCNM in its State Parties, Section B, Indicator I.

27 Doc. CAHMIN(94) 5, Strasbourg, 1 February 1994, First meeting report, 25-28 January 1994, para.14, 4. The word 'framework' indicates in fact that the principles contained in the FCNM are not directly applicable in national legal systems of the States Parties, but need to be implemented 'through national legislation and appropriate governmental policies'. See, Preamble of the FCNM and the Explanatory Report of the FCNM, para.11.

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

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

30 For further details, see Tove Malloy, Roberta Medda-Windischer, Emma Lantschner and Joseph Marko, Indicators for Assessing the Impact of the FCNM in its State Parties, Section B, Indicators A-J. For a slight different categorization, see Asbjørn Eide, Prevention of Discrimination and Protection of Minorities, Report submitted to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Fifty-fifth session, 17 June 2003, UN Doc. E/CN.4/Sub.2/2003/21; Marc Weller, 'Creating the Condition necessary for the Effective Participation of Persons belonging to National Minorities – A critical evaluation of the first results of the monitoring of the FCNM 1998-2003', in *Filling the Frame, 5th Anniversary of the entry into force of the FCNM*, 30-31 October 2003 (Council of Europe, Strasbourg, 2003), 3.

index describing the status and rank to be assigned to this instrument in the hierarchy of national sources of law, the modalities through which the provisions of the FCNM are incorporated in the domestic legal system and the typology of national legislation implementing the provisions of the FCNM. This indicator seeks also to verify the potential, indirect 'negative' impact that the FCNM may have on national legislation if not interpreted in good faith as required by Article 2 of the FCNM and thus in breach of Article 22 FCNM (on the prohibition to construct the FCNM as limiting or derogating from human rights and fundamental freedoms).<sup>31</sup> The scope of application of the FCNM and the extension of the national definition of minorities has been analysed by developing an index assessing the limitations introduced by states to the scope of application of the FCNM and the definition of minorities provided by the contracting parties either through the declarations introduced upon ratification of the FCNM or by making reference to other domestic legislative sources.<sup>32</sup> The indicator concerning the availability and quality of statistical data required an index describing the methodologies employed to collect and process data on minorities, the level of disaggregation, the principles of confidentiality, minority consultation and the voluntary nature of the statements collected.<sup>33</sup> A combination of quantitative and qualitative statistical information on minorities, their numerical size and geographical distribution — to check whether members of a minority live compactly together in a part of the state territory or are dispersed or live in scattered clusters — are in fact essential tools to improve minority protection and the right to existence in a broad sense.

The index measuring the developments related to the Anti-Discrimination legislation focuses on, inter alia, the nature and the scope of application of anti-discrimination legislation, the grounds of discrimination included in the national legislation and the fields of application, the inclusion of indirect discrimination and the adoption of special measures for minorities as well as the mechanism of redress and the institutional instruments for monitoring and implementing anti-discrimination legislation. One of the main questions concerning minorities and the principle of equality is how can variations to the principle of non-discrimination be justified. Particular concern is thus given to how a balance can be struck between the concept of non-discrimination and special norms necessary to guarantee equality for minorities.<sup>34</sup>

The Right to Identity represents in many ways the essence of the case for minorities within the corpus of human rights - the claim to distinctiveness and the contribution of a culture on its own terms to the

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31 For example, in Lithuania there is an ongoing discussion on the introduction of a new legislation concerning ethnic minorities that, by merely reproducing the text of the FCNM, in particular art. 10(2) (use of the minority language in relations with the administrative authorities) and 11(3) (display of topographical indications in the minority language), may have the effect of limiting the protection afforded to minorities by the existing domestic law. See, Art. 4 and 5 of the Lithuanian Law on Ethnic Minorities no. XI-3412 23, November 1989.

32 Most member states of the FCNM that have limited the personal scope of application of this instrument with respect to new minorities stemming from migration have done so by requiring that members of the group concerned must be citizens of the state in order to constitute a national minority. See, among others, FCNM, List of Declarations, Declaration by Germany, dated 11 May 1995, at <<http://conventions.coe.int>>.

33 See, among others, the UN 1990 Guidelines concerning computerised personal data files; EU Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data; CoE 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

34 Article 4 FCNM contains, in addition to the rights of equality before the law and of equal protection by the law as well as the prohibition of discrimination, a further element of minority protection: the introduction of adequate measures for the promotion of full and effective equal rights between minority and majority. The last recital of Article 4 (2) adds that in adopting those measures states must 'take due account of the specific conditions of the persons belonging to national minorities'. The 'adequacy' of such measures is clarified by paragraph 2 of Art. 4 FCNM and the Explanatory Report (para.39).

cultural heritage of mankind. The right to diversity and identity has been analysed along the following set of indicators: (1) Linguistic Rights, (2) Educational Rights, (3) Freedom of Religion and (4) Media Rights .

Linguistic rights required an index describing the existence of clear and comprehensive legal instruments concerning the use of minority language(s) in contact with administrative and judicial bodies, and the use of one's own name in the form of the minority language as well as the conditions to display in a minority language various topographical indications. A difficult question concerning language rights relates to the use of minority language with administrative authorities and public services. Here, in accordance with Article 10(2) of the FCNM much depends upon a series of conditions and 'appropriate circumstances' such as being a minority 'traditionally or in substantial numbers', if those persons 'so request' and where such request corresponds to a 'real need'.<sup>35</sup>

The index related to educational rights describes the conditions regarding the teaching 'in' and 'of' minority language(s) in terms of numbers of hours, typology of school disciplines, types of schools, geographical dimension, numerical thresholds, availability of textbooks and educational material in minority language(s) as well as qualified staff in the mother tongue, provision of special measures to tackle specific problems concerning minority education, conditions for setting up private educational institutions, involvement of minorities in curriculum development and implementation of programming, co-operation with kin-states, awareness raising of cultural and/or religious diversity.<sup>36</sup> Important aspects related to the right to education are the availability of up-to-date textbooks and educational and pedagogical materials as well as the training and adequate numbers of qualified teachers and educational assistants. Bilateral co-operation programmes with kin-states and cross-border initiatives have been indicated by the AC as tools to tackle the problem of the shortage of textbooks and professional staff for instruction in mother tongue.<sup>37</sup>

The right to freedom of religion encompasses the general freedom of thought, conscience, and religion, as set out in Article 7 of the FCNM, and the right to manifest one's religion or belief as provide for in Article 8 of the FCNM. Paragraph 2 of Article 8 includes an additional element, namely the right to establish religious institutions, organisations and associations. The adoption of national laws on the legal status of religious communities and the conclusions of specific agreements between the government and churches and/or religious communities have been considered by the AC as important elements to address specific concerns expressed by the community concerned.<sup>38</sup> Moreover, issues concerning religious institutions, sites and properties, as protected by Article 8 of the FCNM, have been raised in connection with their destruction or confiscation.<sup>39</sup> The index in the field of media rights has been developed along the lines of

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

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

37 ACFC, (Second) Opinion on Croatia, 13 April 2005, ACFC/INF/OP/II(2004)002, para.143. See, HCNM, The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations, 2 October 2008.

38 For instance, in Croatia the conclusion of agreements between the Government and the Serbian Orthodox Church and the Islamic Community in 2002 led to progress in the equal access of these religious communities to various institutions, including in terms of the possibility to offer religious services in the army. See, ACFC, (Second) Opinion on Croatia, 13 April 2005, ACFC/INF/OP/II(2004)002, para. 101.

39 The most disturbing example in this regard has been reported in Kosovo and concerns the destruction of important Orthodox religious sites ACFC, (First) Opinion on Kosovo, 2 March 2006, ACFC/OP/I(2005)004, para. 52.

the existence of a comprehensive and clear legal framework pertaining to minority language programming, the regulation, including through licensing, of public and private media, the involvement of minorities in the programming and other aspects related to broadcasting and printed media, the access to transfrontier media, and the existence of codes of conduct for media professionals regarding the reporting of minority issues. Media rights are of essential relevance for the protection and promotion of the distinct identity of minorities.<sup>40</sup> In our modern age, media are subject to rapid developments featured by the introduction of new technologies and instruments, such as internet and digital modes of distribution. In addition to the more traditional printed media and radio/TV broadcasting, to implement this indicator it would be thus necessary to monitor the existence of legislation reflecting the emergence of new technological means.

The last section on Effective Participation in Public Life has been discussed through two set of indicators: (1) Effective participation in cultural, social and economic life and (2) Effective participation in public affairs.<sup>41</sup> The indicator pertaining to the effective participation in cultural, social and economic life is linked to an index describing access to employment and working conditions, employment in the public sector, promoting employability and adaptability, self-employment, access to land and restitution of property, housing, health, social assistance, cultural associations and modalities to support them. Measuring the legislative developments related to the effective participation of minorities in public affairs required an index on the legislation pertaining to voting rights, political bodies, political parties, the participation of minorities in the legislative process and the requirements that may hamper the participation of persons belonging to national minorities such as language proficiency, citizenship and residency.

The piloting of legislative indicators might appear at the first sight fairly straightforward. There are however a number of hindrances that must be taken into account in order to collect all relevant data and have a clear picture of the influence exerted by the FCNM on the domestic legal systems of its Member States. The main sources for collecting data would be obviously the texts of the national legislation pertaining to minorities as well as those having, if only indirectly, an impact on them. Direct source would be obviously the Official Gazettes of the state concerned that, if available, would also be accessible via internet from the official web portals of the national and local parliaments. In this case, the first obstacle might be the limited availability of the national legal texts in languages different from the official one(s) that might be a hindrance for those whose mother tongue is different from the official language(s), such as members of minority groups. Indirect sources are the database of domestic legislation collected by private or public research institutes or by international organisations as well as documents generated through the monitoring mechanism of the FCNM,

i.e. States' Reports, Shadow Reports, Opinions of the AC and its Commentaries, Government Comments, Resolutions of the Committee of Ministers. All documents related to the FCNM must be read in conjunction with each other to investigate the causal link between the FCNM system and the national legislation. Finally, it is relevant to note that the data collected through the legislative indicators must be complemented with data from non-legal instruments such as administrative measures, regulations and governmental policies pertaining to the implementation of the normative instruments. This will provide a more detailed and

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

41 See, ACFC, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, 5 May 2008; HCNM, The Lund Recommendations Regarding the Effective Participation of National Minorities and Explanatory Note, 1 September 1999; HCNM, Warsaw guidelines - Recommendations to assist national minority participation in the electoral process, elaborating on the Lund Recommendations, 1 January 2001; HCNM, Recommendations on Policing in Multi-Ethnic Societies, 9 February 2006.

complete understating of the domestic ‘internalisation’ of the FCNM.

## Judiciary indicators

The role of the judiciary is to interpret the law and apply it to the social context within which it has been established. The textual analysis undertaken by a judge of every legal norm has to take into consideration the basic normative principles and values enshrined in each constitutional system.<sup>42</sup> One and the same provision can therefore be differently interpreted by different (constitutional) courts, which can have important implications for the protection of minorities. Court rulings can therefore, within the framework provided by the constitution, create a minority- friendly or minority-hostile environment, contribute to the promotion of minority rights and their protection or hamper a progressive development from the perspective of minority rights protection.

This section looks into the question of how the impact of the FCNM, including the AC’s opinions and the Committee of Ministers’ resolutions, on a courts’ system can be assessed. The indicators developed are grouped into two thematic domains: one pertaining to the courts’ structures and organization and one pertaining to the direct impact the FCNM has had on judgments. The professional groups mainly concerned by indicators in these fields are judges, prosecutors, judicial police, civil servants in the judicial administration, lawyers. A first indicator for assessing the impact of the FCNM on courts’ structures and organization concerns the degree of awareness about minority issues in general and the FCNM in particular for justice related professional groups as a precondition for any sort of impact that the FCNM can display on courts’ rulings. To counter shortcomings in the implementation of the FCNM due to a lack of awareness amongst government officials, politicians, judges and police,<sup>43</sup> the AC encourages states to raise awareness about the FCNM and the results of monitoring cycles<sup>44</sup> and to provide training on the FCNM across the country.<sup>45</sup> Such efforts are easily measurable in quantitative terms but not so easily in qualitative terms, which is, however, the more important component.

A second indicator in the domain of the courts’ structures and organization relates to the recruitment of persons belonging to national minorities for positions in connection with the judiciary. The AC ascertained in several of its opinions a disproportionately low number of persons belonging to minorities who work in judicial structures. This makes it difficult to build confidence in the judicial system among minority members,<sup>46</sup> and is not in line with the principle of effective participation (Art. 15 FCNM).<sup>47</sup> Measuring

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

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

44 See, e.g., para. 6 of the second opinion on the Russian Federation. Such efforts should reach out also to persons belonging to national minorities, in order for them to be aware of additional arguments that could back their claim. This aspect is, however, addressed under the political discourse indicators.

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

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

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

minority representation in legal professions requires the collection of reliable statistical data on the level of participation (in terms of numbers and hierarchical positions) of persons belonging to national minorities in these professions. Action plans, training programmes and other incentives having the aim to increase the recruitment of minority members in the judiciary need to be assessed.

A third indicator to assess the impact of the FCNM in the domain of the court's structures and organization relates to the accessibility to the judiciary in terms of language use and outreach. Persons belonging to national minorities can be disadvantaged in their access to the judiciary, first because of potential language barriers that might hamper both, the possibility of finding out about possible remedies and of putting them into practice. Second, minorities often settle in the periphery of a country where the access to courts is difficult due to the distances which is sometimes further aggravated by a limited freedom of movement. Finally, minorities sometimes find themselves in economically more difficult situations than members of the majority and therefore need the support of the state when, for instance, for certain reasons the assistance of a lawyer proves indispensable for an effective access to a court.<sup>48</sup> An indicator on accessibility of the judiciary can be populated by describing which efforts have been made in order to facilitate the communication in the broadest sense of persons belonging to national minorities with judicial authorities. This includes an analysis of the legal provisions concerning the use of a minority language in contacts with judicial authorities and their implementation; of the number of translators and interpreters employed at a court; of the information available in minority languages in courts buildings and websites; of the availability of legal aid provided free of charge and of the outreach capacity of a court. To get reliable information on this indicator it is necessary to look beyond the legal provisions into the day-to-day practice.

A last indicator useful for the assessment of the impact of the FCNM refers to the way in which authorities are dealing with cases related to minorities, in particular when it comes to discriminations or ethnically motivated incidents. What is meant here is not so much how such issues are dealt with in terms of the cases' merits but in terms of their more or less systematic and coordinated 'administration'.

Apart from analysing the courts' structure and organisation, an assessment of the impact of the FCNM in its state parties has taken into consideration how courts have dealt with the question of direct applicability of the FCNM and in which way they have made reference to the FCNM in their judgments.

Different constitutions apply different approaches towards international law, which raises the question of which rank international treaties have within the hierarchy of legal norms within a specific country. An analysis of these settings allows a first assessment of what impact the FCNM can 'formally' have on judicial proceedings. However, in order to assess the real impact of the FCNM one has to go beyond such a positivistic approach and analyse the judgments themselves.<sup>49</sup> By doing so, one comes to the conclusion that the FCNM must have a persuasive authority that induces judges to take it into consideration even in cases where it has not even entered into force.<sup>50</sup>

Counting the number of cases in which direct reference to the FCNM is made is a first indicator for the

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

49 A seminal study on this topic has been provided by Francesco Palermo, 'Domestic Enforcement and Direct Effect of the Framework Convention for the Protection of National Minorities. On the Judicial Implementation of the (Soft?) Law of Integration', in Annelies Verstichel et al., *The FCNM: A Useful Pan-European Instrument?* (Intersentia, 2008), 187- 214.

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

awareness of judges of the Convention and the degree of “absorption” of the FCNM within the judicial culture of the States.<sup>51</sup> If, however, the overall number of cases with a minority subject increases, even without direct reference to the FCNM, this can also be considered as a sign for an increased awareness of minority issues in general.<sup>52</sup> Looking into the fields that were mainly covered by such judgments gives information on one hand, about which fields a mostly felt by minority members and on the other, in which fields the FCNM has the biggest potential to develop some ‘hard-core rights ... that might become judicially enforceable.’<sup>53</sup>

Judgments that have made reference to the FCNM can be divided in two groups: judgments that have made ‘constructive’ use of the FCNM and those that have made ‘disruptive’ use of it. By measuring ‘constructive’ use of the FCNM it is meant to analyse case law where reference has been made to the FCNM with the effect of filling a legislative gap in the national system or promoting the establishment of standards. Finding out about such court rulings gives information about how courts interpret different provisions of the Convention. It further gives insight into the weight given within a national legal system not only to the FCNM as such but also to the soft jurisprudence of the AC. Cataloguing constructive use of the FCNM in court rulings could be useful also for other courts and used as material for trainings for judges. Three types of ‘constructive’ references to the FCNM can be identified:<sup>54</sup> First, there are judgments in which the FCNM is referred to as ‘indirect source of interpretative inspiration’. In these cases the FCNM is not the decisive element to decide the case but provided additional support for the decision.<sup>55</sup> Second, there are judgments, comparatively fewer than cases of the first category, where courts referred to the FCNM ‘as real parameter for adjudication.’<sup>56</sup> Third, in some few cases ‘the courts more or less explicitly consider the FCNM to be a ‘European standard’.<sup>57</sup> The term ‘disruptive use’ is applied here to describe situations in which a court has used the FCNM either to reduce already existing rights of persons belonging to national minorities — which is, of course, a clear violation of Article 22 of the FCNM — or to restrictively interpret certain concepts,<sup>58</sup> or to show that a common European standards in a certain field has still not emerged<sup>59</sup> and therefore states remain with a very broad margin of appreciation when it comes to the determination of measures for the implementation of the FCNM.

Finally, measuring the impact of the FCNM on the implementation of court rulings requires an analysis of the

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51 Palermo, ‘Domestic Enforcement ...’, 192.

52 A cursory research in 2009 resulted in a number of 36 court decisions that made reference to the FCNM. 22 of which were rulings by national constitutional courts, 8 by ordinary courts and 6 by the ECtHR. However, in many countries, there are many more judgments dealing with the protection of national minorities.

53 Palermo, ‘Domestic Enforcement ...’, 193.

54 The distinctions made here follow Palermo, ‘Domestic Enforcement ...’, 196-201.

55 This was e.g. the case in Constitutional Court of Romania, 2 April 1996, case. no. 35/196 (Romania had signed and ratified the Convention but it entered into force only on 1 February 1998); Constitutional Court of Slovenia, 12 February 1998, case U-I-283/94 (at that moment it had signed but not ratified the Convention); Constitutional Court of Latvia, judgment of 5 June 2003, case no. 2003-02-0106 (Latvia had signed in 1995 but ratified the Convention only in 2005); Constitutional Court of Macedonia, 20 May 1998, U.br. 49/98; Constitutional Court of Croatia, 7 February 2007, U-III-3138/2002.

56 E.g. Constitutional Court of Romania, 9 April 2001, no. 112/2001, at I.1 (for details see Malloy et al., *Indicators for Assessing ...*, 92-93); Constitutional Court of Croatia, 12 April 2001, U-I-732/1998: The Court justified affirmative action vis-à-vis its national minorities in the field of political participation amongst others by referring to Art. 4(3) of the FCNM. See also ECtHR, Appl. No. 57325/00, D.H. et al. v. the Czech Republic, judgment (Grand Chamber) of 13 November 2007.

57 Palermo, ‘Domestic Enforcement ...’, 196-199. See, for instance, Constitutional Court of Romania, 20 July 1999, no. 114/1999.

58 An example for such disruptive use is a decision of an administrative court in Lithuania. For details see Malloy et al., *Indicators for Assessing ...*, 94-95.

59 See, for instance, ECtHR, Appl. No. 27238/95, Chapman v. United Kingdom, judgment of 18 January 2001, para. 94.

government's and the legislator's behaviour after the adoption of the judgment which can be either proactive or reluctant. Such an assessment is at the crossing between the judiciary, political discourse and legislative indicators. The implementation of court rulings may trigger both political discourse and government or legislative actions. Whatever is done needs to be evaluated as to the concrete effect it has had to remediate the individual and the general problem.

## Conclusions

The indicators discussed in this article are indicators that may help assess the impact of the FCNM on the behaviour of governments, legislatures and judiciaries. The awareness and acceptance of international standards among parliamentarians and politicians as well as public servants and judges are an indication of whether persons belonging to minorities can feel secure in the territory where they live. As such the indicators speak to the aim of the OSCE's Human Dimension and the HCNM's mandate and work. They support specifically the aim of the HCNM's Recommendations in various areas of minority politics, and they may help take the OSCE's aim as a forum for security dialogue further by showing the extent to which governments are serious about the protection of persons belonging to national minorities. The indicators assess therefore the performance of the FCNM as a governance process rather than its ability to secure the individual protection of persons belonging to national minorities. This will be a future step.















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