7. Conclusion: How to Move Forward

The concerns of States regarding nation building and territorial integrity go hand in hand with the lack of political will for strong minority specific rights. Nevertheless, the development of the human rights paradigm since World War II, at the level of the UN and especially of the Council of Europe, recognises that persons belonging to minorities have additional protection needs. This is also reflected in the FCNM's core values of substantive equality, respect for minorities' distinct identity and inclusion/integration.

The chapter demonstrates that the ECtHR in several respects is willing to interpret the ECHR non-specific rights in a way that embraces substantive equality and respects minorities' identity, thus confirming the FCNM's core values. At the same time, the preceding analysis has revealed that these developments have ultimately been minor, due to the strong focus on a broad margin of appreciation of States, allegedly informed by the Court's legitimacy concerns towards the contracting States.

The case law on language in education rights demonstrates the critical importance of education in general and the medium of instruction in particular in situations of battling nations, due to the important socialisation role of education. The few cases and the shifts between them also nicely demonstrate the ECtHR's legitimacy concerns towards the contracting States. The Court's case law is wavering indeed, revealing leaps forward in cases of illegal occupation, and, as visible in the cases against Latvia, leaps backwards in a post-occupation phase where the minority claiming rights is the same population group that previously occupied the country. Does this reveal that not all minority rights are under threat but rather the rights of particular minorities that are linked to illegal expansionism? Unfortunately, the Court's dismissal of the value of minority rights and their possible contribution to the human rights paradigm risks having broader ramifications. This reasoning, in any event, also entailed that the Court's significant recognition in *Valiullina* of the relevance of the medium of instruction in terms of the prohibition of discrimination, ultimately resulted in a finding of non-violation.

The chapter thus urges the ECtHR to re-evaluate the value of minority specific rights and the underlying core values of substantive equality, the right to respect for the minority identity and minorities' inclusion, and the way in which these can influence the (systematic) interpretation of the ECHR. More particularly regarding the medium of instruction, acknowledging and applying the proportionality checks implicit in the minority specific rights could also assist the Court in fine-tuning the strong principle it has put forward in *Catan*, instead of throwing it out entirely.

7

Minorities' Participation in Public Affairs: A Human Rights Norm or a Conflict Prevention Technique?

MILICA V. MATIJEVIĆ* AND ANA KNEŽEVIĆ BOJOVIĆ**

1. Introduction

If we tried to parallel the evolution of international minority rights as human rights after the Second World War with the main stages of human life, we would probably say that they are now in an early adulthood phase. The inclusion of Article 27 in the International Covenant on Civil and Political Rights[1] could be seen as the moment when they were born as a part of international human rights law; the different attempts to develop them, which were crowned in the United Nations Declaration on Minorities,[2] as a long childhood; and the entering into force of the Framework Convention for the Protection of National Minorities (FCNM)[3] – the first legally binding multilateral instrument devoted to minority protection – could represent their coming-of-age.

One can observe in that picture that the 'adolescence' of international minority rights passed in the blink of an eye. Their meteoric maturing was a consequence of the outburst of ethnic violence on the European continent. It is known in the history of minority rights that their quick evolution was a reaction to the proliferation of violent conflicts that followed the collapse of the Soviet Union and the Socialist

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[1] International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171.

[2] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (3 February 1992) UNGA Res 47/135.

[3] Framework Convention for the Protection of National Minorities (1 February 1998) ETS No 157. Hereinafter, 'FCNM', 'Framework Convention' or 'Convention'.

Federal Republic of Yugoslavia.[4] Less known is that this development was also propelled by the progress in the understanding of ethnic conflict.[5] By the last decade of the twentieth century, conflict resolution theory was already a fully grown field of peace studies, based on the postulate that addressing the needs of ethnic groups was a key to resolving violent ethnic conflicts.[6] In the 1990s, these theoretical insights were incorporated into the conflict resolution strategies pursued in the European war-torn countries through the peacebuilding efforts of the United Nations (UN), the European Union (EU), and other international organisations.[7]

The postulates of conflict resolution theory, and conflict prevention as such,[8] are clearly reflected in the vision of minority rights as 'guarantees of stability, security and peace' on which the FCNM is based.[9] However, the ambition of the drafters of the FCNM was not only to prevent the re-emergence of old (or the emergence of new) ethnic conflicts, but also for the Convention to serve as a source of legally binding principles. These principles were to be developed into fully-fledged minority rights norms through their transposition into national legal frameworks.[10] The Advisory Committee on the FCNM[11] has been given the most

[4] See, for instance: Will Kymlicka, *'The Evolving Basis of European Norms of Minority Rights: Rights to Culture, Participation and Autonomy'* in Marc Weller, Denika Blacklock and Katherine Nobbs (eds), *The Protection of Minorities in the Wider Europe* (Basingstoke, Palgrave Macmillan, 2008) 12–13; Kirsten Shoraka, *Minority Rights in the EU* (London, Routledge, 2010) 95–96; David Galbreath and Joanne McEvoy, *European Minority Rights Regime* (Basingstoke, Palgrave Macmillan, 2012) 112.

[5] According to the definition found in the Routledge Handbook of Ethnic Conflict, ethnic conflict is 'a form of group conflict in which at least one of the parties involved interprets the conflict, its causes, and potential remedies along an actually existing or perceived discriminating ethnic divide (Karl Cordell and Stefan Wolff, 'The Study of Ethnic Conflict: An Introduction' in Karl Cordell and Stefan Wolff (eds), *The Routledge Handbook of Ethnic Conflict* (London, Routledge, 2016) 4).

[6] For a brief overview of the main conflict resolution theories: Milica V Matijević and Vesna Erić Ćorić, 'Peacebuilding and the Conflict Resolution Theories' in Ivica Đorđević, Marina Glamotchak, Svetlana Stanarević, Jasmina Gačić (eds), *Twenty Years of Human Security: Theoretical Foundations and Practical Applications* (Belgrade, Faculty of Security Studies of the University of Belgrade, Institut Français de Géopolitique Université Paris, 2015) 8.

[7] See, for instance, Florian Bieber, 'Power Sharing after Yugoslavia: Functionality and Dysfunctionality of Power Sharing Institutions Post-War Bosnia, Macedonia and Kosovo' in Sid Noel (ed), *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies* (Montreal: McGill-Queen's University Press, 2005).

[8] There is not a commonly accepted definition of conflict prevention (Erik Melander and Claire Pigache, 'Conflict Prevention: Concepts and Challenges' in W Feichtinger, Predrag Jureković (eds), Konfliktprävention: zwischen Anspruch und Wirklichkeit (Wien, Austrian National Defence Academy 2007) 11). For the purpose of this chapter, we define it as the theory and practice concerned with addressing latent, underlying, or structural features of a society that can lead to a conflict, whether a new one or a re-occurrence of the earlier conflict (Dina Carment and Mary Fischer, 'Conflict Prevention: A Policy in Search of a Theory or a Theory in Search of a Policy?' in Karl Cordell and Stefan Wolff (eds), The Routledge Handbook of Ethnic Conflict (Routledge, 2016) 170). Some authors, on the other hand, define it by the stage of conflict and confine it to the pre-conflict stages (Mats Lund, 'Conflict Prevention: Theory in Pursuit of Policy and Practice', in Jacob Bercovitch, Vlad Kremenyuk and Ira William Zartman (eds), *The Sage Handbook of Conflict Resolution* (London, Sage, 2009) 289).

[9] FCNM, Preamble. See, also, the preamble of the UN Declaration *on Minority Rights*. Shoraka argues that the creation of minority protection systems has been always driven by security concerns (Shoraka, *Human Rights and Minority Rights* (n 4) 96).

[10] Council of Europe, *Explanatory Report to the Framework Convention for the Protection of National Minorities*, ETS No 157 para 13.

[11] Hereinafter 'Advisory Committee' or 'Committee'.

important role in that process, not only as the body in charge of monitoring the implementation of the Convention, but also by being entrusted with the task of fleshing out the normative content of these principles.[12]

This chapter examines the relationship between human rights and conflict prevention objectives in European minority rights practice by analysing the monitoring work of the Advisory Committee. The chapter's main question is whether and to what extent the work of the Committee has been influenced by the conflict prevention objectives. The initial impetus came from our earlier research when we observed palpable differences between the Advisory Committee's supervisory practice in different States Parties.[13] From that, an idea was born that these variations might be explained by the different stages of the EU accession process/the EU membership of the monitored countries. We hypothesised that the Advisory Committee pushed harder for the implementation of the minority rights principles in those States Parties that are or have been subject to the minority rights conditioning during accession to the EU.

The literature on the development of the European minority rights standards points to the strong interrelatedness between EU enlargement and the implementation of the FCNM.[14] It is often argued that the integration of minority rights protection into the EU accession criteria turned the accession process into an important form of leverage for the enhanced implementation of the FCNM.[15] At the same time, it is evident that the inclusion of minority rights among the accession requirements was not motivated by a commitment to secure their uniform legal regulation and implementation across the Member States, given the absence of an unequivocal normative basis for the protection of minority rights in the European Union.[16] Rather, the rationale for such a role of minority rights appears to lie in their perceived relevance for preventing the spillover of

[12] See: Marc Weller, 'Creating the Conditions Necessary for the Effective Participation of Persons Belonging to National Minorities' (2004) 10(4) *International Journal on Minority and Group Rights* 266.

[13] Milica V Matijević, 'Adequate Representation of Persons Belonging to National Minorities in Public Sector: The Nature, Content and Scope of Obligations in the Comments of the Advisory Committee for the Framework Convention' (2020) 64(4) *Strani pravni život* 55–68.

[14] Galbreath and McEvoy, *The European Minority Rights Regime* (n 4) 80. Wilkinson even argues that the EU has been relying on the Council of Europe in encouraging the accommodation of the special needs of national minorities as a conflict resolution tool (Steven I Wilkinson, 'Conditionality, Consociationalism, and the European Union' in Sid Noel (ed), *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies* (Montreal: McGill-Queen's University Press, 2005) 239).

[15] Bernd Rechel, 'Introduction' in Bernd Rechel (ed), *Minority Rights in Central and Eastern Europe* 54 (Routledge, 2009) 4.

[16] Tove H. Malloy and Balázs Vizi, 'Introduction to the Research Handbook on Minority Politics in the European Union' in Tove H. Malloy and Balázs Vizi (eds), *Research Handbook on Minority Politics in the European Union* (Edward Elgar Publishing, 2021) 2. Many authors have been highly critical of such 'double standards' situation. See, for instance: Wojciech Sadurski, 'Minority Protection in Central Europe and Accession to the EU' in Marc Weller, Denika Blacklock and Katherine Nobbs (eds), *The Protection of Minorities in the Wider Europe* (Palgrave Macmillan, 2008) 211; Carter Johnson, 'The Use and Abuse of Minority Rights: Assessing Past and Future EU Policies Towards Accession Countries of Central, Eastern and South-Eastern Europe' (2006) 13(1) *International Journal on Minority and Group Rights*; James Hughes and Gwendolyn Sasse, 'Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs' (2003) 1 *Journal on Ethnopolitics and Minority Issues in Europe*.

ethnic disputes from candidate States into the European Union.[17] In that sense, if a correlation between the EU enlargement process and the monitoring of the FCNM is established, it could offer valuable evidence for the thesis that the Committee's work has been influenced by conflict prevention objectives and, consequently, that these objectives continue to shape European minority rights practice.

To test this hypothesis, we conducted a small-scale analysis of the Advisory Committee's country-specific opinions concerning States Parties that have joined the EU during various enlargement waves, including the EU founding members and countries that are still in the pre-accession phase. The analysis was about identifying the main similarities and differences in these opinions by using the EU membership/accession status of a country as the primary point of reference. The research framework developed in this way was to shed light on whether and to what extent conflict prevention goals may have influenced the Advisory Committee's approach to monitoring.

The investigation focused specifically on how the Advisory Committee evaluated the implementation of an aspect of the principle of effective participation of persons belonging to national minorities in public affairs. This aspect concerned the level of representation of persons belonging to national minorities in public bodies, as envisaged under Article 15 of the FCNM. Since the beginning, the Advisory Committee has interpreted Article 15 as embracing not only the political participation of national minorities but also their right to be adequately represented in the workforce of civil administration and other public bodies of States Parties.[18] The ethnic composition of civil administration and other public bodies was also under scrutiny in the European Commission's progress/country reports.[19]

According to the Advisory Committee, Article 15 is a central provision of the FCNM and key to the full enjoyment of other minority rights.[20] Many authors also

[17] Gwendolyn Sasse adds to these democratisation concerns (Gwendolyn Sasse, 'Tracing the Construction and Effects of EU Conditionality' in Bernd Rechel (ed), *Minority Rights in Central and Eastern Europe* (Routledge, 2009) 17).

[18] cp with Joseph Marko, *Effective Participation of National Minorities: A Comment on Conceptual, Legal and Empirical Problems*, Report prepared for the Committee of Experts on Issues Relating to the Protection of National Minorities DH-MIN(2006)014 (Strasbourg, 20 October 2006) 7.

[19] At this stage of the research, the authors were aware that the European Commission, on several occasions, scrutinised the implementation of the standard of adequate representation in Croatia, as well as in-progress reports on Serbia, North Macedonia and Montenegro. e.g. For Croatia, see European Commission progress reports for 2006 (at 11), 2007 (at 12), 2008 (at 13), 2009 (at 14) and Comprehensive monitoring report on Croatia's state of preparedness for EU membership (p 7). For Serbia, see, Reports for 2020 (at 39), 2021 (at 40), 2022 (at 46), 2024 (at 43). For North Macedonia, see, Reports for 2020 (at 35), 2022 (at 36) 2023 (at 38). For Montenegro, see Report for 2020 (at 41).

[20] Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary No. 2: The Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFC/31DOC(2008)001 (27 February 2008), in *Compilation of Thematic Commentaries of the Advisory Committee* (Council of Europe Publishing 2013), para 3; Advisory Committee, *Thematic Commentary No.* 3: The Language Rights of Persons Belonging to National Minorities under the Framework Convention, ACFC/44DOC(2012)001 rev (24 May 2012), in Compilation of Thematic Commentaries of the Advisory Committee (Council of Europe Publishing 2013) para 84.

point to this right as the basic tenet of contemporary minority protection.[21] As an attempt to address both the recognition and the redistribution-related needs of national minorities, Article 15 also strongly resonates with some of the basic assumptions of conflict resolution theory about destructive social conflict. John Burton, one of the pioneers in the field of conflict resolution, in the 1980s, developed the 'human needs theory', later called the 'generic theory of conflict', in which he argued that denial of basic human needs, among which identity and distributive justice have a particularly important role, is at the root of violent conflict.[22] Their fulfilment, according to him, is a prerequisite for sustainable peace. During the 1990s, the ideas of Burton and other peace researchers were materialised in conflict resolution and conflict prevention techniques for addressing identity and distributive justice needs in ethnically divided societies through different power-sharing mechanisms, including proportional representation of ethnic groups in administrative bodies.[23] In that sense, this segment of Article 15 represents an important link between the human rights and the conflict prevention approaches to minority rights.[24]

The chapter is structured in the following way. First, we provide an outline of our research methodology. A brief overview of the main elements of the standard of adequate representation, as we named the selected aspect of Article 15, is then provided. In the third section, we present the main findings of our investigation. Finally, we analyse these findings and offer conclusions about the role of conflict prevention and human rights as two distinct, though overlapping, approaches within European minority protection practice.

[21] Eg, Annelies Verstichel, 'Elaborating a Catalogue of Best Practices of Effective Participation of National Minorities: Review of the Opinions of the Advisory Committee Regarding Article 15 of the Council of Europe Framework Convention for the Protection of National Minorities' (2004) 2 *European Yearbook of Minority Issues* 175; Marc Weller, 'Article 15' in Marc Weller (ed), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford University Press 2005) 429; Kristin Henrard, 'Challenges to Participation in the Name of 'Integration': Participation, Equality and Identity as Interrelated Foundational Principles of Minority Protection' in William Romans, Iryna Ulasiuk and Anton Petrenko Thomsen (eds), *Effective Participation of National Minorities and Conflict Prevention* (Leiden, Brill Nijhoff, 2020) 79.

[22] See, for instance, John Burton, *Resolving Deep-Rooted Conflict: A Handbook* (University Press of America, 1987) 29. For a generic analysis of Burton's 'human needs theory' and his contribution to the conflict resolution theory and practice, see: Richard E Rubenstein, 'Basic Human Needs: The Next Steps in Theory Development' (2001) 6(1) *International Journal of Peace Studies*.

[23] See, for instance, Carnegie Commission on Preventing Deadly Conflict, *Preventing Deadly Conflict: Final Report* (New York, December 1997) Box 4.9, 100. More on the various conceptions and institutional manifestations of powers-sharing in the post-conflict societies in: Sid Noel (ed), *From Power Sharing to Democracy* (McGill-Queen's University Press, 2005).

[24] For a general introduction to the relevance of Article 15 for conflict prevention, see: William Romans and Iryna Ulasiuk, 'Introduction: Effective Participation of National Minorities from a Conflict Prevention Perspective' in William Romans, Iryna Ulasiuk and Anton Petrenko Thomsen (eds), *Effective Participation of National Minorities and Conflict Prevention* (Brill Nijhoff, 2020).

1.1. Methodological Considerations

The Advisory Committee is an independent expert body created to evaluate the level of implementation of the FCNM in States Parties.[25] Through the monitoring procedure, which involves examination of State reports, gathering of information from other relevant sources, and on-site visits, the Advisory Committee adopts detailed country-specific opinions.[26]

In the research, we analyse country-specific opinions on twelve States Parties. A choice was made to form three distinct groups of countries. The first group consists of Western European democracies that recognise the existence of minorities on their territories and that were not subject to EU external conditionality, or their accession requirements did not include minority rights. This group comprises Germany, as one of the 'twin engines' of the European Union; the United Kingdom, which joined the European Community in its first enlargement cycle in the 1970s; Spain, as a representative of the so-called 'Mediterranean enlargement', which joined the European Community in 1986; and Sweden, an EU Member State since 1995, representing the fourth round of enlargement.[27]

The second group consists of countries that have joined the EU as part of the so-called 'Eastern enlargement' and were subject to EU conditionality, which specifically included the 'respect of minority rights' criterion.[28] This group comprises Slovakia and Estonia, which joined the EU along with eight more countries in 2004,[29] and Romania, which joined the ranks of EU Member States in 2007.[30] Finally, this group includes Croatia, which became an EU Member State

[25] Framework Convention, Art 26, para 1. For an overview of the beginnings and the first decade of the Advisory Committee's activities see: Gaetano Pentassuglia, 'Monitoring Minority Rights in Europe: The Implementation Machinery of the Framework Convention for the Protection of National Minorities–With Special Reference to the Role of the Advisory Committee' (1999) 6(4) *International Journal on Minority and Group Rights*; Alan Phillips, 'The Beginning' in Tove H. Malloy and Ugo Caruso, *Minorities, Their Rights, and the Monitoring of the European Framework Convention for the Protection of National Minorities* (Leiden, Brill Nijhoff, 2013) 13–42.

[26] For rules regulating its monitoring activities see: Resolution (97) 10 of the Committee of Ministers of the Council of Europe (17 September 1997).

[27] Treaty of Accession of Denmark, Ireland, Norway and the United Kingdom [1972] OJ L 73; Treaty of Accession of Spain and Portugal [1985] OJ L 302; Treaty of Accession of Norway, Austria, Finland and Sweden, [1994] OJ C 241.

[28] In 1993, the European Union established the Copenhagen criteria for accession to the European Union. They were further strengthened by the Madrid European Council in 1995. (Accession criteria (Copenhagen criteria), at www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:accession_criteria_copenhague). The Copenhagen criteria include: the stability of institutions guaranteeing democracy, rule of law, and protection of human and minority rights, coupled with a functioning market economy and the ability to take on the obligations of membership, including the capacity to effectively implement the body of EU law.

[29] Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia [2003] OJ L 236.

[30] Treaty of Accession of Bulgaria and Romania [2005] OJ L 157. Romania, along with Bulgaria, was subject to a dedicated Cooperation and Verification mechanism aimed to address shortcomings identified in their EU accession process vis-à-vis judicial independence, organised crime, corruption and integrity in the public sector.

in 2013, following an accession process marked with even stricter conditionality with added focus on human rights.[31]

The third group consists of candidates for EU membership: Albania, Montenegro, North Macedonia, and Serbia. The four countries are all subject to comprehensive EU conditionality, marked by the 'fundamentals first' approach.[32] Their EU enlargement is currently directed by the revised EU enlargement methodology,[33] in which progress on the fundamental reforms, including minority protection, sets the overall pace of accession negotiations. The minority rights protection is, therefore, for these countries at the forefront of the EU accession negotiations, which also require the sustained return of refugees and the pursuit of transitional justice and inter-ethnic reconciliation in a post-conflict setting.[34]

The selection of countries was driven by the need to secure representation of all enlargement waves, as well as by our own familiarity with the minority situation and institutional set-up of a country. Until now, all countries under consideration passed through five monitoring cycles, apart from Montenegro and Serbia, who were subject to one less, which means that we have analysed a total of 58 country-specific opinions.[35] Given that countries from the second group became EU Member States during the second (Estonia and Slovakia), third (Romania), and fourth monitoring cycle (Croatia), the changes in the Advisory Committee's monitoring practice before and after their membership admission were an important aspect of the analysis.[36]

In the research, we compared both substantive and procedural aspects of the monitoring process. Although the analysis was focused on the sections of the opinions that deal with the level of representation of persons of minority origin in public sector bodies, as an aspect of Article 15's right to participation in public affairs, at times we also looked at the sections on other provisions of the Convention. There is a mutually reinforcing relationship between the level of implementation of Article 15 and a number of other provisions of the FCNM, which makes its

[31] Treaty of Accession of Croatia [2012] OJ L 112.

[32] The so-called 'fundamentals first' approach was set to push the candidate countries to deal with issues of judicial reform, human rights and fight against organised crime and corruption early in the accession negotiations coupling it with a benchmarking system (Wolgang Nozar, *The 100% Union: The Rise of Chapters 23 and 24* (Netherlands Institute of International Relations, 2012).

[33] The new methodology was introduced in 2020 through the Communication to the European Parliament, the Council, the European Economic, and Social Committee, and the Committee of Regions with a proposal for 'Enhancing the accession process – A credible EU perspective for the Western Balkans' COM(2020) 57 (5 February 2020). More on this in: Ana Knežević Bojović and Vesna Ćorić, 'Challenges of Rule of Law Conditionality' (2023) 7 *Bratislava Law Review*.

[34] These conditions are an integral part of the Stabilisation and Association Agreements (SAAs). See, for instance, Stabilisation and Association Agreement between the European Communities and their Member States, on the one part, and the Republic of Croatia, on the other part [2005] OJ L26/1, Art 4.

[35] The States Parties shall submit their reports every five years calculated from the date on which the previous report was due (Resolution (97) 10 of the Committee of Ministers of the Council of Europe (17 September 1997) para 21).

[36] This aspect was also considered with regard to the Advisory Committee's opinions on the United Kingdom, having in mind its specific situation of having joined the EU in 1972 and formally left it in 2020.

implementation a precondition for the realisation of other minority rights. At the same time, the level of implementation of these other rights reflects the level of implementation of Article 15.[37] This is particularly observable in the relationship of Art. 15 with Art. 6, para. 1, Art. 9, para. 4, Art. 10, para. 2, and Art. 14, para. 2 of the FCNM, given that these provisions require the presence of persons of minority origin in specific segments of the public sector, respectively in police, media, educational institutions, and public administration. For that reason, the share of persons of minority origin/with the command of minority languages in these public bodies was used as an indicator of the degree to which national minorities make up part of the public sector workforce when such analysis was absent from the Article 15 considerations.

2. Adequate Representation of National Minorities in Public Bodies

The participation of persons belonging to national minorities in public affairs through their adequate representation in the workforce of public bodies represents the most novel dimension of participatory rights enshrined in Article 15.[38] While the contours of this aspect of the right to participation in public affairs have also been shaped through the monitoring work of the Human Rights Committee[39] and in the international soft law created under the auspices of the Organization for Security and Cooperation, it is the Advisory Committee that has most significantly contributed to its normative elaboration.[40]

Since the first monitoring cycle, the Advisory Committee has interpreted Article 15 as embracing not only the right to political participation of national minorities but also their right to be adequately represented in public administration and other public bodies of States Parties. Since adequate representation is

[37] Verstichel speaks of the participation of minorities in decision-making processes, taken in broadest sense, 'as a precondition for a sound minority protection'. Verstichel, 'Elaborating a Catalogue of Best Practices' (n 21) 175.

[38] That aspect is not mentioned in the Explanatory Report, which places an accent on the political representation of persons of minority origin. Its novelty is also visible in the fact that, according to Weller, and our own findings, in the first monitoring cycle no State Party met the standard. See: Weller, 'Creating the Conditions' (n 12) 289.

[39] In Article 25 of the ICCPR, access to public service positions is regulated in a separate subparagraph (Art 25, para c). In its General Comment No. 25, the Human Rights Committee interprets the conduct of public affairs broadly as the exercise of power in the legislative, executive and administrative branches (General Comment No. 25: The Rights to participate in public affairs, voting rights and the right of equal access to public service (Art 25, para 5). For the monitoring practice, see, for instance, the Human Rights Committee's concluding observations from 2014, where it expressed its concern over underrepresentation of Israeli citizens of Arab origin in the civil service (Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of Israel* UN Doc CCPR/C/ISR/CO/4 (28 October 2014) paras 7, 8).

[40] OSCE High Commissioner on National Minorities, *The Ljubljana Guidelines on Integration of Diverse Societies & Explanatory Note* (2012) 46–47.

a precondition for the realisation of several other minority rights, the Advisory Committee's reflections on the scope and content of this standard frequently appear in its pronouncements on other provisions of the Convention. The Committee's views on the right to adequate representation are also found in its thematic commentary of Article 15.[41]

Although the Committee employs different terms to distinguish this element of Article 15 from the political representation, its core meaning remains consistent. Regardless of whether a public body is political, administrative, or entrusted with specific mandates, persons of minority origin should be adequately represented within its workforce.[42] The proportion and the qualitative aspects of their presence should be sufficient to ensure that the participation of national minorities in the work of public institutions is effective. These quantitative and qualitative components together form what we have elsewhere defined as the 'standard of adequate representation of persons belonging to national minorities in public bodies'.[43]

In the interpretation of the Advisory Committee, a few basic rules determine what constitutes adequate representation. While the share of persons of minority origin should approximate their share in the overall population, the measures aimed at arriving at 'rigid, mathematical equality in the representation' should be avoided.[44] The duty of adequate representation applies to all territorial levels of public sector bodies. In other words, it concerns not only public bodies situated in areas with a more substantial minority population but also the central-level public bodies. The standard pertains to all segments of the public sector and not only to bodies dealing with matters of particular importance to national minorities. Representation in public administration is just one element of the standard, with other equally important elements being the representation in police, judiciary, and executive bodies, all the way down to public enterprises.[45] To enable effective participation, the representation of persons of minority origin should not be confined to entry-level positions but should also include the senior grades.

Like the majority of the FCNM's provisions, Article 15 is a programmatic norm that sets out the objectives the State Parties are expected to pursue by taking into account the specific circumstances of their minority groups. Beneath its rhetorical and often vague references to concepts such as diversity, social inclusion, and good governance, the Advisory Committee's interpretation of the standard of adequate

[41] Advisory Committee, *Thematic Commentary No. 2*, paras 120–128.

[42] In other words, among persons who occupy a position within the organisational structure of a public body, not as representative of a political party or an interest group but based on their skills and expertise.

[43] Milica V Matijević, *Adequate Representation of Persons Belonging to National Minorities in Public Bodies* (Belgrade, Institute of Comparative Law 2024) Pt I. The Committee primarily uses the term 'adequate representation', but it also employs some other expressions, such as 'reasonable representation' (*Fourth Opinion on Serbia*, para 123), and 'equitable representation' (*Second Opinion on North Macedonia*, para 195).

[44] Advisory Committee, *Thematic Commentary No. 2*, paras 120 and 123.

[45] For the sake of simplicity, in the chapter we use the term 'public bodies', or 'public sector' as general terms denominating all levels of public administration (local, regional, central-level) and all types of public bodies, including public enterprises.

representation reveals three distinct yet interrelated objectives: the elimination of prejudice and employment discrimination, equal access to public services, and the accommodation of identity-related needs of national minorities.[46]

That implies that States Parties are obliged to establish normative and institutional conditions for adequate representation of persons of minority origin within the public sector. Where these ordinary methods fail to bring about the desired outcome, more proactive interventions are warranted. Such measures would typically be concerned with enhancing the employment opportunities for underrepresented minority groups, including through targeted recruitment and specialised training programmes. The States Parties are also expected to ensure the stability of their employment and career progression on par with those available to members of the majority population.[47]

Owing to its relatively novel character, this particular aspect of Article 15 has so far attracted limited attention from scholars, and its doctrinal analysis is rarely found in the literature. Among the few notable scholarly contributions is the monograph by Annelies Verstichel dedicated to participatory minority rights. There, Verstichel provides an overview of the basic characteristics of the Advisory Committee's approach to the standard.[48] Similarly, Mark Weller, through his examination of the Advisory Committee's work, affirms that adequate representation of persons of minority origin in public bodies, or as he calls it, 'executive representation', is an important element of the right to participation that extends to all territorial and functional levels of the public sector.[49] Kristin Henrard, in her analysis of participatory rights in the international hard and soft law instruments, highlights the concept of 'mirror representation' as a core component of the Advisory Committee's normative elaboration of the right to adequate representation.[50] Henrard argues that the Committee's evaluations operate on the premise that a public body is representative when its composition, in approximate terms, mirrors the demographic composition of the country's population.[51] As part of her commentary on Article 15, Tove H. Malloy characterises adequate representation as a form of direct participation in public affairs. She points to inequalities in access to public sector employment and the persistent lack of disaggregated data as recurrent issues raised by the Advisory Committee as barriers to the realisation of this standard.[52]

[46] More on this in: Matijević, *Adequate Representation* (n 43) 24–34.

[47] Fourth Opinion on the UK, para 129; Second Opinion on Estonia, para 186.

[48] Annelis Verstichel, *Participation, Representation and Identity: The Right of Persons Belonging to Minorities to Effective Participation in Public Affairs–Content, Justification and Limits* (Intersentia, 2009) 318–320.

[49] Weller, 'Creating the Conditions' (n 12) 282–284.

[50] Kristin Henrard, '"Participation", "Representation" and "Autonomy" in the Lund Recommendations and Their Reflections in the Supervision of the FCNM and Several Human Rights Conventions' (2005) 12(2) *International Journal on Minority and Group Rights* 136–138.

[51] Henrard, 'Participation, Representation and Autonomy' (n 50) 158, 160.

[52] Tove H. Malloy, 'Commentary of Article 15 of the Framework Convention for the Protection of National Minorities' in Rainer Hofmann, Tove H. Malloy and Detlev Rein (eds), *The Framework Convention for the Protection of National Minorities: A Commentary* (Leiden, Brill Nijhoff, 2018) 278–282.

Following this brief overview of the standard of adequate representation of persons of minority origin in public bodies – both in theory and in the Advisory Committee's practice – we now turn to the main findings of our analysis.

3. The Findings

When the Advisory Committee began its role of evaluating the implementation of the FCNM, none of the countries covered by the analysis had public bodies that could be deemed representative in terms of minority participation. Where the Committee analysed the matter under Article 15, the conclusion was obvious. In other country-specific opinions, such conclusion ensued from the inadequate number of civil servants with the knowledge of minority languages, identified under Art. 10, para. 2 of the Convention, or the sub-performance in the implementation of other closely related provisions. Another important characteristic of the milieu in which the monitoring started was the unavailability of data. The absence of data on ethnic composition of the public sector workforce has been a steady feature of all the countries under analysis, apart from the UK.[53] During further monitoring cycles, partial datasets became available in some of the countries.

3.1. The General Characteristics of the Advisory Committee's Monitoring Approach

The most obvious feature of the Advisory Committee's evaluations concerning the representativeness of public bodies in the selected countries is an absence of the systematic approach to the matter. This is firstly evident in the variations of section headings addressing minority representation in the public sector. For example, in its fifth opinion on Albania, the Committee employed a broad title – 'Socio-economic participation – employment and regional development (Article 15)'[54] – while in the fifth opinion on Croatia, a more specific heading was used: 'Effective participation in public affairs and decision-making process – public administration (Article 15)'.[55] Although most country-specific opinions distinguish between participation in public affairs and participation in socio-economic life by addressing them under separate headings, there are instances where these two aspects of Article 15 are merged into a single section, which also covers the issue of public body representativeness.[56] This

[53] Advisory Committee, *Thematic Commentary No. 2*, para 29.

[54] *Fifth Opinion on Albania*, 37 in relation to paras 199, 201. On the other hand, in the second opinion, the Committee used the section title 'Participation in the public administration and economic life' (*Second Opinion on Albania*, 36, in relation to paras 208, 211).

[55] Fifth Opinion on Croatia, para 35.

[56] In the second opinion on Montenegro, for instance, the Committee used a generic heading 'Effective participation of persons belonging to minorities in social life and in public affairs', under

lack of consistency is observable not only across countries but also in relation to the same country over different monitoring cycles.[57]

The absence of the systematic approach to the matter is further reflected in the discontinuity of evaluations. Specifically, when the Advisory Committee identified the underrepresentation of certain minority groups within the public sector, that did not automatically result in the follow-up on the matter in the subsequent monitoring cycle. In many instances, the Advisory Committee would examine representation in one opinion, neglect the topic in the following one, just to return to similar conclusions in later opinions.[58] Looking back at the first monitoring cycle, it is difficult to discern a clear rationale for the Committee's attention to the representation in some countries from the outset, in contrast to others where it only begun to investigate the matter at later stages of the monitoring process.[59] The most illustrative in this regard is the example of Spain, where the question of adequate representation was only raised in the fifth opinion, when the Committee called on the authorities to 'improve the representation of Roma in the public bodies at all levels, central, regional and local levels, in the media, in executive bodies and the judiciary through positive measures'.[60] As a result of this lack of consistency in the monitoring, it has been difficult to gain a linear understanding of the developments in this field for the majority of analysed countries.

3.2. The Advisory Committee's Monitoring Approach and EU Enlargement

Although the literature points to a strong interrelatedness between EU accessions and the process of monitoring, and despite our initial hypothesis that the

which it addressed several aspects of implementation of Article 15, including the level of participation of persons of minority origin in the public sector workforce. *Second Opinion on Montenegro*, 3 in relation to paras 177, 184.

[57] For instance, in the *Third Opinion on Slovakia*, the Committee uses a very specific title 'Participation in public services and the law enforcement agencies' (*Third Opinion on Slovakia*, 42), while in the fourth opinion it goes back to the general title 'Participation in public life and decision-making processes' (*Fourth Opinion on Slovakia*, 26).

[58] eg, The Committee started investigating the matter already in the first opinion on Romania, when it asked the authorities to collect the data (para 71), it identified underrepresentation in the second opinion (para 187), in the third, fourth and fifth opinion it did not evaluate the matter, even though in the fifth opinion the need to increase the minority language speakers among the public sector employees was among the recommendations for immediate action (para 11).

[59] In Slovakia, for instance, the Advisory Committee did not look into the level of representativeness of public bodies in the first opinion, when it only identified an inadequate number of civil servants with the knowledge of minority languages under Art. 10, para 2. (*First Opinion on Slovakia*, para 36). On the other hand, in the case of Romania, a country belonging to the same group, the evaluation of the presence of minorities in public sector bodies found its place already in the first monitoring cycle (*First Opinion on Romania*, para 71).

[60] Fifth Opinion on Spain, para 89.

Advisory Committee conducted more scrupulous evaluations in the States Parties that were, or are still, subject to the minority rights conditioning, our findings did not support the correlation between the two. The variations observed in the Advisory Committee's supervisory practice across the country-specific opinions cannot be explained by the EU membership or accession status of the countries in question. In other words, the investigation revealed that the more systematic and in-depth evaluations found in some country-specific opinions did not coincide with the phases of EU enlargement during which the implementation of minority rights was a formal accession requirement. This conclusion ensues both from the comparison of the three groups of countries selected for analysis and from the examination of the differences between the countries from the same group. Let us first look at the variations in the Advisory Committee's approach to monitoring across the three groups of countries.

While the Advisory Committee did not evaluate the level of inclusiveness of public bodies at all in the two countries from the first group, Germany and Sweden, it did enquire on this matter in Spain and in the UK, even though they were not subject to formal minority conditioning during their EU accession.[61] The monitoring process concerning the UK is a particularly salient exception to the low prominence of this matter when it comes to the first group of analysed countries, as Article 15 considerations include the question of adequate representation in all of the Committee's opinions.

In the second group of countries, i.e., countries which have joined the EU through the enlargement process that included the formal 'minority rights' criterion, we observed a more sustained Committee's interest in adequate representation. However, the identified variations could not be ascribed to the individual EU accession paths of the countries in question. In Slovakia, the Advisory Committee started addressing the question of representativeness of the public sector only in the second opinion, which was adopted after Slovakia joined the EU. This despite the fact that, already in the first opinion on Slovakia, the Advisory Committee found that minority languages could not be effectively used before public administration due to the lack of civil servants who are proficient in minority languages.[62] Conversely, with regard to Croatia, the Advisory Committee showed a sustained interest in the matter of adequate representation both before and after 2013, when the country became an EU Member State.[63]

[61] While their negotiations on joining the EU did not feature minority protection as an important factor, it should be noted that the requirements for democracy and the rule of law were addressed within the accession context in the case of Spain, through a general commitment of the Member States to safeguard the principle of rule of law. See: Marko Kmezić, *EU Rule of Law Promotion: Judiciary Reform in the Western Balkans* (Routledge, 2018) 15.

[62] *First Opinion on Slovakia*, para 36. On the other hand, as noted, the Committee delves into the matter already in the first monitoring cycle on Romania and Croatia, which are from the same group of countries.

[63] Starting from the first monitoring cycle, when it found that the situation in Croatia vis-à-vis the presence of minorities in the public sector workforce was incompatible with Article 15, the Advisory Committee evaluated the matter under Article 15 in all opinions adopted by now.

The case of Estonia represents an even more telling illustration of our findings about the lack of correlation between the Advisory Committee's monitoring approach and the country-specific EU enlargement trajectories. In the first opinion on Estonia, which was published two years before the country became an EU Member State, the Committee briefly analysed the question of adequate representation under Article 15. In the opinion, it also referred to barriers to the public sector employment of persons of minority ethnicity, such as the high bar regarding proficiency in the State language and the citizenship-related difficulties. In the second opinion, published one year after Estonia became an EU Member State, the Advisory Committee identified underrepresentation of persons of minority origin in the public sector,[64] as well as a generally low unemployment rate of the Russian minority ensuing from the direct and indirect employment discrimination affecting its members.[65] Eventually, among all the countries in the second group, only the monitoring practice regarding Romania sustained our hypothesis, as the Committee investigated the implementation of this segment of Article 15 merely in the opinions that were adopted before the country joined the EU in 2007.[66]

The third group, which is made up of the candidate countries whose EU accession path is to an even greater degree conditioned by the effectiveness of their minority rights regimes, provides further arguments against our initial hypothesis. While the analysis of the opinions on Montenegro, North Macedonia, and Serbia demonstrated a steady attention being devoted to the public sector representation through a scrupulous and detailed analysis of this particular aspect of Article 15 in all monitoring cycles, the situation is different when it comes to Albania. There, the Advisory Committee's approach was less systematic, even though this country has been participating in the EU integrations under the same conditions as the other three countries, albeit with a later start of the process. The Advisory Committee undertook the evaluation in the first and second cycles; it dropped it from the third and fourth ones to address it again in the fifth monitoring cycle but only to a limited extent because of the persistent lack of data on the presence of minorities in the public sector.[67] At the same time, the Committee's pronouncements on the related aspects of other minority rights, such as, for instance, the

[64] Second Opinion on Estonia, para 58.

[65] ibid, para 160. The Advisory Committee also shows that, among else, the legal provisions on the use of minority languages were not in accordance with the Article 10 standards (paras 96, 97).

[66] ie, in the first and second opinion, which were adopted in 2002 and 2006; ie, before the country became an EU Member State in 2007. In the subsequent opinions, the Advisory Committee analysed only the political participation of minorities, the consultative mechanisms, and the general level of participation of persons of minority origin, in particular of Roma, in the economic and social life of the country. At the same time, the level of realisation of some other provisions of the Convention pointed to the continuous underrepresentation of persons of minority origin in certain segments of the public sector (*Third Opinion on Romania*, para 188; *Fourth Opinion on Romania*, para 133; *Fifth Opinion on Romania*, para 11).

[67] First Opinion on Albania, paras 75, 76; Second Opinion on Albania, para 211; Fifth Opinion on Albania, paras 199, 201.

presence of minorities in the police force, demonstrated the continuous relevance of this question in Albania.[68]

3.3. Monitoring in the Ethnic Conflict Settings

Even though the investigation did not confirm the validity of our initial hypothesis about the correlation between the EU accession and the Advisory Committee's monitoring practice, the research findings have pointed to another potential link between the conflict prevention objectives and the Committee's approach to the standard of adequate representation. Throughout the research, we have observed several important similarities in the Advisory Committee's evaluations of the matter in the opinions that concerned five countries. These countries come from all three groups covered by the research: the UK (first group), Croatia (second group), Montenegro, North Macedonia, and Serbia (third group).

The most obvious feature shared by all five countries is that they have had an ethnic conflict experience in their recent past.[69] Four out of five countries on the list were party to the conflicts that led to the dissolution of the Socialist Federal Republic of Yugoslavia. There is ample literature explaining in detail these civil wars and their role in the adoption of the FCNM. Here we shall just briefly note that the break-up of the Socialist Federal Republic of Yugoslavia gave rise to three major armed conflicts: in Croatia (1991–1995), Bosnia and Herzegovina (1992–1995), and Kosovo*[70] (1998–1999). Serbia and Montenegro, at the time making up the Federal Republic of Yugoslavia, were directly involved in all three ethnic conflicts. Some smaller conflicts were also waged, including the one in North Macedonia (January-August 2001).[71] All four conflicts ended with peace settlements that included extensive minority rights guarantees. In the United Kingdom, decades of ethnic cleavages in Northern Ireland, known as the *Troubles*, gave rise to a lengthy peace process that finished with the signing of the so-called 'Good Friday Agreement' in 1998.[72]

[68] For instance, the Advisory Committee invited the authorities to promote recruitment of the members of this minority group into the police force (*Third Opinion on Albania*, para 101), and noted that members of Roma and Egyptian communities were hit by an unemployment rate five times higher than for the rest of the population (*Fourth Opinion on Albania*, para 152).

[69] In other words, in the period that shortly preceded or coincided with the adoption and entering into force of the Framework Convention.

[70] This designation is without prejudice to positions on status, and is in line with the UN Security Council Resolution 1244/99 and the International Court of Justice Opinion on the Kosovo Declaration of Independence.

[71] A that time known under the name 'The former Yugoslav Republic of Macedonia'.

[72] The Good Friday Agreement of 10 April 1998, also known as the Belfast Agreement, is in fact a set of two agreements: an agreement reached in the Multi-Party Talks between the British and Irish governments and the eight participating political parties, and an agreement between the British and Irish governments, where the former Agreement is one of the annexes to the latter. Rober Montgomery, 'The Good Friday Agreement and a United Ireland' (2021) 32(2) *Irish Studies in International Affairs* 83–110. See, also: Ian McBride, 'Ethnicity and Conflict: The Northern Ireland Troubles' (2023) 62 *Journal of British Studies* 618–39.

The similarities in the Advisory Committee's approach to the duty of adequate representation in the five countries were observed in relation to both the procedural and the substantive aspects of the monitoring. The principal similarity concerns a more systematic approach to monitoring. In these opinions, a special section was often dedicated to the level of participation of persons of minority origin in public bodies; conversely, in other opinions, these considerations were more often found under generic headings.[73] Another easily observable characteristic of these country-specific opinions is that the sections dealing with adequate representation were more detailed.[74] They included analysis of the ethnic composition of the staff of various public bodies, including those that were rarely or never under evaluation in other country-specific opinions, such as defence sector bodies or public enterprises.[75] Additionally, the Committee paid more attention to the level of representation in the senior grades and managerial structures.[76]

In contrast to the sporadic character of evaluations in other opinions, here the Committee monitored the implementation of the standard within the Article 15 section in each monitoring cycle. The Committee was evaluating the level of representation in the five countries since the first monitoring cycle, whereas such considerations were found in the first opinions of only three other countries.[77] In these opinions, the Committee was not discouraged by the lack of official statistics, unlike in the opinions on other countries, where it often decided not to investigate the matter for the lack of official data.[78] In the second opinion on Slovakia, for instance, the Committee noted the lack of data and invited the authorities 'to ascertain whether the persons belonging to national minorities, particularly to numerically smaller minorities, are adequately represented in the civil service'.[79]

[73] In Serbia, for instance, the Committee used very specific headings, such as 'Participation in public administration and in the judiciary' (*Second Opinion on Serbia*, 42; *Third Opinion on Serbia*, 44), or 'Representation of national minorities in public administration' (Fourth Opinion on Serbia, 36). In the fourth opinion on North Macedonia, the Committee used the heading 'Representation in civil service and administration', although under the same heading it also analysed the level of minority representation in police (*Fourth Opinion on North Macedonia*, 35 and para 88).

[74] As noted, in those country-specific opinions not rarely an entire sub-section under the Article 15 considerations was devoted to the matter of adequate representation (see the ft above). cp with, for instance, *Second Opinion on Estonia*, paras 158, 160.

[75] See, for instance, the *Third Opinion on Croatia*, para 203 and *Third Opinion on Serbia*, para 183.

[76] See, as an illustration, the Committee's pronouncement on North Macedonia, in which it addressed the level of representation of minorities in 'all sectors of the public administration (including in the defence sector)', and also in relation to more senior grades (*First Opinion on North Macedonia*, para 98); the level of presence of minorities in the managerial structures of the public bodies (*Second Opinion on North Macedonia*, para 195); the representation of persons belonging to numerically smaller minorities (*Fifth Opinion on North Macedonia*, para 128).

[77] The considerations of adequate representation are not present in the first monitoring cycle of the other three countries from the first group (Germany, Sweden, Spain). When it comes to the second group, they are not found in the opinion on Slovakia, and in the opinion on Albania, as the remaining country from the third group.

[78] Second Opinion on Slovakia, paras 116, 118.

[79] ibid, para 118.

Conversely, despite the chronic lack of ethnic data in Serbia, the matter was evaluated since the very first opinion.[80]

Speaking about the ethnic data, as already noted, their absence has been the principal problem for evaluations. In all analysed countries apart from the UK and, to a certain extent, Croatia and North Macedonia, the data on the ethnic composition of the public sector workforce have been either non-existent or only partially available. In Germany, for instance, the Advisory Committee was generally considerate of the historical reasons that caused a broad societal opposition to the collection of ethnic data. Only in the last opinion on Germany has the Committee more vigorously addressed the problem, stating that it was not possible to have an understanding of the position of minorities without at least qualitative research that would correlate equality indicators with ethnic affiliation.[81] On the other hand, in the ex-ethnic conflict settings, the Advisory Committee addressed the lack of data with greater resoluteness and persistence. There, the Advisory Committee often insisted on a more comprehensive and systematic data collection. For instance, an outstanding issue under Article 15 in the second opinion on Serbia was that only the data on mother tongue and proficiency in other languages of civil servants were available regarding central-level institutions. This was accompanied by an observation that data on the ethnic belonging of civil servants were needed in order to reach conclusive findings on the level of participation of national minorities.[82] In Montenegro, the Advisory Committee reproached the authorities for the fact that the data on the level of representation were collected through a survey that did not cover the entire State administration and did not display the fields and the professional ranks of positions held by persons of minority origin.[83] Then again, when it comes to Romania, it seemed that the Committee would have been content if at least data on the minority language speakers among the civil servants in the local administrative bodies were available.[84]

It was also observed that the absence of data was less of an impediment to the Advisory Committee's investigations of the level of representation in countries with an ethnic conflict experience.[85] While in some other analysed countries the lack of official data represented a barrier to the evaluation of the matter,

[80] Even though 'the authorities were not in a position to submit quality data on the present situation in this field', already in the first opinion on Serbia and Montenegro, which then formed a State Union of Serbia and Montenegro, the Committee evaluated the situation at a greater length and invited the authorities 'to review and monitor the situation with increased vigour and to take additional measures' (*First Report on State Union of Serbia and Montenegro*, para 103).

[81] *Fifth Opinion on Germany*, paras 78, 83. An earlier, but more modest attempt to address this matter is also found in the third opinion, para 54.

[82] *Second Opinion on Serbia*, para 239. See, also the 'recommendations for immediate action' in the *Fourth Opinion on Serbia*, 2.

[83] Fourth Opinion on Montenegro, para 153.

[84] Fifth Opinion on Romania, para 146.

[85] This observation does not apply to the UK, as this State Party, with some exceptions, regularly and in a systematic manner collected the ethnic data.

in ex-Yugoslav countries the Committee did not seem discouraged. Instead, it relied extensively on other sources, such as circumstantial evidence, reports of State bodies and civil society organisations, and statements of the representatives of national minorities.

Eventually, the analysis showed that in the States Parties with an 'ethnic conflict' background, the Advisory Committee often assigned special importance to the standard of adequate representation. Starting from the second monitoring cycle, the Committee has emphasized the most pressing issues in a separate section entitled, in the beginning, 'issues of concern' and later 'issues for immediate action'. In eight of the total of 23 opinions on the countries with experience of ethnic conflict, the low representation of persons of minority origin was given the status of an 'issue of concern/for immediate action',[86] while in three opinions it was singled out as an 'issue of concern following two or more cycles of monitoring'.[87] In contrast, out of 34 analysed opinions concerning the remaining seven countries, this matter was assigned such rank in only two opinions.[88] Even though in Estonia, for instance, the Committee found in the fifth opinion that the number of persons of minority origin among the staff of public bodies was three times lower than their share in the population and that conditions for the use of minority languages, including before the civil administration, raised 'grave concerns' as to their compatibility with Article 10, this problem was among the issues of concern in only one earlier opinion.[89]

Interestingly enough, our findings on the Committee's approach to the matter of adequate representation in the countries with a background of ethnic conflict are to some extent paralleled in the scholarly literature and practice-oriented texts. A precursory literature review showed that the greatest number of papers and studies on the ethnic composition of the public bodies' workforce and on the legal regulation of this matter comes from these five countries.[90]

[86] The representation of persons of minority origin was given the status of an issue of concern/for immediate action or of 'recommendation for immediate action' in the following country-specific opinions: *Second Opinion on Serbia*, para 283; *Third Opinion on Serbia*, 2; *Fourth Opinion on Serbia*, 2, 41; Second *Opinion* on North Macedonia, para 229; *Third Opinion on North Macedonia*, 2, 34; *Fourth Opinion on North Macedonia*, 2, 40; *Second Opinion on Croatia*, para 185; *Third Opinion on Croatia*, 3, 38.

[87] The representation of persons of minority origin was given the status of an 'issue of concern following two or more cycles of monitoring' in the following country-specific opinions: *Third Opinion on Serbia*, para 231; *Third Opinion on Montenegro*, para 192; *Third Opinion on North Macedonia*, para 197.

[88] The representation of persons of minority origin was given the status of an issue of concern in the *Second Opinion on Estonia*, para 186. The representation of persons of minority origin was given the status of an 'issue of concern following two or more cycles of monitoring' in the *Third Opinion on Slovakia*, para 215.

[89] Second Opinion on Estonia, para 186.

[90] See, for instance: Tijana Vukojičić Tomić, 'Suvremeni pristupi i modeli zapošljavanja društvenih manjina u javnoj upravi' (2017) 17(3) *Hrvatska i komparativna javna uprava* 365–388; Natalija Shikova and Marina Andeva, 'Analysis of the Systems for Representation of Minorities in Public Administration: The Case of the Republic of North Macedonia' (2023) 22(1) *Journal on Ethnopolitics and Minority Issues in Europe* 94–125; Jelena Džankić, 'Montenegro's Minorities in the Tangles of Citizenship, Participation, and Access to Rights' (2012) 11(3) *Journal on Ethnopolitics and Minority Issues in Europe* 40–59; For the studies, see: Elise Uberoi and Helena Carthew, *Ethnic Diversity in Politics and Public Life* (House of Commons Library, No 01156, 2 October 2023); Neli Demireva, 'Ethnic Minority Representation in the Public Sectors of the UK, France, Germany, Sweden and the US' (Equalsoc Reports, 2009); Inicijativa mladih za ljudska prava and Institut za otvoreno društvo, *Zastupljenost etničkih zajednica u državnim organima u Crnoj Gori* (Podgorica, 2010).

[91] However, we do not argue that the Advisory Committee did not rely on the EU accessions as a leverage for the more effective implementation of the Framework Convention. On the contrary, in many opinions, the Committee invokes concrete activities of the States Parties undertaken within the EU accession process. See, for instance, *Third Opinion on Albania*, para 89.

4. The Analysis

In this section, we will try to summarise the findings and discuss some of the factors that might explain them. We also explore what our findings can say about the broader inquiry that has steered the present research, that is, about the relationship between the conflict prevention and the human rights trajectories of the European minority rights regime.

The research showed that the differences in the monitoring approach of the Advisory Committee to the selected countries cannot be explained through the differences in their individual EU accession routes.[91] Instead, the research identified another potential explanation for the variations in the Committee's approach to the standard of adequate representation. We have observed that in the countries that had an ethnic conflict experience in the recent past, the Committee's approach exhibits several common traits, which also represent the main difference between these country-specific opinions and other opinions covered by the research. Put succinctly, the findings testify to a more systematic approach of the Committee to this specific segment of Article 15 in the countries with an 'ethnic conflict' background and a greater vigour in investigating the matter and overcoming the barriers to its evaluation.

Our view is that this difference is closely linked to the significance of participatory minority rights, including the representation of national minorities in public bodies, for conflict prevention. Before elaborating on this point, however, we will also consider some other possible explanations.

A simple explanation – one that would cut short our attempts to identify deeper theoretical implications of the findings – is that public sector employment has played a more important role in securing the socioeconomic equality of national minorities in the five countries in terms of their participation in economic and social life. In other words, a reason could be that in these countries, as compared to others, a position in a public body carries more value due to the bleak situation of their job markets. Of course, such reasoning falls flat once we remember the vast economic differences between the five countries (UK, Croatia, Montenegro, North Macedonia, and Serbia), as well as their economic similarities and differences with the other analysed countries.

This leads us to another potential explanation, which concerns the practices of structural or systemic discrimination of national minorities.[92] It could be argued that the Advisory Committee was more attentive to the matter in the countries where national minorities were exposed to systemic discrimination in access to public sector employment. There are two principal problems with this argument. Not only would it have been difficult to prove the existence of continuous discriminatory practices against minorities in all five countries,[93] but the argument also collapses once we bring into the picture the position of the Roma minority across Europe and the lack of identical attention to the issue of its adequate representation in the opinions on many other analysed countries.

However, the argument is valuable because it points to an important link between Article 15 and its standard of adequate representation, on the one hand, and the conflict prevention objectives, on the other. In its commentary on Article 15, the Advisory Committee construed the link by emphasising that '[i]n post-conflict situations, particular attention should be paid to the socio-economic situation of persons belonging to minorities who have been discriminated against on account of their national minority background and were barred from employment'.[94] One of the main goals of the standard of adequate representation, as we have already noted, is the elimination of discriminatory practices and the ensuing inequality of ethnic minorities. It is not hard to link this goal to the conflict prevention strategy of addressing the root causes of conflict, embodied in the systematic denial of the basic needs of a group, as its principal approach to violent conflict. In other words, the relationship between the two is quite straightforward.

The third possible explanation of our findings is that the Advisory Committee placed greater attention on the monitoring of this aspect of Article 15 because the five countries had specific legal guarantees of adequate representation. One of the characteristics of the monitoring is that the Advisory Committee mostly reflects on the existing legal and institutional arrangements. According to Annelies Verstichel, this is the main reason why so few of its comments deal with the representation in public bodies.[95]

Although the investigation of the national regulation of adequate representation goes beyond the scope of this chapter, there is no doubt that the legal frameworks of the five countries guarantee adequate representation of persons belonging to minority communities in the public sector in a very concrete way.

[92] More about the concept of structural or systemic discrimination in: Milica V Matijević and Ana Zdravković, 'Breaking the Invisible Cage: Limits of Law in Structural Discrimination' (2024) 3 *Diritto, Immigrazione e Cittadinanza* 1–18; Milica V Matijević, 'Navigating Through the Substantive Equality Doctrine: Anti-Discrimination Law and Social Change' (2024) 15 *Pravni zapisi* 101–103.

[93] Apart from Croatia, where the Committee found in the first monitoring cycle that the situation is not compatible with Article 15 (*First Opinion on Croatia*, para 57), and Serbia and Montenegro, where the Committee, under Art. 4, pointed during the first monitoring cycle to the past discriminatory practices as the reason behind the underrepresentation of minorities in some public sectors (*First Opinion on State Union of Serbia and Montenegro*, para 38).

[94] Thematic commentary No. 2, para 46.

[95] Verstichel, Participation, Representation and Identity (n 48) 332.

In the four ex-Yugoslav countries (Croatia, Montenegro, North Macedonia, and Serbia), adequate representation provisions are laid down in constitutions and constitutional laws,[96] and their implementation is upheld by the constitutional courts.[97] Similarly, in the UK, the presence of persons of minority origin in the public sector is mandated by its equality laws.[98] On the contrary, in most of the other analysed countries, this issue is not regulated by law or is not regulated at all.[99]

The same argument could be used with regard to the observed differences in the Advisory Committee's approach to the collection of ethnic data in the five countries. It could be argued that the Committee has so persistently insisted on the collection of data on the ethnic composition of their public sector workforce simply because such requirement stemmed from their own legal frameworks. In particular, the attentiveness with which the Committee evaluated the matter in the UK could be ascribed to the availability of official data, which has been regularly collected pursuant to the UK equality laws.

The problem with this explanation is that its main argument is only partly valid since, in some of the five countries, specific legal guarantees were adopted after the monitoring process commenced, while the evaluation of the standard took place already in the first monitoring cycle.[100]

However, this hypothetical explanation is very useful because it points to another important link between conflict prevention and the supervisory mechanism embodied in the Advisory Committee. By the time the Advisory Committee started to carry out its monitoring role, the participation of national minorities in public affairs, including through their representation in the public sector

[96] The Constitution of the Republic of Serbia (Official Gazette of the Republic of Serbia 98/2006) includes a provision establishing the obligation of public bodies to take care of the appropriate representation of persons belonging to national minorities in public administration (Art. 77, para 2). In Montenegro, the Constitution adopted in 2007 (Constitution of the Republic of Montenegro (Official Gazette of the Republic of Montenegro, No. 1/2007)) guarantees to the persons of minority origin 'the right to proportionate representation in public services, State authorities and local self-government bodies' (Art 79(10)). The right to adequate representation is in Croatia granted in Art. 22, para 3 of the Constitutional Law on the Rights of National Minorities (Official Gazette No. 155/2002). The Constitution of North Macedonia, as amended further to the Ohrid Agreement (para 4.2), contains several provisions on participation by persons belonging to national minorities in the work of non-elected public bodies (eg, Art. 8).

[97] eg, Constitutional Court of Serbia, Decision IУ-171/2002 of 5th June 2003. cp with the Decision No. 6324/2013 of the Romanian High Court of Cassation and Justice (Decizia nr. 6324/2013), where the court held that the condition to speak the Hungarian language as a part of the job description for a position of a general-secretary of a village hall in a municipality where 70% of the residents belonged to the Hungarian minority was discriminatory.

[98] Equality Act 2010, s 149.

[99] In Albania, for instance, the matter was addressed only in relation to the Roma minority in a policy document (National Action Plan for the Equality, Inclusion and Participation of Roma and Egyptians 2021–2025 of the Republic of Albania (2021), activity 5.7.1, at 107.

[100] In Serbia, for instance, the specific legal regulation of the matter took place in 2002 (Art 21 of the Law on the Protection of the Rights and Freedoms of National Minorities before amendments (Official Gazette of the Federal Republic of Yugoslavia No. 11/2002)), ie, in the year when the monitoring cycle was completed.

workforce, had already become an important conflict resolution technique and a component of the peace accords that brought an end to the main ethnic conflicts in Europe.[101] These peace accords precipitated the legal regulation of the matter in the five countries.[102] It seems that such legal developments, in synergy with the specificities of the Advisory Committee's *modus operandi*, ie, its focus on the existing mechanisms, have entrenched the conflict prevention considerations in the Committee's monitoring practice.[103]

Let us now return to the absence of consistency and coherence as the main characteristic of the Advisory Committee's monitoring practice concerning other countries. We have observed that the Advisory Committee's approach to the standard was not systematic, apart from its opinions on the five countries with ethnic conflict experience. What does that mean for our considerations of the role of conflict prevention and human rights as two distinct, although overlapping, approaches to minority rights? To answer this, we need to briefly go back to the basic postulates of the two approaches.

By its very nature, conflict prevention is concentrated on situations characterised by a higher potential for violent ethnic confrontations. Consequently, the conflict prevention approach to minority rights is necessarily one of selective focus, in which attention is primarily directed to the implementation of minority rights in such contexts where the antagonism between the majority and the minority exhibits an ethnic conflict potential of a certain degree. The short-term goal of conflict prevention is to eliminate factors that can lead to the recurrence of violence, while in the long term it strives towards the transformation of violent conflict into 'peaceful (non-violent) processes of social and political change'[104]

[101] See: Framework Agreement (Ohrid Peace Agreement) (signed 13 August 2001, Skopje), paras 4.1–4.3; The Belfast (Good Friday) Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland (Cm 3883, April 1998), para 3, at 16, para 4. at 17; General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement) (signed 14 December 1995, Paris), Article IX: General Provisions, para 3. However, the link between the power sharing mechanism, including the adequate representation guarantees in the peace accords, and the Advisory Committee's monitoring practice should be further examined in the future research.

[102] For instance, as a consequence of the Belfast (Good Friday) Agreement, the Government of the United Kingdom and devolved Executives have taken a number of steps to secure the rights of minorities in Wales, Scotland and Northern Ireland. In North Macedonia, the sections on equitable representation in the Ohrid Peace Agreement gave rise to a series of legislative activities for the further elaboration of this principle. For a brief overview of the contemporary peace agreements see: Alexia Solomou, 'Comparing the Impact of the Interpretation of Peace Agreements by International Courts and Tribunals on Legal Accountability and Legal Certainty in Post-Conflict Societies' (2014) 27 *Leiden Journal of International Law* 496–499.

[103] Another finding closely related to this one, which is common to all country-specific opinions covered by the analysis and that we found worthy of further examination, is related to the fact that the Advisory Committee in its evaluations places particular emphasis on the level of representation of persons of minority origin in the police and the judiciary, as the segments of the public sector that have special significance in conflict prevention strategies. See, for instance, *Fourth Opinion on Croatia*, para 90; *Second Opinion on Romania*, para 195; *First Opinion on Serbia*, para 103; *Third Opinion on Albania*, para 101.

[104] Hugh Miall, Oliver Ramsbotham and Tom Woodhouse, *Contemporary Conflict Resolution: The Prevention, Management and Transformation of Deadly Conflicts* (Polity Press, 2011) 32.

that would lead to the creation of a more just society. Justice is, in that sense, vital for conflict prevention, but its realisation at times can be sacrificed to the realisation of other, short-term objectives, such as security and stability.

On the other hand, in the human rights approach, the pursuit of justice is above all other considerations. The realisation of justice is both the foundation and the ultimate goal of human rights. They are the trump cards because 'the rights secured by justice are not subject to political bargaining or to the calculus of social interests'.[105] At the same time, this pursuit of justice, as in other fields of law, is shaped by the need to secure legal certainty, as the main *differentia specifica* between law and other normative frameworks.[106] Predictability is a classical criterion for a definition of legal certainty, commonly taken to signify consistency and coherence.[107]

The short comparison of the conflict prevention and the human rights approach shows that, no matter whether the lack of coherence and consistency of the Advisory Committee's monitoring is explained by the limitations of its mandate, the broad margin of appreciation of the States Parties in implementing Article 15, or the vagueness of the standard of adequate representation, this trait brings the monitoring closer to a conflict prevention technique than to its human rights ideal.[108]

No doubt, the two paths are compatible and can work in synergy. Yet, which one of the two prevails could have practical consequences for the European minority rights regime. The balance sheet of more than twenty years of elaboration and monitoring of the standard of adequate representation shows that no country included in the analysis has arrived at the adequate level of ethnic representation of persons of minority origin by the last monitoring cycle.[109] The situation has been even deteriorating in some of them.[110] In the five countries where the monitoring was more systematic, only some of those legal guarantees that were stipulated in the peace accords were implemented.[111] In the meantime, new problems in the implementation

[105] John Rawls, *Theory of Justice* (Belknap Press, 1999), 3–7.

[106] Legal certainty, in the words of Mark Fenwick et al, is 'a normative ideal that has structured legal debates, both at the national and transnational level'. Mark Fenwick, Mathias Siems and Stefan Wrbka, 'The State of the Art and Shifting Meaning of Legal Certainty' in Mark Fenwick, Mathias Siems and Stefan Wrbka (eds), *The Shifting Meaning of Legal Certainty in Comparative and Transnational Law* (Oxford, Portland, Oregon: Hart Publishing, 2017) 17.

[107] For an overview of the definitions of the concept of legal certainty in different jurisdictions in Fenwick et al, 'Legal Certainty' (n 106) 2–9.

[108] Kristin Henrard, for instance, observes that 'allowing states a margin of appreciation regarding the way in which they implement human rights carries the risk of negating the need for uniformity and the related concerns of legal certainty, as well as predictability' (Kristin Henrard, 'A Critical Appraisal of the Margin of Appreciation Left to States Pertaining to 'Church–State Relations' under the Jurisprudence of the European Court of Human Rights', in Kristin Henrard (ed), *The Interrelation between the Right to Identity of Minorities and Their Socio-Economic Participation* (Leiden, Brill Nijhoff, 2013) 237).

[109] In some countries and in some respects, the situation has been deteriorating. See, for instance: Fourth *Opinion on Croatia*, para 90; *Fourth Opinion on the UK*, para 129.

[110] See, for instance: Fourt Opinion on Croatia, para 90; Fourth Opinion on the UK, para 129.

[111] See, for instance, the arrangements for the adequate representation of the members of the Albanian ethnic minority into the police forces in South Serbia (*Second Opinion on Serbia*, para 238; *Third Opinion on Serbia*, para 185), as addressed in the Demilitarisation Statement signed in 2001 in Konculj

of the standard have started to loom: the chronic under-representation of smaller minorities and majority in minority positions,[112] politicisation of ethnicity,[113] and the misuse of the right to adequate representation.[114]

5. Conclusion

In the chapter, we examined the relationship between the human rights and the conflict prevention objectives in the European minority rights regime by analysing the monitoring practice of the Advisory Committee on the FCNM. Specifically, we compared the Committee's approach to the right to effective participation in public affairs across twelve countries with the different EU integration trajectories. The investigation focused on the Committee's evaluations of the representation of persons of minority origin in the workforce of public bodies, as a distinct segment of Article 15 that has emerged from the Committee's monitoring and interpretative practice.

Our initial hypothesis was that more systematic evaluations of the matter in certain country-specific opinions coincided with EU enlargement phases, during which minority rights formed part of the accession requirements. We assumed that the primary rationale for incorporating minority rights into EU accession conditions was to prevent an outbreak of ethnic confrontations within an expanded European Union. Accordingly, the presumed correlation between the EU enlargement process and the Committee's supervision practices was supposed to indicate the influence of conflict prevention objectives on the evolution of European minority rights.

However, the research findings did not confirm our initial hypothesis. Instead, they revealed another potential link between the conflict prevention objectives and the Committee's approach to the standard of adequate representation. Throughout the research, we observed several important similarities in the Advisory Committee's evaluations of the matter in the countries that had an ethnic conflict experience in the recent past. These country-specific opinions exhibited

(Serbia); the equitable representation of persons of Albanian origin in the public sector in North Macedonia, as enshrined in the 2001 Ohrid Agreement (*Fourth Opinion on North Macedonia*, para 86), and the similar arrangements for the representation of protestants in the police in Northern Ireland. When it comes to other countries with ethnic conflict experience, a number of scholars have pointed out, mostly in the context of EU integrations, that the results in the sphere of minority protection were mostly limited to the adoption of laws and policies, without due attention being paid to their effective implementation (eg, Kristina Beretka and Margarita Andeva, 'The Non-Existing EU Standards in National Minority Protection as Prerequisites for Successful European Integration: The Case of Macedonia and Serbia' 2018 13(1) *AICEI Proceedings*; Sanja Vasiljević, 'EU Minority Conditionality and the Rule of Law: The Case of Croatia' in Mario Krešić, Damir Banović, Alberto Carrio Sampedro and Janis Pleps (eds), *Ethnic Diversity, Plural Democracy and Human Dignity* (Springer, 2022) 223–252; Ana Knežević Bojović, Vesna Ćorić and Aleksandra Višekruna, 'Spoljašnje uslovljavanje uslovljavanje Evropske unije i regulatorni odgovori Srbije' (2019) 3 *Srpska politička misao*).

[112] Fourth Opinion on the UK, para 129; Second Opinion on North Macedonia, para 25.

[113] Fourt Opinion on North Macedonia, para 87; Fifth Opinion on North Macedonia, para 128.

[114] Fourt Opinion on Croatia, para 89.

more systematic and persistent monitoring of the standard, in contrast to the general lack of consistency and coherence in the Committee's evaluations vis-à-vis other countries.

We argue that the observed variations in the Committee's approach are closely linked to the relevance of participatory minority rights – including the representation of national minorities in public bodies – for conflict prevention. By the time the Advisory Committee began its monitoring role, the inclusion of national minorities in the public sector workforce had already become a key conflict resolution strategy and, as such, a component of the peace accords that ended major ethnic conflicts in Europe. The peace accords led to the legal regulation of the issue in the countries with an ethnic conflict experience. In turn, these legal developments, combined with the specific character of the Advisory Committee's approach – namely, its focus on existing mechanisms – have embedded the conflict prevention considerations into the Committee's monitoring practice.

This interpretation is further supported by the inherent differences between conflict prevention and human rights approaches to minority rights. While these approaches can and often do operate in synergy – given that the conflict prevention draws its normative framework from the contemporary human rights standards – the influence of the conflict prevention objectives on the Advisory Committee's monitoring practice leads to an instrumental approach to minority rights. As a result, their protection becomes largely directed at achieving practical outcomes, such as stability, rather than at securing the realisation of legal standards. Such an instrumental approach to minority rights may partly explain the low level of implementation of the standard of adequate representation in the analysed countries.

Further research is needed to test the robustness of our findings and explore their broader relevance. It should encompass other minority rights standards that are routinely deployed as conflict prevention tools and broaden the analysis to include other States Parties with a past ethnic conflict experience.[115] For now, we may conclude that the early adulthood phase of international minority rights still reflects an impulse to use them as a shield against new ethnic cleavages – an impulse which twenty years ago catalysed their transformation into legally binding standards.

[115] It would be interesting to analyse the Advisory Committee's approach to the matter in Moldova, as well as in Slovenia and Bosnia and Herzegovina, as the other two ex-Yugoslav countries not covered by the present research. Apart from the questions raised in this chapter, another important direction for future research is the impact of technological development on the standard of adequate representation and its recognition and redistributions related objectives.