

Minority Rights Protections in Contemporary  
Europe:  
The Double Standards between the obligations of  
Member States and Candidate Countries.

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Through the principle of EU conditionality, the European Union has proven itself to be somewhat of a normative actor in a number of key foreign policy areas including in minority rights. In 2003, Moravcsik and Vachudova proposed that “the accession process imposes something of a double standard in a handful of areas, chiefly the protection of ethnic minority rights, where candidates have to meet standards that the EU-15 have never set for themselves”.<sup>1</sup> This assertion has been widely proven in academic literature to be correct for the case of the Central and Eastern (CEEC) enlargements of 2004 and 2007. However, there has been limited scholarly attention on whether this assertion still applies to states currently seeking European Union Membership. This thesis proposes that this ‘double standard’ in minority rights obligations has evolved into a four-way divide in minority rights standards taking into account the CEEC and the present accession processes involving the Western Balkan states. The thesis analyses this four-way divide, focusing on the key case studies of Latvia and Bosnia and Herzegovina. It furthermore rejects the arguments offered to justify the different standards which have emerged in minority rights standards across the region. With the European Union facing turbulent times with the June 2016 Brexit vote and rising Euroscepticism, it is essential that the European Union seek to bring accession requirements and membership obligations in line with each other and develop an *acquis communautaire* on the fundamental area of minority rights.

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<sup>1</sup> A. Moravcsik and M. Vachudova, “National Interests, State Power and EU Enlargement”, *East European Politics & Societies* 17(1) (2003), p.46.

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## List of Abbreviations

CEEC	Central and Eastern European Countries
CSCE	Commission on Security and Co-operation in Europe
CVM	Co-operation and Verification Mechanism
DPA	Dayton Peace Agreement
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FCNM	Framework Convention for the Protection of National Minorities
HCNM	High Commissioner on National Minorities
HR	High Representative
HRC	Human Rights Committee
ICCPR	The International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the Former Yugoslavia
NATO	North Atlantic Treaty Organisation
OHR	Office of High Representative
OSCE	Organisation for Security and Co-operation in Europe
SAA	Stabilisation and Association Agreement
SAP	Stabilisation and Association Process
TEU	Treaty of the European Union
UN	United Nations
USSR	Union of Soviet Socialist Republics

## Introduction

The European Union (EU) enlargements of 2004 and 2007 were a major focus of academic attention at the time. The literature investigated not only the impact of an enlarged EU but the existence of double standards in a number of policy areas, notably in minority rights. Moravcsik and Vachudova claim that “many of the changes the East has been forced to make do not reflect the laws of the West”.<sup>1</sup> The failure of the EU to establish an internal EU minority standard is in part to blame for this double standard; the EU had neither developed minority rights within the *acquis communautaire* nor did the existing member states, or the EU-15, subscribe to a single standard. Chandler suggests that the double standards emerged from the fact that the member states “had no conception of how to apply such policies in relation to their own minorities or accepting such a level of international regulations in the affairs of the state”.<sup>2</sup> Prior to the accession of the Central and Eastern European countries (CEEC), there was extensive academic interest in the issue of double standards in minority rights.<sup>3</sup> However, this interest in minority rights standards has drastically reduced following the membership of the CEECs, with attention shifting to post-accession compliance of these states.

The double standards in minority rights obligations are evidenced by the fact that a number of the Western European states or EU-15, are very selective in the minority rights policies that they adopt. For example, France has failed to sign any treaties on the protection of minorities and issued a reservation to the ICCPR, the leading international instrument on minority rights, stating that “In the light of Article 2 of the Constitution of the French Republic, the French Government declares that Article 27 is not applicable so far as the Republic is concerned”.<sup>4</sup> This can be compared to the CEECs which were required to comply with the Copenhagen Criteria. This

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<sup>1</sup> A. Moravcsik and M. Vachudova, “National Interests, State Power and EU Enlargement”, *East European Politics & Societies* 17.1 (2003), p.46.

<sup>2</sup> D. Chandler, “The OSCE and the Internationalisation of National Minority Rights”, in D. Forsythe (eds), *Human Rights in the New Europe* (Lincoln: University of Nebraska Press, 1994), p.66.

<sup>3</sup> See Moravcsik and Vachudova (2003), pp.42-57.

<sup>4</sup> France, “Reservation on Article 27 ICCPR”, 3 April 1978, <http://indicators.ohchr.org/> accessed 6 April 2017.

criterion provides that states seeking membership into the EU must have stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, requiring the ratification of minority rights protections such as the Framework Convention for the Protection of National Minorities. The EU held the candidates to much higher minority rights standards than its members were prepared to meet with their own minority groups. The protection gap that this double standard created highlights that it was essential that the EU bring accession requirements and membership obligations, in the area of minority rights, in line with each other.

Prior to the accession of the CEEC, there was extensive academic interest in the issue of double standards in minority rights. However, this interest has drastically reduced following the membership of the CEECs, with attention shifting to post-accession compliance of these states. The protection of minorities has become part of the accession process for all aspiring member states, with a number of requirements linking to minorities, such as the need for states to ratify the Framework Convention for the Protection of National Minorities. However, despite minority rights still playing a central part of the accession process, there has been limited academic debate on the continued existence of a double standard between the CEEC and the current aspiring member states, creating a gap in the knowledge in the field of minority rights. In order to fill this knowledge gap, this thesis will examine the extent to which the EU has created double standards in minority rights due to inconsistent requirements of minority rights standards between aspiring and member states

## 1. Methodology

In order to examine the extent to which the EU has created double standards in minority rights, it is necessary to complete comparative analysis of minority rights standards required for membership of the CEECs which joined the EU in the 2004 or 2007 wave of enlargement with countries currently seeking membership with the status of candidate or potential candidate of the EU. According to Halperin and Heath, comparative research design refers to “the rules and standards and procedures for



identifying and explaining differences and similarities between the cases (often, but not always, defined terms of countries), using concepts that are applicable in more than one case or country".<sup>5</sup> In order to examine the extent to which the EU has created double standards in minority rights due to inconsistent requirements of minority rights standards between aspiring and member states, it is necessary to do as Halperin and Heath suggest, and identify and explain any differences in minority rights standards.

The key advantages of comparative research are that it allows researchers to contextualize knowledge, to improve classifications, to formulate and test hypotheses and to make predictions.<sup>6</sup> Of these four benefits, two apply directly to this thesis. First is the proposition that comparative research allows researchers to contextualize knowledge by enabling us to overcome implicit ethnocentrism. What this essentially means is that comparisons force researchers to recognise that not all countries have the same political system. Thus, comparative research provides the opportunity to develop an understanding and explanation for the diversity of the political arena.<sup>7</sup> In this thesis, comparative research design will be adopted to develop a greater understanding of the effectiveness of minority rights and more specifically, the relationship between EU membership and minority rights. It seeks to fill a knowledge gap, determining the extent to which the EU has created double standards in minority rights due to inconsistent requirements of minority rights standards between aspiring and member states.

The second advantage to comparative research which directly applies to this thesis, is the proposition that comparative research allows researchers to formulate and test hypotheses, or theory confirming or infirming as identified by Lijphart.<sup>8</sup> In order to produce high quality research, it is necessary to develop and test theories to

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<sup>5</sup> S. Halperin and O. Heath, *Political research: methods and practical skills* (Oxford: Oxford University Press, 2012), p.211.

<sup>6</sup> R. Hague and M. Harrop, *Comparative government and politics: an introduction* (Basingstoke: Palgrave Macmillan, 2011).

<sup>7</sup> P. Burnham, K. Gilland, W. Grant, and Z. Layton-Henry, *Research methods in Politics* (Basingstoke: Palgrave Macmillan, 2008), p.53.

<sup>8</sup> A. Lijphart, "Comparative politics and the comparative method", *American political science review* 65.3 (1971), pp.682-693.

explain the differences which are identified in the research conducted,<sup>9</sup> which is easier to achieve in comparative research. In this thesis, comparative research methods will be used to determine whether or not an existing theory applies to new case studies. This will be achieved by taking the existing theory, that there exists a double standard in minority rights standards, as proven in the existing literature<sup>10</sup> and testing whether or not the theory also applies to current candidate countries. This thesis also seeks to examine why these different minority rights standards exist.

Despite the benefits to comparative research design, it must be noted that there are a number of weaknesses to this research model. The “major methodological task in comparative research is to devise and select theoretical problems, conceptual schemes, samples and measurement and analysis strategies that are comparable or equivalent across the societies involved in a particular study”.<sup>11</sup> This can give rise to a number of challenges, with the key challenge being the concern of too many variables, not enough cases. According to Ragin, the research environment of political science is too rich and varied (that is, it consists of too many variables) for the researcher to be able to find enough cases to control the effect of these variables: it is suggested that it is impossible to isolate the dynamics of the primary interest.<sup>12</sup> Thus, when conducting comparative research on the topic of minority rights, it is necessary to be appreciative of the fact that unlike in scientific research, it is not possible to isolate all possible variables that may impact the results and to be aware that these variables may impact the results of the research conducted. Another difficulty in comparative design is finding comparable cases. It is necessary to compare examples which are similar in a large number of respects to the case which the researchers want to treat as constant, but dissimilar in the variables that they wish to compare to each other. However, researchers can never be certain that the two or more political systems being

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<sup>9</sup> Halperin and Heath (2012), p.216.

<sup>10</sup> See Moravcsik and Vachudova (2003), pp.42-57.

<sup>11</sup> M. Armer, “Methodological Problems and Possibilities in Comparative research” in M. Armer and A. Grimshaw (eds), *Comparative Social Research: Methodological Problems and Strategies* (New York: Wiley, 1973), p.51.

<sup>12</sup> C. Ragin, *The comparative method: Moving beyond qualitative and quantitative strategies* (Berkeley, University of California Press, 1987), pp.23-26

compared agree or differ in all respects, save the ones under investigation.<sup>13</sup> For this reason, it is essential that the case studies used in comparative design are carefully selected.

An analysis of the strengths and weaknesses of comparative design highlights the importance of selecting suitable case studies for comparison in this thesis. There are three types of variables which must be considered in case selection. These are dependent variables, independent variables and intervening variables. Dependent variables are the phenomena that we want to explain in the research.<sup>14</sup> In this thesis, the dependent variable is the double standard in minority rights between aspiring and member states of the EU. This thesis will test whether the double standard in minority rights which occurred in the CEEC enlargement, continues to exist in the minority rights standards required of countries currently seeking membership. Moreover, this thesis seeks to explain why different states are obliged to meet different minority rights standards by the EU.

Independent variables are the things that we suspect influence the dependent variable.<sup>15</sup> There are two independent variables that are relevant to the case study selection in this thesis. The first independent variable is the time at which the country in question has sought membership of the European Union and the impact that this has had on the minority rights standards required of the country to be successful in the membership process. For this reason, it is necessary to select case studies where the country has sought EU membership at different times: for this thesis I have selected to compare countries involved in the 2004/2007 enlargement process and a country currently seeking membership of the EU. The second independent variable is that it is necessary to select case studies where minority rights, and more specifically political participation rights of minorities, have been an ongoing internal issue for the countries in question. In selecting the case studies for this thesis, I have chosen to use case law from the European Court of Human Rights (ECtHR) on the political

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<sup>13</sup> Burnham, Gilland, Grant, and Layton-Henry (2008), pp.55-56.

<sup>14</sup> A. Przeworski and H. Teune, *Logic of Social Enquiry* (New York: Wiley, 1970), p.35.

<sup>15</sup> Burnham, Gilland, Grant, and Layton-Henry (2008), p.62.

participation of minorities as a main indicator of minority rights issues in a country. Finally, intervening variables refer to all other factors.<sup>16</sup> These variables are generally out of the researcher's control, but it is necessary to show an awareness of these. In this thesis, this includes the geopolitical background of states and the impact that this has upon minority rights and the state's relationship with the EU.

On this basis, in selecting my case studies I have chosen to adopt a most similar systems design (MSSD). This design means that it is necessary to select my case studies on the basis that they share many (theoretically) important characteristics, such as ongoing minority rights concerns, but differ in one crucial respect (related to the hypothesis of interest),<sup>17</sup> being the time that the country is seeking membership into the EU. According to Halperin and Heath, "the shared characteristic act as a control in order to test whether the crucial difference between the countries is associated with the variation in the dependent variable".<sup>18</sup> Under this model, it is necessary to select case studies based on the independent and not the dependent variable. In this thesis, the two independent variables, the time the country is seeking membership and internal minority rights concerns are the key variables for the selection of the case studies.

The limits of this thesis do not provide scope to complete an analysis of the minority rights standards of each of the CEEC member states, nor all of the current aspiring member states. For this reason, the thesis will be based on a small-n comparison. Small-n comparisons are based on the analysis of a small number of countries and have a number of advantages including in-depth analysis of case study, whilst providing scope for contextualisation.<sup>19</sup> There are however a number of weaknesses in completing a small-n comparison. These include the risk of selection bias which can lead to results which are misleading and exclude important factors or variables from the analysis or fail to adequately control them. Moreover, small-n comparisons can create difficulties in testing theories and making generalisations.

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<sup>16</sup> Burnham, Gilland, Grant, and Layton-Henry (2008), p.62.

<sup>17</sup> Przeworski and Teune (1970), p.33.

<sup>18</sup> Halperin and Heath (2012), p.219.

<sup>19</sup> Halperin and Heath (2012), p.217.

Despite, the weaknesses of small-n comparison, the advantages of completing an in-depth case analysis make this the most appropriate method to adopt in this thesis. This thesis will therefore compare the minority rights standards required of one CEEC EU member state and one country which is currently seeking EU membership.

### 1.1 Options for the CEEC Case Study

There are a number of case studies which could be suitable options for the country which joined the European Union in the 2004 or 2007 enlargement: Slovakia, Hungary, Romania, Estonia and Latvia. By considering each of these in turn with relation to the variables outlined above, it will be possible to select the most appropriate for this thesis. The first option to consider is Slovakia, which joined the European Union in 2004, fulfilling the first independent variable. Prior to this, Slovakia faced some stumbling blocks in its journey to Europe, involving minority rights. In 1997, Slovakia was excluded from accession negotiations due to its failure to comply with political criteria of the Copenhagen criteria, though this was not due to an infringement of minority rights. However, the 1998 Accession Partnership identified two minority rights policies that were required to be adopted for membership; the adoption of minority language measures and policies protecting the rights of minorities, with specific reference made to the protection of the Hungarian and Roma minority.<sup>20</sup> Despite these ongoing concerns, in 1999, Slovakia was considered to have met the Copenhagen criteria. Whilst the case of Slovakia satisfies one of the independent variables, it does not satisfy the second variable, as there have been no cases brought to the ECtHR in regards to the political participation of minorities. For this reason, Slovakia is not a suitable case study for this thesis.

The second option to consider is Hungary, which joined the EU in 2007, fulfilling the first independent variable. The concerns about Hungarian minorities abroad led to the government to actively support minority rights. Since the late 1980s, there has been an increase in minority rights policies in Hungary, such as the creations

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<sup>20</sup> European Commission, *Regular Report from the Commission on Slovakia's Progress Towards Accession*, (Luxembourg: European Commission, 1998), p.12.

of the Office of National and Ethnic Minorities. Furthermore, the 2003 Act on Equal Treatment and the Promotion of the Equality of Opportunities prohibits discrimination based on a number of grounds relevant to national minorities, including race and nationality. As a result, whilst there have been concerns about Hungarian minorities in other states, there have not been internal minority rights concerns in Hungary nor are there any ECtHR cases on political participation of minorities. Therefore, Hungary does not fulfil the second independent variable and is not a suitable case study for this thesis.

The third option for this case study is Romania, which joined the EU in 2007, fulfilling the first independent variable. In December 1991, the new constitution, approved by referendum, guaranteed minorities the right 'to the preservation, development and expression' of identity. Moreover, the constitution additionally provides for the deputies appointed by national minorities to be represented in the parliament.<sup>21</sup> In 1993, the government also set up a Council for National Minorities to monitor and advice on minority issues. When Romania became a candidate for EU further reforms were made to minority rights to comply with the Copenhagen Criteria, including new legal guarantees for minority rights, ensuring the minorities are represented at national and local levels. Since 2004 the main Hungarian political party, the Democratic Union of the Hungarians of Romania, has been part of the ruling coalition. The minority rights standards in Romania has therefore created no specific concerns or ECtHR cases on political participation of minorities, making Romania an unsuitable case study, as it does not meet the second independent variable.

The forth option for this case study to consider is Estonia, which joined the EU in 2004, fulfilling the first independent variable. The Estonian Constitution of 1992 prohibits discrimination based on race, sex, religion or political or other beliefs and guarantees the same fundamental rights to Estonian citizens and non-citizens alike. Despite the non-discrimination policies, Estonia only granted automatic citizenship to pre-1940 citizens or the security of ethnic Estonians, leading to highly discriminatory

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<sup>21</sup> Chamber of Deputies, "Romanian Constitution", 21 November 1991, <http://www.cdep.ro/pls/dic/site.page?id=371&idl=2&par1=3> accessed 7 March 2017, article 62.

policies towards the Russian minority that moved to Estonia during the Soviet Occupation. For example, the Law on Local Elections adopted in 1993 permits resident non-citizens to vote but not to run for office, limiting political participation of the Russian minority. However, while Russia has repeatedly attempted to portray Estonia's treatment of its Russian-speaking population as a violation of human rights, most international observers have disagreed.<sup>22</sup> Therefore the case study of Estonia does not fulfil the second independent variable, making it unsuitable.

The fifth option for this case study to consider is Latvia, which joined the EU in 2004, fulfilling the first independent variable of this research. In the case of Latvia, the minority rights issues also involve the Russian-speaking minority, who remained on the territory following the fall of communism and became central to Latvia's EU membership. At the time of independence in 1991, the Russian-speaking minority accounted for up to 37.2% of the population, but only 17.8% of the citizenry.<sup>23</sup> Despite the increased minority population, the Saeima, (the Latvian Parliament) chose to restore the pre-occupation legislation from 1922, similar to Estonia, which was highly discriminatory towards the Russian minority. Moreover, both the Latvian language law<sup>24</sup> and the Latvian Election law<sup>25</sup> required near native proficiency in Latvian for political participation. The discriminatory nature of these policies created strong ethnic tensions. This is highlighted in ECtHR case of Podkolzina v. Latvia.<sup>26</sup> According to the Election Act, political candidates who had not completed their education in Latvian were required to obtain the highest level certificate of knowledge in Latvian. Podkolzina held a valid language certificate but had her name stuck off. This case and other issues connected to political participation will be further analysed in chapter four of this thesis. Despite the minority rights issues in Latvia satisfying the second independent variable of this thesis, the country was successful in joining the EU in 2004, following some reform, making it a suitable case study.

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<sup>22</sup> Minority Rights Group International, "Estonia", 19 June 2015, <http://minorityrights.org/country/estonia/>, accessed 4 March 2017.

<sup>23</sup> United Nations Development Programme, *Latvian Human Development Report: Human Capabilities in the Region* (Riga: UNDP, 1997), p.49.

<sup>24</sup> Saeima of the Republic of Latvia, *Republic of Latvia Language Law* (Riga, Saeima, 1992), article one.

<sup>25</sup> Saeima of the Republic of Latvia, *The Saeima Election Law* (Riga: Saeima, 1992).

<sup>26</sup> *Podkolzina v. Latvia* Application No. 46726/99 (European Court of Human Rights, 9 April 2002).

## 1.2 Options for the Current Candidate Case Study

There are two case studies which could be suitable options for the country which is currently seeking EU membership and has internal minority rights issues: Turkey and Bosnia and Herzegovina. With regards to the first option, Turkey fulfils the first independent variable of this research as it is a current candidate member of the EU. Turkey has a number of ethnic, linguistic and religious minorities, though it is not possible to determine exact numbers, as Turkey does not collect data on ethnic, religious or other origin of its citizens.<sup>27</sup> Moreover, the government continues to only recognise Armenians, Jews and Rum Christians as minorities. Minority rights reforms are on the political agenda in Turkey, following the December 2004 recognition of Turkey as an official candidate for EU accession and the need to fulfil the minority protection requirement of the Copenhagen criteria. As a result, the Turkish government introduced a number of constitutional and legislative reforms, granting minority rights. However, the government carefully avoided any explicit reference to an official recognition of minority identities.<sup>28</sup> To date, Turkey has also refused to sign and ratify the Framework Convention on the Protection of National Minorities.<sup>29</sup> However, whilst there are internal minority rights issues there have been no cases brought to the ECtHR directly concerning the political participation of minorities. As a result, this case study lacks one of the independent variables, making it unsuitable for this thesis.

The second option for the case study for the country currently seeking membership into the EU is Bosnia and Herzegovina (Bosnia), which is currently a potential member state. Bosnia submitted its application for membership on the 15<sup>th</sup>

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<sup>27</sup> Minority Rights Group International, "Turkey", 19 June 2015, <http://minorityrights.org/country/turkey/> accessed 7 March 2017.

<sup>28</sup> Minority Rights Group International, "Turkey", 19 June 2015, <http://minorityrights.org/country/turkey/> accessed 7 March 2017.

<sup>29</sup> April 2017.



February 2016 and is still awaiting a response.<sup>30</sup> The substantial minority rights issues in Bosnia have become a key focus for its accession into Europe, fulfilling one of the independent variables of this research. The current population of Bosnia is a mixture of different minority groups and the internationally drafted Dayton Peace Agreement created a political framework based on power-sharing between the constituent peoples, the Serbs, Bosniaks and Croats, excluding others. The constituent peoples are protected under the Bosnian constitution whereas, the others in Bosnia, which include seventeen ethnic groups, including Jews, Roma, and Czechs are largely excluded. One of the main hurdles of Bosnia's road map to Europe is the implementation of the ECtHR case of *Sejdić and Finci v. Bosnia and Herzegovina*,<sup>31</sup> on the political participation of minorities, fulfilling the second independent variable outlined above. The case involved Sejdić, a member of the Roma community, prevented from standing for the Presidency and Finci, a member of the Jewish community, prevented from being a candidate for the House of Peoples, as a direct result of articles V<sup>32</sup> and IV<sup>33</sup> of the Bosnian constitution. Compliance with the judgment is a requirement for membership, making Bosnia a suitable case study for minority rights standards for current aspiring member states.

### 1.3 Case Studies

This thesis will therefore compare the minority rights standards required for EU membership of Latvia as a CEEC that gained membership in 2004 and Bosnia as a current potential candidate. The minority rights issues raised in these case studies are not identical. In Latvia, the minority rights issues have centred on the Russian minority, a linguistic minority found in Latvia following the Soviet occupation, whereas, the minority rights situation in Bosnia is based on ethnic minorities with different rights provided for the constituent peoples and others. Despite these differences, both

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<sup>30</sup> European Commission, "Bosnia and Herzegovina", 6<sup>th</sup> December 2016, [https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/bosnia-herzegovina\\_en](https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/bosnia-herzegovina_en) accessed 7 March 2017.

<sup>31</sup> *Sejdić and Finci v. Bosnia and Herzegovina* Application Nos. 27996/06 and 34836/06 (European Court of Human Rights, 22<sup>nd</sup> December 2009).

<sup>32</sup> Requires the tri-member presidency to comprise of one member of each of the constituent peoples.

<sup>33</sup> Requires the House of Peoples has fifteen members, with five members from each of the Constituent peoples.

countries have experienced minority rights issues as a stumbling block to EU membership. In both countries, minority rights standards have formed substantial elements of the membership process with constitutional reform required in both cases. Furthermore, the political participation of minorities in both Latvia and Bosnia has created difficulties in the accession processes with claims brought against both states in the ECtHR.

## 2. Research Questions

This thesis will provide answers to three principle research questions:

1. Do there exist any effective mechanisms for the protection of minority rights in contemporary Europe?
2. What influence does EU conditionality have upon norm adoption in states with European Union Aspirations?
  - a. Has that influence diminished since 2008?
3. Is the European Union consistent in the minority rights standards it requires in aspiring and member states?

The first question, which asks whether there are effective mechanisms for the protection of minority rights in Europe, is addressed in the first two chapters, the second question which concerns the influence of EU conditionality is addressed in chapter three, and the third question which asks whether the EU is consistent in its minority rights requirements, is addressed in chapters four and five of this thesis.

### 2.1 Chapter One

In order to determine whether or not the EU can influence minority rights or if it is consistent in the minority rights standards or obligations it places upon states, it is necessary to first determine whether or not effective minority rights exist. In order to assess the effectiveness of minority rights, it is first necessary to consider what is meant by the term minority. The meaning of the term minority should be easily identified as it is possible to open a dictionary and find a definition. However, these

dictionary definitions lack practical application, in a general sense and more importantly when it comes to minority rights. This chapter will begin to provide an answer to the first research question of this thesis, 'Do there exist any effective mechanisms for the protection of minority rights in contemporary Europe?' by asking the essential question, 'what is a minority?'.

The political importance of a definition of a minority will be questioned in this chapter, as the pursuit of a definition has not received universal support; it has been suggested that "we are able to recognise minorities without any definitions".<sup>34</sup> Drawing upon the work of Hannum,<sup>35</sup> the chapter critically analyses the various theoretical and practical explanations of the reluctance of the international community to committing to a definition. This will be balanced with a consideration of the benefits of the creation of a definition that crosses borders. I argue that the importance of developing a definition lies in the need to bridge the current protection gap that has evolved in the protection of minority rights with states having a wide margin of discretion in their interpretation of the term minority.

Scholarly attention to the meaning of the term minority is not a new pursuit; it is something which has occupied academics and political institutions alike since the emergence of specific minority rights in the League of Nations era. Despite numerous attempts by both the international community and institutions such as the United Nations (UN), as well as regional attempts by the Council of Europe and the Organization for Security and Co-operation in Europe (OSCE), no definition has received sufficient support to become binding. I will compare the attempts by the International Community through the UN, focusing on the work of Capotorti<sup>36</sup> and Deschênes,<sup>37</sup> with the efforts of Europe, concluding that a regional definition would prove more effective. The difficulties faced at both an international and regional level

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<sup>34</sup> T. Simon, "Minorities in International Law", *The Canadian Journal of Law and Jurisprudence* 10.2 (1997), p.518.

<sup>35</sup> H. Hannum, "The concept and definition of minorities", in M. Weller (eds), *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford: Oxford University Press, 2007) pp.50-51.

<sup>36</sup> F. Capotorti, *Study on the rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (New York: UN, 1979).

<sup>37</sup> J. Deschênes, *Proposal concerning a definition of the term Minority* (New York: UN, 1985).

highlight the need to consider alternative approaches to developing a definition of a minority. The importance of both individual and group rights to a minority shall be explored in this chapter, as well as the benefits of adopting a more pragmatic approach to a definition. The discussion of the concept of pragmatism and the balance between individual and group rights are relevant to the thesis as a whole. This chapter concludes by proposing a definition of a minority that strikes the correct balance between a definition that goes beyond the state, whilst being pragmatic, to maintain a sense of state sovereignty and control over minorities.

## 2.2 Chapter Two

The creation of the UN following the end of the Second World War in 1945 saw human rights emerge on the international agenda. Despite the sufferings of minority groups in the Second World War, most notably the Jewish community, minority rights were widely excluded from the international agenda until 1989. It took the end of the Cold War and the associated ethnic tensions from the collapse of both the USSR and Yugoslavia, to bring minority rights into the attention of Western democracies. Developing on the first chapter of this thesis, the second chapter critically analyses the different mechanisms that have been developed to protect minority rights. This chapter will assess whether international or regional instruments provide more effective protection mechanisms, providing an answer to the first research question of this thesis 'Do there exist any effective mechanisms for the protection of minority rights in contemporary Europe?'. The failure of both the International and European community to develop a binding definition of a minority has serious implications for the effectiveness of minority rights, as it is very difficult, if not impossible, to have an effective rights system in place without a clear understanding to whom they apply. Both the UN and the European institutions have begun to realise the need to develop effective minority rights, with varying levels of enthusiasm and success.

The first part of this chapter will critically analyse the protection mechanisms which exist at an international level, with a focus on the minority rights provided for by the UN, including article 27 International Covenant on Civil and Political Rights

(ICCPR)1966. The second part of this chapter shall consider the protection mechanisms offered at the European level, with particular attention given to the efforts of the EU, the Council of Europe and the OSCE. This is central to the overall research aims of the thesis, given the focus on minority rights standards in the EU and requires clarification and analysis. To this end, linking to research question two and the ability of the EU to influence norm adoption, I analyse the validity of claims of the EU as a normative power to develop an effective framework of minority rights that is adopted by states and other institutions. I conclude that until a clear definition is created, the present minority rights frameworks fail to provide minority rights which are applicable to all those which require protection. The discretion provided to states in the provision of minority rights, along with limited monitoring mechanisms, leave minority rights unprotected. This chapter concludes that there is a fine balance to be sought between pragmatism and certainty in minority rights. Until either a regional or international instrument is developed or amended which limits the current unlimited discretion given to states on minority issues, neither level of protections will provide adequate minority rights protections. Institutions should develop a protection mechanism which protects minority rights more effectively.

### 2.3 Chapter Three

The ability of the EU to influence policy in both member states and aspiring member states is essential to the development of effective and efficient policies on all areas, including minority rights. The wave of enlargement which took place in 2004 and 2007 marked a shift in membership requirements for aspiring members. For the first time, it was necessary for the candidate countries to engage in substantial reform, to bring domestic policy in line with the EU *acquis communautaire* prior to membership. The third chapter of this thesis builds upon the concept of the EU as a normative power and explores the key tool at the disposal of the EU to ensure these reforms; the principle of EU conditionality. The principle of EU conditionality, or the 'Carrot and Stick' approach to reform, proved successful in the CEEC enlargement, to an extent. The prospect of membership generally provided motivation for the candidate countries to make the required reforms.

The success of this policy saw enlargement “claimed to be the most successful foreign policy of the EU”<sup>38</sup> with suggestions that it had “contributed to democratic consolidation, respect for human rights, minority protection, conflict resolution and stability in Eastern Europe”.<sup>39</sup> The third chapter of this thesis will question what influence EU conditionality has upon norm adoption in current states with EU aspirations. After an initial analysis of the development of the principle of EU conditionality through the external incentives model, this chapter will introduce the two principle case studies of this thesis, Latvia and Bosnia and examine the effectiveness of EU conditionality as a policy driver in all policy areas, before going on to analyse the minority rights standards found in each state in chapters four and five.

In Latvia, reforms in the pre-accession period in domestic minority rights through the Accession Partnerships are cited as EU conditionality’s greatest success, where EU conditionality and the reward of EU membership was the key impetus for a change towards minority-friendly legislation.<sup>40</sup> I critically evaluate the strength of this claim, questioning how successful EU conditionality really was, in light of the poor post-accession compliance with minority rights in Latvia. I shall compare this to the use of EU conditionality in the case study of Bosnia through the Stabilization and Association Process. Through analysis of the use of EU conditionality in both the state building and the integration process in Bosnia, I conclude that the carrot and stick approach may no longer be enough to entice the political elite to undertake policy reform, suggesting that the influence of the EU on countries with membership aspirations has diminished since 2008. This is in part due to the vague nature of the accession documents and a lack of consistency in the requirements of each state. A brief analysis of post-accession compliance in Croatia, as the most recent state to gain membership in 2013, will highlight that EU conditionality may be successful in ensuring that formal reforms are made through the adoption of legislation. However, EU

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<sup>38</sup> F. Schimmelfennig, “EU political accession conditionality after the 2004 enlargement: consistency and effectiveness”, *Journal of European Public Policy* 15.6 (2008), p.918.

<sup>39</sup> Schimmelfennig (2008), p.918.

<sup>40</sup> J. Kelley, *Ethnic Politics in Europe. A Power of Norms and Incentives* (NJ: Princeton University Press, 2004), pp.73-93.

conditionality cannot guarantee that these reforms trickle down due to a lack of cultural, social and economic acceptance of these changes.

## 2.4 Chapter Four

This chapter will build upon the issue of consistency in EU requirements, highlighted in chapter three, and will begin to consider the third research question of this thesis, 'is the EU consistent in the minority rights standards it requires in aspiring and member states?' The end of the Cold War saw a dramatic change in political borders with the emergence of the newly democratized CEECs. It is undoubtable that immediate tension between the democratic and well established states in Western Europe and the CEECs developed. The Western European states were cautious of the new states and the CEECs felt as though they were being held to a higher standard than the rest. The 2004 and 2007 enlargements provide clear evidence of a double standard in the minority rights obligations of the EU-15 and newer member states at the time. The failure of the EU to establish an internal EU minority standard is in part to blame for this double standard at the time of the CEECs accession. I propose that at this time, there were three different standards of minority rights in Europe, and argue that the claims of 'double standards' of minority rights do not truly represent the minority rights situation. This chapter examines claims that the "minority protection conditionality varies greatly across accession states",<sup>41</sup> through an analysis of minority rights obligations in the CEECs at the time of accession.

This fourth chapter analyses the various developments of minority rights in Latvia, during the pre-accession period, such as the impact of the ruling of the ECtHR case of *Podkolzina v. Latvia*.<sup>42</sup> I conclude that at the time of accession, Latvia had a minority rights standard based on assimilation, where established discrimination

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<sup>41</sup> A. Wiener and G. Schwellnus, "Contested norms in the process of EU enlargement: non-discrimination and minority rights", 16 April 2004, <https://www.wiso.uni-hamburg.de/fachbereich-sowi/professuren/wiener/dokumente/conwebpaperspdfs/2004/conweb-2-2004.pdf> accessed 27 May 2014, p.15.

<sup>42</sup> *Podkolzina v. Latvia* Application No. 46726/99 (European Court of Human Rights, 9 April 2002).

against minority groups, in particular the Russian-speaking minority were tolerated,<sup>43</sup> and little criticism was offered by the EU. I draw attention to the fact that the EU turned a blind eye to many failures in Latvian minority rights standards, including a failure to ratify the Framework Convention for the Protection of National Minorities prior to gaining membership, suggesting that this may be explained by Brubaker's triadic nexus. Moreover, I will analyse the various minority rights issues that have occurred in Latvia post-accession, highlighting the fact that minority rights remain a cause for concern in Latvia despite the reforms made at the request of the European institutions prior to membership. Drawing upon the analysis of the EU as a normative actor in chapter two, it is concluded that the EU did act as a normative power in the Latvian enlargement process, and the CEEC enlargement more generally.

## 2.5 Chapter Five

The fifth chapter of thesis will examine the minority rights obligations required of Bosnia in order to gain membership, in order to draw comparisons with the requirements in Latvia at the time of accession and to determine if the EU is consistent in its requirements for minority rights standards. At present, Bosnia has the status of potential candidate country, despite the Stabilisation and Association Agreement entering into force in June 2015. To date, limited progress has been made by Bosnia towards complying with the *acquis communautaire*, highlighting the weakness of EU conditionality, as concluded in chapter three. Minority rights are a contentious issue in Bosnia, as the country is often referred to as the nation of minorities. Rather than having a majority ethnic group, the country has the constituent peoples, consisting of the three leading ethnic groups in Bosnia; the Bosniaks, Serbs and Croats. The first part of this chapter examines how to reconcile political stability and deep vertical cleavages. The deep vertical cleavages in Bosnia are found in the political divisions in the country due to the different ethnic groups, all seeking to protect their own national interests. In Bosnia, this is achieved through the model of consociational

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<sup>43</sup> D. Kochenov, "Commission's Approach to Minority Protection During the Preparation of the EU's Eastern Enlargement: Is 2 Better than the Promised 1?", *European Diversity and Autonomy Papers* 2 (2007), p.15.



democracy. Wippman suggests that consociational democracy is the "only means by which members of ethnic groups can maintain their identities and still participate meaningfully in the life of the larger societies".<sup>44</sup> I will explore the validity of this claim and analyse both the suitability and effectiveness of consociational democracy in Bosnia, concluding that this form of democracy in fact exacerbates the minority issues of this country.

In order to draw a comparison with the minority rights standards required by the EU it is necessary to analyse the ECtHR *Sejdić and Finci v. Bosnia and Herzegovina*.<sup>45</sup> This case concerned political participation of minorities and created further minority rights obligations, as compliance with the ruling is a requirement of EU membership. I will examine the various proposals for reform to membership of the Presidency and the House of Peoples that have made in order to comply with the ruling. Using the various definitions of a normative power outlined in chapter two, I analyse whether the actions of the EU with regards to minority rights and Bosnia were normative. I conclude that the level of reform required in Bosnia exceeds minority rights standards that have been required of any other member of the EU, meaning that the actions lack normative justification. This also provides evidence that it is no longer sufficient to make claims of double standards in minority rights obligations between the member states and potential member states of the EU.

## 2.6 Chapter Six

The final chapter of this thesis will set out the key findings relating to each of the research questions set out in this introductory chapter. With regards to the first research question asking, 'do there exist any effective and consistent mechanisms for the protection of minority rights in contemporary Europe?', the concluding argument is that both international and European institutions have sought to develop

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<sup>44</sup> D. Wippman, "Practical and Legal Constraints on Internal Power Sharing", in D. Wippman (eds), *International Law and Ethnic Conflict* (Cornell: Cornell University Press, 1998), p.211.

<sup>45</sup> *Sejdić and Finci v. Bosnia and Herzegovina* Application nos. 27996/06 and 34836/06 (European Court of Human Rights, 22<sup>nd</sup> December 2009).

frameworks for minority rights. However, this is undermined by the failure of these institutions to provide a binding definition of a minority; I will conclude that no minority rights can be effective if it is unclear to whom they apply. The second research question of this thesis asks 'what influence does EU conditionality have upon minority rights standards in states with EU aspirations and has that influence diminished since 2008?'. The findings of this thesis highlight three principle weaknesses of EU conditionality, which limits the impact of the EU to promote and ensure norm adoption: vague terms, lack of consistency, and a failure to appreciate the need for social recognition of policies. This analysis leads to conclusions that the influence of the EU through the principle of conditionality has diminished since 2008, following the CEEC enlargements.

The final research question of this thesis questions draws upon the issue consistency raised by EU conditionality and asks: is the EU consistent in the minority rights standards it requires in aspiring and member states? Analysis of minority rights in Latvia and Bosnia during the accession process leads to clear conclusions that there exists not only a double standard in minority rights, but suggests that there exist at least four different standards of minority rights. This raises the question as to whether the EU can act as a normative power in regards to minority rights. An analysis of the utility, universal human rights and value based arguments presented by Lerch and Schwellnus,<sup>46</sup> confirms that there is no normative justification for the different minority rights standards and that the ongoing issue negatively impacts upon the normative power of the EU. An analysis of the definition of a minority, minority rights and the case studies of Latvia and Bosnia lead to the conclusion that pragmatism is necessary with regards to minority rights. However, the degree to which the EU is inconsistent in the minority rights standards is problematic. It is necessary that the EU takes steps to develop a single standard in minority rights across all states, both members and aspiring members.

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<sup>46</sup> M. Lerch and G. Schwellnus, "Normative by nature? The role of coherence in justifying the EU's external human rights policy", *Journal of European Public Policy* 13.2 (2006), pp.304-321.

## Chapter One: What is a Minority?

### 1. Introduction

“Minority is an ambiguous term, potentially definable through an endless combination of interacting variables like religion, language, ethnicity, race, culture, physical characteristics and other traits”.<sup>1</sup> An understanding of the term minority is essential when considering minority rights and to whom they apply. The Oxford dictionary states that a minority is “a small group of people within a community or country, differing from the main population in race, religion, language, or political persuasion”.<sup>2</sup> Whilst providing a basic understanding of the concept, with reference to numerical inferiority and cultural difference, this definition provides limited guidance for practical application. The term minority is associated with a number of characteristics such as religion, language, ethnicity, nationality, culture and numerical inferiority not considered in the dictionary definition. It is evident that each of these characteristics has different implications to what we understand by the term a minority. For example, an ethnic minority is often linked with “persons belonging to those ethnic communities which do not make up the majority of the population”,<sup>3</sup> such as the Indian population in England and Wales which accounted for 2.5% of the population in the 2011 population census.<sup>4</sup> This can be compared to the EU understanding of the term minority. Drawing upon examples, such as the German population in Belgium, the understanding of a minority in the EU is a national minority, defined as “people living on soil which they have occupied from time immemorial, but who, through change of boundaries, have become politically subordinate”,<sup>5</sup> linking minorities to long-term residency.

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<sup>1</sup> J. Rehman, *The Weakness in the International Protection of Minority rights: A Study With Particular Reference to the State Practice of Pakistan* (The Hague: Martinus Nijhoff Publishers, 2000), p.14.

<sup>2</sup> Oxford University Press “Definition of Minorities”, 15 November 2012, <http://oxforddictionaries.com/definition/english/minority?q=minorities>, accessed 15 November 2012.

<sup>3</sup> T. Benedikter, “Legal instruments of minority protection in Europe: an over view”, 30 November 2006, [www.gfbv.it/3dossier/eu-min/autonomy-eu.html](http://www.gfbv.it/3dossier/eu-min/autonomy-eu.html) accessed 8 October 2012.

<sup>4</sup> Office of National Statistics, “Ethnicity and National Identity in England and Wales 2011”, 11 December 2012, [http://www.ons.gov.uk/ons/dcp171776\\_290558.pdf](http://www.ons.gov.uk/ons/dcp171776_290558.pdf) accessed 14 April 2015.

<sup>5</sup> R. Schermerhorn, “Minorities: European and American”, *The Phylon Quarterly* 20.2 (1959), p.179.

The scope of this thesis precludes an in-depth engagement with the rich political theory literature on the relationship between democracy and minorities. However, it must be acknowledged there has long been concern about the tyranny of the majority and the challenges of protecting minority rights in diverse political communities. JS Mill warned that majoritarianism and representative democracy may lead to the danger of class legislation,<sup>6</sup> as a numerical majority would dominate the decision making process and will not adequately serve the interests of minorities. In a majority society, minorities find themselves in a disadvantageous situation; society will aim to develop policies that are to benefit the majority, at the expense of the minority. Moreover, the process of democratisation “opens up both a space for increased respect for minority rights and a forum where intolerance and hatred can come into play”,<sup>7</sup> providing a heightened potential for conflict. A defining feature of the Cold War era was the upsurge in ethnic conflict, as states failed to have due consideration for minority rights. Field proposes that in the post-Cold War era, numerous minority groups felt that the political, legal and social institutions did not respect or protect minority group norms,<sup>8</sup> which will be explored throughout this thesis.

The number of variables to be considered in determining, ‘what is a minority?’ creates difficulties in developing a definition which receives sufficient support. The different approaches adopted by states, international bodies and individuals have led to uncertainty and insecurity for those who are, or have the potential to be, a minority. This chapter will argue for the relevance of context, in practical terms, as an understanding of the term minority is dependent upon an appreciation of context and local variables. The history of a geographical area, such as previous conflicts, is important to the understanding of a minority and so practical context cannot be overlooked when defining a minority. However, as will be explored in this chapter, the protection gap in minority rights standards leaves some minority groups highly disadvantaged and subject to discrimination. The research questions of this thesis

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<sup>6</sup> J.S. Mill, *On Liberty* (London: Penguin, 1974), p.7.

<sup>7</sup> M. Salter, “Democracy for all? Minority rights and democratisation”, 12 February 2010, <https://www.opendemocracy.net/mark-salter/democracy-for-all-minority-rights-and-democratisation> accessed 2 December 2015.

<sup>8</sup> R. Field, “In Search of Democracy: Reconciling Majority Rule, Minority Rights, and Group Rights in South Africa and the United States”, *Boston College Third World Law Journal* 16.1 (1996), p.66.

focus on minority rights among both member and possible member states of the EU. It is essential to understand what is meant by the term minority, in order to fully engage in the key debates raised over minority rights protections in the region, which will be critically analysed in later chapters of this thesis. Whilst there have been attempts to develop a definition, there have been difficulties in reaching an agreement on both the terminology and content.

This chapter seeks to answer the question of ‘what is a minority?’. The first part of this chapter will look at the key tensions of whether there is a need to create a universal definition of a minority that has consensus amongst the international community. I question the need to develop a definition, examining the reluctance of states and international actors to commit to a definition. I conclude that the lack of a definition creates a protection gap for minorities, highlighting the difficulties this creates to provide effective minority rights protections. The second part of this chapter will analyse the development of an understanding of the term minority from the League of Nations to the present day, and how this has resulted in a number of important proposals but no binding definition. I will compare the attempts by the International Community, focusing on the work of the UN through Capotorti and Deschênes, with the efforts of key European institutions to create a definition, concluding that a regional definition of a minority is more appropriate, owing to the importance of regional knowledge and context which cannot be fully appreciated at an international level.

The final part of this chapter will analyse the alternative approaches that have been proposed in order to create a universal definition. The importance of both individual and group rights to a minority will be explored in this chapter. I will question how we can balance individual autonomy and the freedom of choice with the deeply constitutive impact of culture and community on individuals. I will analyse the political implications of the shift from the comprehensiveness of the classical approach towards a simple, more pragmatic approach to defining a minority, which allows for greater flexibility and interpretation. The Council of Europe stated that “the delineation of beneficiaries (of minority rights) has been a stumbling block for

international standard-setting activities...in light of these and other difficulties; it is probably worthwhile to look for an alternative to a comprehensive and globally applicable definition".<sup>9</sup> The need to adopt a context-sensitive approach must be balanced with a definition that goes beyond the state and can be applied in all states to ensure a degree of consistency in what we mean by a minority. On this basis, I will argue that a definition based on a strict set of variables is not suitable, advocating a more pragmatic approach to defining a minority. This is necessary, as it allows for context and interpretation to be embraced at a wider level, something which to date, has only been advocated at a European level.

## 2. Is There a Need for a Definition of a Minority?

The need to define 'what is a minority' is faced with varied levels of support. On the one hand, scholars such as Jasudowicz, suggest it is not possible to define a minority due to the complexities and unlimited variables which must be considered.<sup>10</sup> On the other hand, scholars such as Simon claim that "we are able to recognise minorities without any definitions".<sup>11</sup> However, leaving the identification of a minority to the full discretion of the interested parties, such as the state, has serious political implications; it leaves minority rights open to abuse and risks these rights being omitted from the domestic legislation, as will be analysed throughout this thesis. Drawing upon the work of Hannum,<sup>12</sup> this part of the chapter will critically analyse the various theoretical and practical explanations of the current resistance to committing to a definition, in order to gain insight into the reluctance of the International Community. In 1995, when the Council of Europe introduced the Framework Convention on the Protection of National Minorities, "it was decided to adopt a

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<sup>9</sup> Council of Europe, *Equality and Non-Discrimination: Minority Rights* (Strasbourg: Council of Europe, 1990).

<sup>10</sup> T. Jasudowicz, "Some legal aspects of the protection of minority rights", in A. Bloed and W. de Jonge (eds), *Europe in Legal aspects of a New European Infrastructure* (Utrecht: European Institute, 1992), p.102.

<sup>11</sup> T. Simon, "Minorities in International Law", *The Canadian Journal of Law and Jurisprudence* 2 (1997), p.518.

<sup>12</sup> H. Hannum, "The Concept and Definition of Minorities", in M. Weller (eds), *Universal Minority rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford: Oxford University Press, 2007), pp.50-51.

pragmatic approach, based on the recognition... it is impossible to arrive at a definition capable of mustering general support”,<sup>13</sup> suggesting that it was not possible to reach an agreement on how to define a minority. This was in part due to the political climate that developed following the Cold War. However, despite the definition of a minority being difficult to achieve, I argue that some guidance is necessary to guarantee effective minority rights.

## 2.1 Tensions in Defining a Minority

The first tension in the pursuit of a definition of the concept of a minority can be found in the theoretical concepts of the nation-state and a minority. Historically, governments have adopted various policies towards minorities in pursuit of political homogeneity including genocide and assimilation.<sup>14</sup> If a current government were to pursue these policies against minorities, they would face both criminal and political sanctions through the UN and other international organisations. However, the concept of minorities does not fit easily with most theoretical ideas of the state. For example, according to Hannum, the state is based on “a collection of shifting coalitions founded on individual self-interest or economic interests of classes”.<sup>15</sup> This leaves limited scope for the consideration of characteristics such as ethnicity and culture or the concept of a minority. Moreover, the theory of the nation-state proposes that the sovereign state is centred on the idea of its peoples and excludes any national, cultural or ethnic differences,<sup>16</sup> suggesting that there is no acceptance of minorities. If the concept of a minority is not required in a theoretical understanding of the state, this raises questions about the need to develop a definition of a minority at all.

It is a modern day reality that most countries are culturally diverse, with very few having all citizens share the same language or belong to the same ethno-national group. However, there remains evidence of reluctance among a small number of

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<sup>13</sup> Council of Europe, *Framework Convention for the Protection of National Minorities and Explanatory Report* (Strasbourg: Council of Europe, 1995).

<sup>14</sup> See W. Kymlicka, "The Internationalization of Minority Rights", *International Journal of Constitutional Law* 6 (2008), pp.1-32.

<sup>15</sup> Hannum (2007), p.50.

<sup>16</sup> Hannum (2007), p.50.

states to accommodate these differences, despite the fact that multiculturalism is a reality of the modern world. Evidence of this can be seen in the minority situation in France. In 2007, the United Nations Independent Expert on Minority issues, Gay McDougall, issued a press release stating that:

To become a citizen of France is not sufficient for full acceptance; that acceptance will be granted only with total assimilation that forces them to reject major facets of their identities. Only when a way is found to shed the colour of their skins, hide the manifestations of their religion or the traditions of their ancestors, only then will they be accepted.<sup>17</sup>

The attempt in France to preserve the nation-state, with a population of individuals with the same national and cultural needs, does not accommodate minorities. Whilst this does not represent the position adopted by most states, the case of France does illustrate that there are still leading states in the international community that pursue this ideal, rather than embracing multiculturalism and minority rights. With states such as France not supporting the concept of minorities, it is difficult to envisage the international community reaching an agreement on how to define a minority. Moreover, the tension between minorities and nationhood has further consequences for a pragmatic definition of a minority as endorsed in this thesis. As this approach to defining a minority provides the state a wide margin of discretion, there is the risk that states will simply continue to refuse to acknowledge the existence of minorities through a very narrow interpretation of the definition and thus not guarantee minority rights.

The second tension in the pursuit of the definition of a minority is the international community's reluctance to define a minority on the basis that minority rights "run counter to philosophical underpinnings of human rights".<sup>18</sup> The traditional

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<sup>17</sup> Office of High Commissioner for Human Rights, "UN Expert on Minority Issues Calls for Committed Leadership to Promote Non-Discrimination, Equality and Diversity in France", 1 October 2007, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2558&LangID=E> accessed January 4 2015.

<sup>18</sup> Hannum (2007), p.50.



interpretation of human rights places the holder of rights as the individual and not with groups,<sup>19</sup> in contrast to the way minority rights are often interpreted. According to this understanding of human rights, if minority groups were to seek to enforce minority rights protections, they must do so through individual rights and relevant anti-discrimination provisions. It is possible to conclude that, as individual rights protect the individual members of minority groups from discrimination, there is no need to define a minority. However, non-discrimination provisions do not provide effective minority rights as they are not created to deal with minority issues. Highlighting the direct link between the definition of a minority and effective minority rights, chapter two of this thesis will conclude that minority rights protection mechanisms across the international community are not adequate for two reasons. Firstly, non-discrimination provisions are not adequate for effective minority rights and secondly, the failure of the international community to develop a binding definition of a minority means that it is almost impossible to have effective minority rights where there is no agreement to whom they apply. Placing minority rights under the umbrella concept of non-discrimination rights fails to consider the key tensions between human rights as individual or group rights that will be considered in further detail in this chapter.

The third tension in defining a minority can be found in the issue of minority groups and the right to self-determination, as protected under the International Covenant on Civil and Political Rights 1966 (ICCPR).<sup>20</sup> States with a significant minority population often fear that a binding definition of a minority and guaranteeing minority rights would encourage fragmentation or separatism.<sup>21</sup> The fear is that if identifiable in both the legal and political sphere, minorities will seek to exercise the right to self-determination, to the detriment of the territorial and sovereign state. However, an examination of the legal framework on the right to self-determination confirms that this is, to an extent, unfounded. Article 1 of the ICCPR states that, “all peoples have the right of self-determination. By virtue of this right they freely determine their

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<sup>19</sup> See F. Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (New York: UN, 1979).

<sup>20</sup> UN, *International Covenant on Civil and Political Rights* (New York: UN, 1966).

<sup>21</sup> Hannum (2007), p.51.

political status and freely pursue their economic, social and cultural development".<sup>22</sup> However, article one confers this right to peoples,<sup>23</sup> which is understood as a group right, available to entire populations and nations only. Thus, as minorities are not considered a category of peoples, it can be claimed that they do not have the right to self-determination.<sup>24</sup> This interpretation of article 1 has been confirmed by the Human Rights Committee and at a European level by the Venice Commission, who ruled that national minorities do not have the right of self-determination, or even internal self-determination.<sup>25</sup>

Despite the rulings of the Human Rights Committee and the Venice Commission, in practice, the terms peoples or minorities do not have a clear definition and so the distinction between the terms remains contentious. Thus, it is not so clear cut as to exclude the right of self-determination to minority groups. Previous global incidents concerning minorities and self-determination, such as Kosovo's declaration of independence highlight the potential relationship between minorities and the right to self-determination. This connection has led to the reluctance of some states to cooperate in the work towards a definition for fear it would increase the exercise of such right. In order to alleviate the opposition to minority rights on this basis, it is necessary to define a minority which precludes any link to the right to self-determination.

The fourth tension in defining a minority it seen in the reality that widespread discrimination and intolerance still exists.<sup>26</sup> The events of World War Two, the apartheid in South Africa and the civil war in Bosnia all demonstrate that state discrimination against minority groups has been a historical feature in the

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<sup>22</sup> UN (1966), article one.

<sup>23</sup> R. White "Self-determination: Time for a Re-assessment?", *Netherlands International Law Review* 28.2 (1981), p.168.

<sup>24</sup> V. Gudeleviciute, "Does the Principle of Self-determination Prevail over the Principle of Territorial Integrity?", *International Journal of Baltic Law* 2.2 (2005), pp.53-54.

<sup>25</sup> Venice Commission, "Opinion of the European Commission for Democracy Through Law on the Interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights Annexed to Recommendation 1201 of the Parliamentary Assembly", 21 February 1996, <http://miris.eurac.edu/mugs2/do/blob.html?type=html&serial=1013680176466> accessed 4 March 2012.

<sup>26</sup> Hannum (2007), p.50.

international community. However, pervasive state discrimination against minorities throughout the world remains a feature today. In 2016, the Minority Rights Group International identified that in the Ukraine, the Tatars, Krymchak and Karaites in Crimea, Russians, Hungarians and the Moldovans were all classified as peoples under threat due to their minority status.<sup>27</sup> With ongoing state discrimination, it seems that minority rights are unlikely to be taken seriously.<sup>28</sup> It could be concluded that as minority protections will not be effectively implemented without substantial changes in the way in which minority rights and policies are perceived at the international, regional and state level, that at present, it would be a waste of time and resources to try and develop a definition.

The key tensions outlined in this section have highlighted the leading reasons for opposition to minority rights. I argue that these tensions do not outweigh the need to improve minority rights, by first developing a definition. It is necessary that the international community set aside these tensions in order to successfully develop a definition of a minority. Whilst, there are challenges to the acceptance of a definition of a minority, it must be noted that there are a number of arguments demonstrating the urgency in the development of a definition, to which this chapter now turns.

## 2.2 The Need for a Definition

The “lack of a definition of the term minority has been troubling the international community for a very long time”.<sup>29</sup> The first argument in favour of creating a definition of a minority is the practical benefit it would have. Sohn states the “term minority is not a question of only theoretical and academic importance. It is a practical question that arises”.<sup>30</sup> The practical consequences that arise from the lack of a definition include but are not limited to the denial of, or difficulties in accessing,

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<sup>27</sup> Minority Rights Group International, “State of the World’s Minorities and Indigenous Peoples 2016 Events of 2015”, 12 July 2016, <http://minorityrights.org/wp-content/uploads/2016/07/MRG-SWM-2016.pdf> accessed 15 August 2016.

<sup>28</sup> Hannum (2007), p.50.

<sup>29</sup> A. Åkermark, *Justifications of Minority Protection in International Law* (London: Martinus Nijhoff Publishers, 1997), p.86.

<sup>30</sup> L. Sohn, “The Rights of Minorities”, in L. Henkin (eds), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia: Columbia University Press, 1981), p.280.

minority rights. The meaning of a minority is also important to the development of minority rights policies by the international community, as effective policies require a clear understanding of who these policies apply to. Pentassuglia states that the self-definition of a minority that is presently occurring is not a decisive or absolute criterion and that the existence of a minority as a matter of fact calls for a legal criterion to be observed.<sup>31</sup> It is essential that the international community “communicate over natural and cultural borders, using common terms which facilitate a meaningful communication”.<sup>32</sup> A definition which receives support from the international community will be able to overcome borders and ensure that all persons benefit from equal protection.

At present, different definitions of the term minority are applied depending on the location. “Many countries accord a different legal status to different subcategories”,<sup>33</sup> creating different levels of minority protection within the same country. Furthermore, some states<sup>34</sup> claim to have no minorities: France issued a reservation to the ICCPR stating that “In the light of Article 2 of the Constitution of the French Republic, the French Government declares that Article 27 is not applicable”.<sup>35</sup> According to the French Government, no minorities reside on its territory and thus they provide limited minority rights. Pentassuglia argues the reluctance of some states to accept the existence of minorities on their territory “does not prejudice the question of knowing what the minimum requirements for establishing the existence of minority are”.<sup>36</sup> The mere refusal to accept the existence of minorities on one’s territory does not amount to a refusal to accept the concept of a minority; it simply means that states believe they have no concern for minority issues. However, I suggest that by refusing to acknowledge minorities, states are limiting the rights and protections afforded to some of their population.

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<sup>31</sup> G. Pentassuglia, *Minorities in International Law* (Strasbourg: Council of Europe publishing, 2002), p.63.

<sup>32</sup> Åkermark (1997), p.87.

<sup>33</sup> Kymlicka (2008), p.7.

<sup>34</sup> France, Greece and Turkey.

<sup>35</sup> UN Treaty Collection “Status of the International Covenant on Civil and Political Rights”, 11 January 2015, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec) accessed 11 January 2015.

<sup>36</sup> Pentassuglia (2002), p.63.

To date, France has failed to sign regional documents on minority rights, including the Framework Convention on the Protection of National Minorities and the Charter on Minority and Regional Languages. In 1994, it was highlighted that “many important areas of French public life in which the legacy of republicanism (is) still potent”,<sup>37</sup> an issue which remains relevant today. Moreover, the 1997 report of the Haut Conseil à l’intégration, confirmed that France “has always refused to recognize collective rights that are specific to groups or minorities”.<sup>38</sup> Republicanism in France created a direct link between ensuring equal rights and removing the need for any specific reference to ethnicity, religion or culture. Therefore, France’s understanding of nationhood is not compatible with the inclusion of minority rights into the legislative framework. The only other states that have failed to sign the Convention in the region are Andorra, Monaco and Turkey,<sup>39</sup> due to their similar views on nationhood.

The second argument put forward in favour of the development of a definition is the protection gap of minorities that has evolved as result of the lack of a definition. The protection gap in minority rights has evolved from different states adopting different international requirements on minority rights. Prior to the first EU enlargement, Pan and Pfeil found that France had only met their minority rights obligations in 30-40% of cases.<sup>40</sup> The approach to minority rights protections in France has a direct effect on minority groups; in particular, the Breton community. The Breton community sought to use their own language in areas such as courts, postal services, tax authorities and education,<sup>41</sup> but this was denied. Thus, the Breton language is now classified as severely endangered by the UNESCO Atlas of the World's Languages in

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<sup>37</sup> S. Hazareesingh, *Political Traditions in Modern France* (Oxford: Oxford University Press, 1994), p.65.

<sup>38</sup> Haut Conseil à l’intégration, *Affaiblissement du lien social, enfermement dans les particularismes et integration dans la cite* (Paris: La Documentation Française, 1997), p.14.

<sup>39</sup> Council of Europe, “Geographical Reach of the FCNM”, October 24 2008, [http://www.coe.int/t/dghl/monitoring/minorities/1\\_AtGlance/PDF\\_MapMinorities\\_bil.pdf](http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_MapMinorities_bil.pdf) accessed April 25 2012.

<sup>40</sup> T. Benedikter, “Legal instruments of minority protection in Europe: an over view”, 30 November 2006, [www.gfbv.it/3dossier/eu-min/autonomy-eu.html](http://www.gfbv.it/3dossier/eu-min/autonomy-eu.html) accessed 8 October 2012.

<sup>41</sup> Åkermark (1997), p.165.

Danger, with only an estimated 250 000 remaining speakers.<sup>42</sup> It is estimated that other European states have been more successful in fulfilling their minority rights obligations. For example, Belgium fulfilled their minority rights requirements in 80% of cases and Spain in 70-80% cases,<sup>43</sup> ensuring good minority rights standards. Whilst a cautious approach to this quantitative data is necessary, it indicated a significant protection gap in minority rights, at a regional level, even before the enlargement of the EU. From these statistics, I propose that this protection gap would be significantly reduced if all states were to interpret a minority in the same way.

As outlined above, there is opposition to minority rights, and the creation of a binding definition is not without its challenges. However, I argue that that a definition created by the consensus of interested parties, including states and international organisations, may be the turning point to ensuring states take greater levels of responsibility for minorities residing in their territory. At present, the state has too much discretion in defining a minority and providing minority rights protections, making it easy for states to irk from these responsibilities. A definition would provide a clear criterion that states must follow when identifying minority groups in need of these additional rights, provided there were sanctions imposed upon the state for a failure to comply. Furthermore, a definition would eliminate some of the opposition and fears surrounding minority rights and would clarify the position of minorities and overcome the cautious approach adopted by some states.

### 3. Defining a Minority

#### 3.1 Early Attempts to Develop a Definition

The League of Nations was the first institution which sought to develop a definition of a minority through minority treaties. The treaties assumed “that persons

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<sup>42</sup> UNESCO, “Atlas of the World’s Languages in Danger”, 21 March 2011, <http://www.unesco.org/new/en/communication-and-information/access-to-knowledge/linguistic-diversity-and-multilingualism-on-internet/atlas-of-languages-in-danger/> accessed 15 August 2016.

<sup>43</sup> T. Benedikter, “Legal instruments of minority protection in Europe: an over view”, 30 November 2006, [www.gfbv.it/3dossier/eu-min/autonomy-eu.html](http://www.gfbv.it/3dossier/eu-min/autonomy-eu.html) accessed 8 October 2012.

of different nationality needed some law of exception until or unless they were completely assimilated and divorced from their origin".<sup>44</sup> Where applicable treaties existed, minorities were guaranteed a minimum level of protection from discrimination and oppression, if there was a kin-state nearby which took an interest in their wellbeing. However, where such kin-states existed, the treaties were often used as grounds for invading or intervening in weaker countries; in Czechoslovakia and Poland, the international recognition given to German-speaking minorities was exploited by Nazi Germany.<sup>45</sup> The countries without minority treaties had no minority rights protections and thus no definition. Furthermore, the League of Nations was composed of countries with limited minority issues in their own states, creating little confidence in the ability of the institution to protect minority rights on a greater scale. Those members of the League of Nations without significant minority populations took it for granted that the law of the country could be responsible for persons insisting on a different nationality.<sup>46</sup> It was believed that domestic legislation was sufficient to deal with the minority situation and there was little appreciation of the need to be concerned with minority rights at an international level. Ultimately, the League of Nations resorted to minority rights protections through non-discrimination principles without any effective implementation or enforcement mechanisms. I argue that it is not possible to fully protect minority rights through non-discrimination principles, as will be explored in further detail in the next chapter of this thesis.

The meaning of the term minority was considered by the Permanent Court of International Justice (PCIJ) in regards to the 1919 Convention between Greece and Bulgaria. In the case, involving the Greco-Bulgarian communities, the court interpreted communities and minorities as synonymous. In the advisory opinion, the Court defined a community as

A group of persons living in a given country or locality having a race, religion, language and tradition in a sentiment of

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<sup>44</sup> H. Arendt, "The Decline of the Nation-State and the End of the Rights of Man", in H. Arendt (eds), *The Origins of Totalitarianism* (London: George Allen & Unwin Ltd, 1951), p.275.

<sup>45</sup> W. Kymlicka, *The rights of minority cultures* (Oxford: Oxford University Press, 1995), p.2.

<sup>46</sup> Arendt (1951), p.275.

solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another.<sup>47</sup>

Whilst both a community and minority group can be characterised by a commitment to a common value or standard, a community is a much wider group than a minority group. A community refers to a group of any size, whereas, numerical inferiority is an essential element to minority status. For both the individual and state involved, it is easy to identify if a group is statistically smaller, making it uncontroversial. Failing to take into account the fundamental feature of a minority, numerical inferiority, led to the definition of community and minority to be rejected by the League of Nations.

### 3.2 The United Nations

After World War Two, the newly formed UN sought to create a definition of a minority and provide adequate minority right protections. In 1950, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed that a minority included individuals from stable ethnic, religious or linguistic peculiarities, as to make them, markedly different, from the rest of the population; a non-dominant position; a demand to preserve their own cultural identity; and loyalty to the state in which they live and whose members are citizens of that state.<sup>48</sup> This narrow definition provided limited scope for flexibility and interpretation, taking power away from the state to define minorities and so failed to gain support. However, it was a significant stepping stone in the development of definition as it served as the foundation of a number of proposed definitions that have proven popular among the international community.

The introduction of the ICCPR 1966 saw the first and only source of international law which provides specific guarantees for minorities. Article 27 provides

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<sup>47</sup> *Greco-Bulgarian Communities* Advisory opinion No.17 (Permanent Court of International Justice, 31 July 1930).

<sup>48</sup> UN, *The Definition and the Classification of Minorities* (New York: UN, 1950).



In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.<sup>49</sup>

Whilst providing for minority rights, the ICCPR fails to provide a definition. However, through his work for the UN Sub-Commission on the Prevention and Protection of Minorities on article 27, Francesco Capotorti developed the classic definition of a minority. Capotorti defined minorities as those groups which are numerically inferior to the rest of the population of a state; who find themselves in a non-dominant position; whom possess ethnic, religious or linguistic characteristics differing from those of the rest of the population; as well as a sense of solidarity directed towards preserving their culture, traditions, religion or language.<sup>50</sup>

This definition was the first to make reference to both objective and subjective elements of a definition. These two key elements to the definition are identified, but no explanation for the distinction was provided. The objective elements of a definition are those parts of the definition that are based on observable facts that can be said to be actual or real, including numerical inferiority, non-dominant position, nationality or minority membership and characteristics of the group.<sup>51</sup> Based on factual evidence, the objective elements of a definition of a minority provide a minimum standard against which states can measure if someone is a minority. They are narrow, providing limited scope for interpretation, ensuring that the standard is applied universally. The subjective elements of a definition of a minority are those traits and characteristics that the individual associates with minority status based on their experiences and understandings of a minority. It includes personal attributes of minority identity that arise from an awareness of a minority's distinct identity from the majority and the

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<sup>49</sup> United Nations, *International Covenant on Civil and Political Rights* (New York: UN, 1966), article 27.

<sup>50</sup> Capotorti (1979), p.96.

<sup>51</sup> Capotorti (1979, p.96.

freedom of choice, in minority group membership.<sup>52</sup> Moreover, the subjective part of a definition includes the requirement of a sense of solidarity and the will of the group to preserve its culture, tradition, and religion or language.<sup>53</sup> This provides flexibility for both the state and the individual to interpret the term minority, endorsing a pragmatic approach to defining a minority. The subjective elements provide a framework for effective minority protection which must be assessed for each individual case; it is necessary to demonstrate that the individual has an active link to the group and wishes to preserve the group, beyond mere membership of a group. The combination of subjective and objective elements provides a balanced definition based on narrow and strict list of criteria whilst providing a degree of interpretation and flexibility required for the protection of an individual member of a minority group, yet the definition is not legally binding.

Following on from the work of Capotorti, Deschênes sought to further develop this definition, in an attempt to gain sufficient support. It remained committed to the definition developed by Capotorti, with only a slight change made to the language used. He proposed that a minority is:

A group of citizens of a state, consisting a numerical minority and in a non-dominant position in that state, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.<sup>54</sup>

This definition contains the same balance of subjective and objective elements, with the additional aim to achieve equality in both fact and law.<sup>55</sup> The aim of this additional element was to reduce positive discrimination of minority groups and alleviate fears that the majority would face differential treatment in minorities. A minority may only

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<sup>52</sup> Pentassuglia (2002), p.58.

<sup>53</sup> Capotorti (1979), p.96, para. 567.

<sup>54</sup> J. Deschênes, *Proposal concerning a definition of the term Minority* (New York: UN, 1985), para. 181.

<sup>55</sup> Åkermark (1997), p.91.

use this definition to ensure non-discrimination and equal treatment and not to ensure preferential treatment. Despite the amendments, this definition has also failed to receive the necessary international acceptance.

Whilst it provides no definition of a minority, case law on the application of article 27 ICCPR provides further insight on how to interpret the term minority. The key case on the application of article 27 ICCPR is the Human Rights Committee (HRC) case of *Ballantyne et al v. Canada*.<sup>56</sup> The claimant argued that the ban on English signage due to the Language Laws of Québec protecting the use of the French language breached article 27. It was necessary for the committee to consider whether the English speaking community in Québec could be considered as a minority. They concluded that:

Minorities referred to in article 27 are minorities within such a state, and not minorities within any province. A group may constitute a majority in a province but constitute a minority in the state and thus be entitled to the benefits of article 27; English speaking citizens of Canada cannot be considered a linguistic minority.<sup>57</sup>

Despite the English speaking population in Québec being numerically inferior, the committee held that they could not be interpreted as minorities, concluding that a group must be numerically inferior within the whole state and not merely within one province of a state. The Committee placed significant emphasis on the objective elements to defining a minority, highlighting their desire to ensure certainty. This certainty protects both parties involved; the state is able to rely on numerical facts to determine who is a minority and the individual is able to judge their circumstances against a clear criterion. However, in a dissenting comment, Mr Wennergren, stated that “the issue of what constitutes a minority in a state must be decided on a case by

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<sup>56</sup> *Ballantyne, Davidson, McIntyre v. Canada* Communications Nos. 359/1989 and 385/1989 (Human Rights Committee, 5 May 1993).

<sup>57</sup> *Ballantyne, Davidson, McIntyre v. Canada* Communications Nos. 359/1989 and 385/1989 (Human Rights Committee, 5 May 1993), para 11.2.

case basis, due regard being given to the particular circumstances of each case".<sup>58</sup> This dissenting judgment marked a shift towards a pragmatic definition of a minority, as widely supported at a European level and will be considered in greater detail in the next part of this chapter.

The definitions proposed by the UN and International institutions contain some elements that have been widely accepted as necessary to the definition of a minority. An emphasis has been placed on the idea that "minority means a group historically rooted in the territory of a state and whose specific ethno-cultural features markedly distinguish it from the rest of the population of the state",<sup>59</sup> and yet there is no agreement on a legally binding definition. However,

the lack of a universal consensus on the Capotorti definition and the ongoing discussion of additional dimensions to the traditional understanding of minority do not prejudice the existence of a general consensus on its core meaning, not as a purely abstract notion singled out for its own sake, but as a concrete fundamental legal threshold that all states must meet without any unreasonable distinctions.<sup>60</sup>

Pentassuglia convincingly argues that the lack of agreement on a definition does not mean that a definition does not exist. The Capotorti definition could develop into a legal definition through customary international law. According to the International Court of Justice, customary international law is "evidence of a general practice accepted as law".<sup>61</sup> The definition provided in the UN report would become customary law if there is sufficient adoption and implementation of the definition into national law and policy. The Capotorti definition is widely considered to be the most comprehensive and most popular proposed definition of the term minority<sup>62</sup> and so

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<sup>58</sup> *Ballantyne, Davidson, McIntyre v. Canada* Communications Nos. 359/1989 and 385/1989 (Human Rights Committee, 5 May 1993), appendix D.

<sup>59</sup> Pentassuglia (2002), p 58.

<sup>60</sup> Pentassuglia (2002), p.10.

<sup>61</sup> UN, *International Court of Justice Statute* (New York: UN, 1945), article 38(1)(b).

<sup>62</sup> Thornberry has noted that it is doubtful that any future instruments on minority definition will greatly differ from that proposed by Capotorti, given the balance of objective and subjective elements which it

the emergence of customary law from this definition could be accepted. However, to date, this has not occurred as there is not sufficient domestic use of this definition and minority rights remain difficult to protect. In the context of this thesis, with the focus on minority rights within the EU, the actions of the EU in attempt to create a definition must be analysed in the next section of this chapter.

### 3.3 A European Definition

Traditionally, Europe has focused on the idea of national minorities and minority rights were based on issues such as culture, education, political participation and representation. However, Doroszewska notes that it would have been naïve to apply these generalisations about the minority issues of Western Europe to the former USSR due to the diametrically opposed geopolitical positions held by the minority and the majority.<sup>63</sup> The end of the Cold War led to a shift away from traditional concerns of minority rights towards an emphasis on the relationship between minority rights and security. This shift was sparked by events such as attempts by Russia to undermine the newly independent states of Abkhazia and Nagorno-Karabakh due to the large Russian speaking minority population.<sup>64</sup> However, the link between minority rights and security was not fully realised at the time and the international community and the EU only engaged in the minority based conflicts once the tensions escalated into violence rather than early stage engagement, as seen in the Western Balkans conflicts of 1992-1995. "In virtually all the cases where the UN has endorsed autonomy for national minorities, it is after the minorities have resorted to violence. By contrast, where national minorities have peacefully and democratically mobilized...they have typically received no support".<sup>65</sup> As a result minority groups resorted to violence in order to gain support of the international community or the European community, as in the

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contains. See P. Thornberry, *International law and Rights of Minorities* (Oxford: Clarendon press, 1991), p.7.

<sup>63</sup> U. Doroszewska, "Rethinking the state, minorities and national security", in W. Kymlicka and M. Opalski (eds), *Can liberal pluralism be exported? Western political theory and ethnic relations in Eastern Europe* (Oxford: Oxford University Press, 2002), p.129.

<sup>64</sup> Doroszewska (2002), p.129.

<sup>65</sup> Kymlicka (2008), p.20.

case of post-communist states, increasing the link between minorities and security issues.

The first institution at a European level to consider is the EU. The end of the Cold War and the emergence of the CEECs, with their multi-ethnic populations saw increased attentions on minority rights at a regional level. Furthermore, the collapse of the Former Yugoslavia and the minority rights situations such as the civil war in Bosnia, prompted action. These events taking place on its door step led to the EU to fear the risk of a spill over effect of minority rights issues, for fear of a similar event occurring in a member state, sparking the initial debate. There are concerns about the suitability of the EU to develop a definition of a minority or minority rights. As very few citizens of member states identify themselves as EU nationals, there is no clearly identifiable EU nationality or minority. As a result, “the Union cannot define its own EU minorities as there is no EU majority”.<sup>66</sup> Moreover, there are constitutional concerns about regional minority rights. A potential difficulty arises in achieving a balance of power between the EU and member states. There is a risk that “fully-fledged minority competence may infringe on the unity-diversity balance, away from the diversity between member states”.<sup>67</sup> The EU has arguably removed too much power from member states; creating a Union level minority definition and rights policy would exacerbate these complaints by shifting member states constitutional powers away from state governments to the EU and could cause further tensions in what is already a strained relationship. However, I do not find these concerns persuasive enough to reject a regional definition.

The second institution that must be considered at a European level is the Organisation for Security and Cooperation in Europe (OSCE), which has also placed an emphasis on national minorities. The Copenhagen Document stipulates that “persons belonging to national minorities have the right to freely express, preserve and develop their ‘ethnic, cultural, linguistic or religious identity’ and to develop their culture in all

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<sup>66</sup> T. Benedikter, “Legal instruments of minority protection in Europe: an over view”, 30 November 2006, [www.gfbv.it/3dossier/eu-min/autonomy-eu.html](http://www.gfbv.it/3dossier/eu-min/autonomy-eu.html) accessed 8 October 2012.

<sup>67</sup> T. Benedikter, “Legal instruments of minority protection in Europe: an over view”, 30 November 2006, [www.gfbv.it/3dossier/eu-min/autonomy-eu.html](http://www.gfbv.it/3dossier/eu-min/autonomy-eu.html) accessed 8 October 2012.

its aspects”,<sup>68</sup> but there is no definition included. The High Commissioner for National Minorities has been quoted stating “I know a (national) minority where I see one”,<sup>69</sup> suggesting that the OSCE favours a more pragmatic approach to a definition. Given the support a pragmatic approach towards defining a minority has at the European level, this approach has become a possible alternative to defining a minority, which be further analysed in the next part of this chapter.

The third institution at a European level that has been engaged in the minority issue is the Council of Europe. In 1991, tasked with completing a study on the protection of minorities, the Venice Commission proposed that;

minority shall mean a group which is smaller in number than the rest of the population of a state, whose members, although nationals of that state have ethnical, religious or linguistic features different from those of the rest of the population and are guided by the will to safeguard their culture, traditions, religion or language.<sup>70</sup>

Whilst the work of the Venice Commission, through the Council of Europe, had no immediate effect, it resulted in the Council of Europe adopting the Framework Convention for the Protection of National Minorities, which shall be considered below.

The European Convention on Human Rights is the cornerstone Human Rights Legislation at the European level and was developed in 1950 by the Council of Europe. It is the foundation of the work of the Council of Europe, focusing on the promotion and protection of human rights and yet it did not contain any minority right specific provisions, at the time it was introduced.<sup>71</sup> The first direct reference the inclusion of minority rights in the Convention was made in recommendation 1201 (1993) of the

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<sup>68</sup> OSCE/CSCE, *Copenhagen Document*, (Copenhagen: OSCE, 1990), paragraph 32.

<sup>69</sup> See M. Van der Stoep, "Prevention of Minority Conflicts", in L. B. Sohn, *The CSCE and the Turbulent New Europe* (Friedrich-Naumann: Stiftung, 1993), p.148.

<sup>70</sup> Council of Europe, *European Commission for Democracy through Law: Proposal for a European Convention for the Protection of Minorities* (Strasbourg: Council of Europe, 1991).

<sup>71</sup> The only reference in the original text of the ECHR to a minority can be found in article 14 which prohibits discrimination on basis of association with a national minority. There have been further references made to minorities in article 1 of protocol no. 12.

Parliamentary Assembly. It proposed an additional protocol on the rights of national minorities to the European Convention on Human Rights.<sup>72</sup> Article one of the proposed protocol stated that for the purpose of the convention a minority refers to a group of persons in a state who;

Reside on the territory of that state and are citizens thereof;  
Maintain longstanding firm and lasting ties with that state;  
Display distinctive ethnic, cultural, religious or linguistic characteristics; are sufficiently representative, although smaller in number than the rest of the population of that state; and are motivated by the concern to preserve together that which constitutes their common identity including their culture, traditions, religion and their language.<sup>73</sup>

The combination of subjective and objective elements to define the term a minority, in the European contexts, highlights the regional support for this type of definition. Furthermore, it “avoids too theoretical an approach.... and ensures that the potential enforcement of the system for the protection of minorities is not too large”,<sup>74</sup> making it easily workable in practical terms. Whilst this definition was not accepted by the Council of Ministers, it is significant to the application of rights. The Parliamentary Assembly requires that the legislation of member states and states applying for membership conform to the requirements of the protocol. Thus, all new member states must ensure their national legislation is compatible with the requirements of the protocol, by using the above definition, putting this definition into effect.

The Framework Convention for the Protection of National Minorities (FCNM) was introduced by the Council of Europe in 1995 and represents a significant improvement to the position of minorities. The content of the FCNM will be further analysed in chapter two of this thesis, but it should be noted that the FCNM was the first legally binding instrument designed for the sole purpose of the protection of

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<sup>72</sup> Formally the Convention for the Protection of Human Rights and Fundamental Freedoms

<sup>73</sup> Council of Europe Parliamentary Assembly, *Recommendation 1201 (1993): Additional protocol on the rights of Minorities to the European Convention on Human Rights* (Strasbourg: Council of Europe, 1993).

<sup>74</sup> F. Benoit-Rohmer, *The Minority question in Europe: Texts and Commentary* (Strasbourg: Council of Europe, 1996), p. 4.



minorities. The Convention eliminates the requirement of citizenship and adopts a pragmatic approach to defining a minority, which are discussed in further detail in section four of this chapter. However, it should be noted that the removal of the citizenship requirement from our understanding of a minority extends minority rights to those individuals who do not have long-term ties to the territory but are in need of minority right protections, such as the Roma community. Whilst the Venice Commission was able to make improvements to minority rights in the region, there is still one significant weakness to the document; it does not provide a clear definition of a minority.

At the time the FCNM was adopted, both EU and Council of Europe member states were less varied in terms of their population than current member states and yet a definition could not be established. In the explanatory report of the Convention, it was noted, that the lack of a definition was a result of the decision to adopt a pragmatic approach to interpretation to the term as “it was evident that it was impossible to arrive at a definition accepted by all member states”.<sup>75</sup> The Council of Europe failed to qualify this, giving no explanation for why it was impossible to create a definition; it must be assumed the diverse political backgrounds of the member states proved too much to overcome in creating a definition of a minority. Whilst a pragmatic approach to a definition is favourable, providing member states flexibility to interpret the term in the context of their own political environment, it does not justify the failure to provide any guidance to the various interested parties.

The creation of a regional definition would lead to a reduction in the protection gap that currently exists in Europe for minorities. The current practice allows states too much flexibility in the granting of minority rights, which can amount to a refusal to protect or even acknowledge minorities. This is clearly seen in the case of France as previously discussed, where by existence of minorities on French territory is not acknowledged and so limited protections are provided. A regional definition would mean that states are unable to pick and choose the groups that they afford minority

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<sup>75</sup> Council of Europe (1995), paragraph 12.

protections ensuring equal protections across the region. It may also be more suitable than an international definition, given the importance of regional knowledge and context on the sensitive issue of minorities.

#### 4. Alternative Ways to Define of a Minority

The previous parts of this chapter have examined the unsuccessful attempts to develop a definition of a minority. Both International and European bodies have been unable to develop a definition which reaches a consensus, in part, due to the diverse political and legal needs of both different states and different groups of minorities. It is “difficult to come up with a definition that covers all categories of minorities, on account of both the very great variety of minority groups and the difficulty of classifying them in a homogenous manner”.<sup>76</sup> With each state applying their own interpretation of a minority, rights aimed at protecting minorities are not universally applied, creating a worrying protection gap. Whilst certain levels of interpretation through subjective elements of a definition are necessary, the objective elements remain essential to provide a minimum criterion and consistency in the application of the definition. The absence of the objective elements of a definition leaves interpretation of the term open to abuse, by states wanting to minimise the minority rights obligations that they must uphold and potentially, minority status being sought by those seeking minority rights protections when that are not actually classified as minorities.

The failure to create a definition of a minority has resulted in a shift from the classical approach by Capotorti, towards a broader approach to define a minority, as favoured at a European level. Whilst a definition would need to contain both subjective and objective elements,<sup>77</sup> the only way to reach a consensus on the definition of a minority is to develop a definition that provides the state with greater

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<sup>76</sup> Benoit-Rohmer (1996), p.12.

<sup>77</sup>See Hannum (2007), p.66. Thornberry is also doubtful that any international instruments will depart from this approach of subjective and objective elements: Thornberry (1991), p.7.

flexibility. A liberal understanding of human rights supports a broader definition,<sup>78</sup> placing minority rights within the general human rights provided for the individual. It provides that minority rights fall within the scope of general human rights protections, with greater scope for implementation by the state. Furthermore, it is increasingly difficult to accommodate the diverse needs of groups with different links with the state.<sup>79</sup> Populations are becoming more diverse, complicating the ties between the individual and the state, and making the task of defining a minority more difficult. However, by waiting for consensus on a definition, the international community could be preventing progress in minority rights.<sup>80</sup> The failure to reach a legal definition could result in human rights violations and pose a risk to state security; it may be argued that any definition may be more acceptable than none at all. For this reason, the final part of chapter will question whether effective minority rights protections could be achieved by creating a pragmatic definition of a minority. The liberal approach to minority rights will be considered, including the key tensions raised by the individual versus group rights debate. By evaluating these theoretical and practical approaches, I will conclude this chapter by proposing a solution to ‘what is a minority’?

#### 4.1 The Liberal Approach

The assumption that minority rights are first and foremost a human rights issue fails to consider the wider aims of minority rights, notably the protection of minority identity and cultures.<sup>81</sup> The liberal approach to minority rights highlights “that both liberal human rights theory and sociological reality render a focus on particular minorities untenable and discriminatory in the modern world”,<sup>82</sup> as minority status leaves an individual susceptible to the same discrimination as any individual in any other non-dominant position. Adopting a liberal approach, Packer<sup>83</sup> rejects the traditional limitations used to define the minorities, stating that:

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<sup>78</sup> Hannum (2007), p.67.

<sup>79</sup> Pentassuglia (2002), pp. 46-50.

<sup>80</sup> Hannum (2007), p.67.

<sup>81</sup> Åkermark (1997), p.94.

<sup>82</sup> Hannum (2007), p.68.

<sup>83</sup> Former senior legal adviser to the OSCE's High Commissioner.

From the perspective of Human Rights philosophy and law, a good definition of 'minority' must emphasize freedom of choice....(I)t is both consistent and workable to define a minority as a 'group of people who freely associate for an established purpose where their shared desire differs from that of the majority rule'.<sup>84</sup>

The definition proposed by Packer contains a combination of narrow and broad elements, similar to the objective and subjective elements to the definitions that have been analysed. The broader element of the definition consists of the freedom of choice provided to the individual. Packer emphasises that the definition requires a group of people who freely associate with a group, but gives no specification of the type of association required. This implies that any association such as ethnic, linguistic or national would be sufficient. On the other hand, the requirement of an established purpose narrows the definition.<sup>85</sup> The association must have a certain function relating to minorities such as meeting for religious worship or to converse in their mother tongue. However, the definition fails to expand upon the meaning of an established purpose, leading to further uncertainty.

The position on minority rights as a group or individual right has evolved over time, but remains a contentious issue. Traditional liberal theorists such as J.S. Mill, place minority rights with the individual; the individual is seen as more important than the community, as it is only important to the extent that it contributes to the standard of living of the individual.<sup>86</sup> Modern liberal theorists such as Kymlicka and Raz have developed an understanding of minority rights as group or even a combination of rights. They view individuals as the product of social practices and deny that group rights could be reduced to rights of the individual members and the only way minority rights could be effectively protected was through group rights.<sup>87</sup> Hannum states that "the question whether minority rights are group rights or individual rights may be of

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<sup>84</sup> J. Packer and M. Kristian (eds), *The Protection of Ethnic and Linguistic Minorities in Europe* (Institute for Human Rights: Åbo Akademi University, 1993), p.45.

<sup>85</sup> Åkermark (1997), p.95.

<sup>86</sup> W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford: Oxford University Press, 2001), p.18.

<sup>87</sup> Kymlicka (2001), p.19.

theoretical interest, but the practical implications of the debate are more difficult to discern”.<sup>88</sup> Hannum seems to suggest that the debate as to whether minority rights should be group or individual rights is purely academic, with limited impact in the real world. I disagree with this proposition; the question of whether minority rights are group rights or individual rights is complicated and has implications in the real world in the application of rights.

#### A. Minority rights as Individual Rights

The evolving function of the rights of man and citizens is essential to the individual versus group rights debate. The traditional purpose of human rights was the protection of certain groups such as nations, ethnic groups or linguistic groups from the state, to ensure their continued existence and security. The end of World War Two saw a sudden shift in theoretical thinking on human rights, away from group rights towards individual rights. This was embraced as a “natural extension from the way religious minorities were protected”.<sup>89</sup> Prior to this shift, religious minorities were the only group that were protected by individual rights, allowing them to freely express and practice their religious beliefs in private. As religious practice was not considered to be a concern of the state, there was no need for group rights to protect religious minorities. However, following the persecution of ethnic groups such as Austrian Jews, the need to protect other types of minority groups became apparent, extending individual minority rights to also protect ethnic and cultural minorities.

Every individual is entitled to human rights simply due to fact that they are a human being who needs protection as an individual, rather than as an individual as a member of a group. An understanding of human rights as individual rights, would suggest that “human rights are not only individualistic but also deeply egalitarian”.<sup>90</sup> This confirms that all persons have equal moral status with equal entitlement to human rights and rejects the need for specific rights for groups. On this understanding,

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<sup>88</sup> Hannum (2007), p.69.

<sup>89</sup> Kymlicka (1995), p.3.

<sup>90</sup> Åkermark (1997), pp.44-45.

group rights would result in human beings not all being treated equally. Furthermore, Individualism assumes that the only unit of moral concern is the individual. Rawls states that the individual is the only "self-originating source of valid claims",<sup>91</sup> supporting that only an individual is capable of making moral claims and in need of rights and protections. This suggests that group rights are neither desirable nor necessary.

As the modern state has developed, the purpose of human rights has evolved. Gakenkamp proposes that the modern concept of human rights is designed around the needs of the individual to be protected from the state.<sup>92</sup> According to Individualists, the community only matters to the extent that it has an effect on the individual's standard of life, and they therefore reject the notion minority groups have any collective rights.<sup>93</sup> Whilst groups remain an integral part of society, many individuals identify with more than one group when expressing their ethnic and cultural background for a variety of reasons, including but not limited to, inter-ethnic heritage or being second or third generation migrants. With individuals no longer identifying with a single group, the need of the individual takes precedent over group needs, resulting in the development of individual facing human rights. It can therefore be argued that minority rights and a definition of a minority should reflect this shift towards individual rights.

## B. Minority Rights as Group Rights

Traditionally, the emphasis of proposed definitions of a minority has been centred on group rights. According to Capotorti, minorities are groups which are "numerically inferior to the rest of the population of a state".<sup>94</sup> Moreover, article 27 ICCPR is applicable to persons who are members of a community of minorities, reinforcing the possibility of minority rights as group rights. However, this emphasis on

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<sup>91</sup> J. Rawls, "Kantian constructivism in Moral Theory", *Journal of Philosophy* 77.9 (1980), p.543.

<sup>92</sup> M. Gakenkamp, "Collective Rights: Much ado about Nothing", *Netherlands Quarterly of Human Rights* 9.3 (1991), pp.291-307.

<sup>93</sup> Kymlicka (2001), p.18.

<sup>94</sup> Capotorti (1979), p.96.

group rights has not sat comfortably with classical liberal theory and is reflected in the liberal fear popularised by Canadian Prime Minister Pierre Trudeau in the 1990s. He suggested that the group rights requested by the national and ethnic groups in Canada were “inimical to individual rights”.<sup>95</sup> There has been a tendency for liberal theorists to focus on the inequalities that exist between different minority groups as an explanation and justification for the need to develop special minority group protections. However, minority group protections can exacerbate inequalities and discrimination within minority groups.

It is proposed by Kymlicka that there are different ways in which one can make claims of group rights that are significant when considering the use of group rights to define and protect minorities. The first claim to group rights involves placing internal restrictions on its own group members in order to protect the group from internal dissent.<sup>96</sup> This form of group rights is not compatible with liberal theory, as it places restrictions on members’ civil and political liberties at the expense of group solidarity. However, minority groups may need external protections and rights in order to reduce their vulnerability to the economic and political power of the larger society.<sup>97</sup> Whilst these external claims of group rights may come at the cost of internal restrictions, it is more likely to improve equality between groups, reducing group vulnerability and protecting smaller groups from decisions of the wider society that may run counter to their group needs. The second claim to group rights, according to Kymlicka, provides that “liberals can and should endorse certain external protections, where they promote fairness between groups, but reject internal restrictions which limit the right of group members to question and revise traditional authorities and practices”.<sup>98</sup> Group rights could provide a solution to the definition of a minority and develop effective minority rights, with different group rights responding to different minority right situations. For example, special group representation rights within political institutions make it less likely national or ethnic minority will be ignored on decisions whereas, polyethnic rights protect specific religious and cultural practices.

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<sup>95</sup> Kymlicka (1995), p.35.

<sup>96</sup> Kymlicka (1995), p.35.

<sup>97</sup> Kymlicka (1995), p.35.

<sup>98</sup> Kymlicka (1995), p.37.

Membership of a minority group is often seen as a matter of choice and it is argued that as a choice, members should not benefit from specific rights. Adopting the philosophy of liberal toleration, Kukathas argues that there are no group rights, only individual rights, and that states should pursue a politics of indifference toward minority groups.<sup>99</sup> Further, Barry suggests that minorities of both religious and cultural groups adopt certain beliefs and practices through choice, thus members should be held responsible for bearing the consequences of these actions.<sup>100</sup> The freedom of association and conscience suggest the group membership is an individual choice and it is the right to choose an association that must be protected and not specific group rights.<sup>101</sup> The most basic commitment of states should be to the freedom and equality of citizens. Therefore, this framework rejects that groups can legitimately restrict the basic civil or political rights of their own members in the name of preserving the purity or authenticity of the groups' culture and traditions; minority rights can only serve to protect the group from the larger society to reduce vulnerability.<sup>102</sup> Therefore, minority cultural and religious groups must be protected to the extent that they have equal opportunities with the majority. This does not mean that opportunities must guarantee a particular outcome,<sup>103</sup> but that these opportunities must exist.

Theorists such as Anderson<sup>104</sup> and Scheffler,<sup>105</sup> agree that individuals should be held responsible for inequalities resulting from their own choices. However, an individual should not and cannot be responsible for the inequalities that arise from unchosen circumstances: membership with a minority group or culture is rarely a choice but something which an individual is born into. Kymlicka argues that minority group rights are justified, "within a liberal egalitarian theory...which emphasizes the

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<sup>99</sup> C. Kukathas, *The Liberal Archipelago: A theory of Diversity and Freedom* (Oxford: Oxford University Press, 2003), p.15.

<sup>100</sup> B. Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Polity, 2001), p.37.

<sup>101</sup> Barry (2001), p.37.

<sup>102</sup> Kymlicka (2001), p.22.

<sup>103</sup> Barry (2001), p.37.

<sup>104</sup> E. Anderson, "What is the point in Equality?", *Ethics* 109.2 (1999), pp.287-337.

<sup>105</sup> S. Scheffler, "What is Egalitarianism?", *Philosophy and Public Affairs* 31.1 (2003), pp.5-39.



importance of rectifying unchosen inequalities".<sup>106</sup> An individual does not choose to be born into a minority position and so it can be argued that group rights are essential for effective minority rights which can overcome any inequalities suffered.

Drawing upon the relationship between minorities and culture, Raz proposes that the autonomy of individuals are ultimately tied up with access to culture, with the prosperity of their culture, and with the respect accorded to their culture by others.<sup>107</sup> According to the liberal egalitarian principle, culture is essential to an individual's self-respect; there is an important connection between the cultural group that an individual is part of and their self-respect on the basis that one's culture must be secure as there would be great difficulty in giving it up.<sup>108</sup> However, liberal multiculturalists, such as Kymlicka, argue that there is an injustice when state practices have a negative effect on the religious or cultural practices of minority groups and propose that group-differentiated rights are required in light of the impact of differentiated state action.<sup>109</sup> Group rights that help ensure cultural prosperity and development and mutual respect between different cultures<sup>110</sup>, and so are essential to an understanding of what is meant by a minority.

The emphasis placed on group rights in defining a minority is subject to criticism on the grounds of the principle of *Locus Standi*, the right to be heard by a court, which is only granted to individuals. The lack of *Locus Standi* for groups raises questions of the legal enforceability of the rights. If a group is not able to be heard by the court in the event of a dispute how can group rights be enforced and monitored in a legal framework? Gilbert has argued that provided there are enforcement mechanisms in place to protect group rights, then this is sufficient;<sup>111</sup> there is no requirement that enforcement is effective, merely that an enforcement mechanism

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<sup>106</sup> Kymlicka (1995), p.109.

<sup>107</sup> J. Raz, "Multiculturalism", *Ratio Juris* 11.3 (1998), pp.193-205.

<sup>108</sup> Kymlicka (1995)

<sup>109</sup> Kymlicka, (1995), pp.108–115.

<sup>110</sup> Raz (1998), pp.193-205.

<sup>111</sup> G. Gilbert, "The Legal protection accorded to Minority groups in Europe", *Netherlands Yearbook of international law* 23 (1992), p.80.

exists. However, when individual rights are easier to enforce does this trump the more difficult group rights; or is a compromise available?

### C. Minority Rights as a Hybrid Right: A Combination of Group and Individual Rights

The debate on individual versus group rights demonstrates that “on the one hand, individual rights do not adequately protect the world’s cultural and social group; yet, on the other hand, group rights have served supremacist ideologies with disastrous historical consequences”.<sup>112</sup> The obvious response is to develop a definition of a minority which accommodates both group and individual rights. Traditionally, group rights have not sat comfortably with the individual facing position adopted by Liberals on human rights and minority rights that “seems more concerned with the status of groups than with the individual...It seems to treat individuals as mere carriers of group identities and objectives”.<sup>113</sup> However, Kymlicka argues that this is a misconception and that a combination of group-differentiated rights and individual rights are consistent with liberal principles of freedom.<sup>114</sup>

The strength of the combination of individual and group rights is evident in the current approach adopted by legal instruments on minority rights. Benoit-Rohmer draws attention to the fact that “the various international instruments aimed at ensuring the protection of minorities have always resorted to compromise; allowing the exercise as individuals and groups”.<sup>115</sup> Whilst not providing a definition of the term minority, article 27 ICCPR provides some direction as to how the term should be interpreted. Article 27 guarantees only individual rights, due to the fact that minority groups do not have legal personality in international law, and that only individuals have *Locus Standi*.<sup>116</sup> However, Capotorti confirmed the rights provided in article 27 are based on the interests of the collective group and consequently it is the individual

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<sup>112</sup> W. Felice, "The Case for Collective Human Rights: The Reality of Group Suffering", *Ethics & International Affairs* 10.1 (1996), p.47.

<sup>113</sup> Kymlicka (1995), p.34.

<sup>114</sup> Kymlicka (1995), p.34.

<sup>115</sup> Benoit-Rohmer (1996), p.19.

<sup>116</sup> Åkermark (1997), p.46.

as a member of the minority group who is destined to benefit from the protection.<sup>117</sup> Moreover, Thornberry proposes that the rights in article 27 ICCPR are a hybrid between individual and group rights, which “grapple with the group dimension within the individualist framework of human rights work”.<sup>118</sup>

The “human experience is such that human beings possess both individual and social dimensions”.<sup>119</sup> Due to the increasing difficulties in distinguishing between the two different dimensions of human life and the necessary rights required for both, a combination of individual and group rights may present the best approach. “The human rights tradition has clearly emphasized the individual’s rights in collective situations”.<sup>120</sup> References to a minority, generally imply a reference to a community or groups, whereas, international instruments, tend to refer to the rights of an individual as part of a group. It is suggested that group and individual rights are interdependent, as certain individual rights can only be exercised in the context of membership of a group, reinforcing the difficulties of separating the individual and group dimensions of human life. Furthermore, the distinction between individual and group rights fails to consider the complex relationship between the two types of rights:

Some collective rights threaten individual rights, some are the very preconditions of individual rights and some collective rights protect individual rights and empower their bearers because organised groups and communities are better able to defend rights of their members.<sup>121</sup>

For this reason, I propose defining a minority in such a way that incorporates both group and individual rights as this would ensure all dimensions of minority life are protected. Moreover, the current legislation adopts a fusion of the two. De Nova notes that “the respect for human individual rights may entail also the satisfaction of

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<sup>117</sup> F. Capotorti, “Are minorities entitled to Collective international rights?”, in Y. Dinstein and M. Tabor (eds), *The protection of Minorities and Human Rights* (London: Martinus Nijhoff, 1992), pp.505-511.

<sup>118</sup> Thornberry (1991), p.173.

<sup>119</sup> Packer (1999), p.241.

<sup>120</sup> W. Felice, *Taking Suffering Seriously: The Importance of Collective Human Rights* (USA: State University of New York Press, 1996), p.19.

<sup>121</sup> B. Parekh, *Rethinking multiculturalism: Cultural diversity and political theory* (London: Palgrave Macmillan, 2006), p.216.

collective needs and vice-versa certain collective interests and ideals do require satisfaction, if the individual is to be really protected".<sup>122</sup> Thus, any proposed definitions of a minority must take into consideration the need to provide for individual and group minority rights. By providing for a combination of the two, gaps in minority rights protections may also be avoided.

#### 4.2 The Pragmatic Approach

The rationale behind adopting a pragmatic approach is that it allows for interpretation of each individual instance through "best practice",<sup>123</sup> with guidance from a definition. The diversity of the needs and circumstances of minorities supports the adoption of a pragmatic approach to defining a minority. Kymlicka condemns narrow definition of minorities which is formed on the basis of race or descent,<sup>124</sup> advocating a broader concept, that minorities are historical communities arising from the incorporation of territories into a larger state, and ethnic groups as the result of immigration.<sup>125</sup> An internationally binding definition of minority requires a level of flexibility and discretion in the interpretation of the necessary rights. Due to the diverse nature of minority circumstance, the same concept of minorities would not fit in both Cameroon and Sweden.<sup>126</sup> However, providing national authorities with the responsibility of determining minority status through best practices, does leave the system open to abuse with national authorities denying minority rights to those who should be protected. "While the principle may be abused, it does not in and of itself undermine the rights concerned".<sup>127</sup> The risk of abuse could be reduced by the creation of an effective monitoring system, to which an individual could appeal to if they felt they were wrongly denied minority rights protections. Thus, the possibility of abuse, whilst apparent, is outweighed by the benefits of a flexible and dynamic approach of interpreting minorities.

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<sup>122</sup> R. De Nova, "The International protection of National Minorities and Human Rights", *Howard Law Journal* 11 (1965), p 285.

<sup>123</sup> Hannum (2007), p.68.

<sup>124</sup> Kymlicka (1995), p.23.

<sup>125</sup> Kymlicka (1995), p.11.

<sup>126</sup> Hannum (2007), p.69.

<sup>127</sup> Hannum (2007), p.69.

The failure of the international and European communities to create a definition of a minority supports the notion that “to a certain extent, pragmatism must prevail”.<sup>128</sup> At present, a binding definition has yet to be developed due to the extensive list of variables which must be considered in developing an acceptable definition, to avoid the creation of a definition which is either too broad or too narrow. In the introduction of this chapter, the Council of Europe was cited, stating that “it is probably worthwhile to look for an alternative to a comprehensive and globally applicable definition”.<sup>129</sup> In light of the critical analysis completed in this chapter on the development of a definition of a minority, I contend that the concept of a minority is contentious and raises wide ranging concerns. However, a definition is still required for effective minority rights and I will propose a solution to how to define a minority given all the competing tensions analysed throughout this chapter, in the final section of this chapter.

## 5. A Proposed Solution

The concept of a minority has proven difficult to comprehensively define due to the infinite number of variables which must be considered in the establishment of minority status. If a definition were to list every possible variable and consideration possible when determining minority status, the resulting definition, would be extremely cumbersome. The definition would be broad in the sense that it would accommodate a wide number of factors and individual traits which may be considered to amount to a minority status in certain states and not in others. However, greater significance is given to different variables of minority status in each state, creating an extensive and overly burdensome criterion. On the other hand, by including set criteria, any variable not included would automatically be excluded. This would remove any room for interpretation and flexibility, narrowing the definition. The inability of the international community to determine the exact wording on how to

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<sup>128</sup> Hannum (2007), p.69.

<sup>129</sup> Council of Europe, *Equality and Non-discrimination: Minority Rights* (Strasbourg: Council of Europe, 1990).

define the concept has resulted in human rights difficulties for both states and individuals and will be considered in further detail in the proceeding chapters. Despite these challenges, the proposed definitions all contain the same core objective elements suggesting that

the term “minority” means a group historically rooted in the territory of a state and whose specific ethno-cultural features (with the respective claims of protection) markedly distinguish it from the rest of the population of the state; the effect is also to “orient” the permanent social and political links of its members with the state as manifested by citizenship.<sup>130</sup>

Whilst the objective elements are widely accepted, it is the subjective elements that are not consistently included. The combination of objective and subjective elements to a definition of a minority takes the power away from the state to determine who is a minority. States view the subjective elements of a definition as erosion of sovereignty and the right to define minorities on their territory. However, they are necessary for consistency in the application of a definition.

The diversity of circumstances in which minorities find themselves means that if a definition of a minority were created that gained sufficient support by the international community, it would need to adopt a pragmatic approach. Therefore, a definition combining the freedom of choice of association, along with the flexibility of the pragmatic approach of a best practice, accommodating contextual requirements may be the answer to the minority question. This combination would allow the states the freedom to interpret the criteria according to their national policies and population demographic, as well as, ensure that the criteria were flexible enough to ensure that those individuals in need of minority rights are protected. Due to the level of interpretation bestowed upon state governments and the risk of abuse under this type of definition, a monitoring body would be essential to avoid any abuses of the definition by either states or individuals seeking minority status.

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<sup>130</sup> G. Pentassuglia, *Defining 'Minority' in International Law: A Critical Appraisal* (Rovaniemi: Lapland's University Press, 2000), p.10.

A definition incorporating these elements would have the correct balance of objective and subjective elements whilst having providing for the group and individual needs of minorities. This can best be achieved through a two part definition as proposed below:

- 1) A minority is a group comprised of voluntary members that is numerically inferior though significantly represented, in a state or region, where the individuals can display longstanding and firm ties to the state. The group must seek to preserve their distinct cultural identity to the benefit of both the individual member and wider group.
- 2) The state must adopt 'best practice' in applying this definition, taking the local political situation into consideration to ensure that all those in need of specific minority rights are protected.

This definition contains elements which have been highlighted throughout this chapter in the different definitions proposed combining the classic approach to a definition with the inclusion of clear pragmatic elements providing flexibility of interpretation. The definition proposed above has removed the traditional requirement of citizenship to the definition, to better incorporate groups such as the Roma who do not usually have citizenship but are able to display longstanding ties to the state. This is in line with Pentassuglia's proposal to ease the necessity of a long stay in the territory of the state, allowing minority rights to be the primary concern<sup>131</sup> and the Human Rights Committee who confirmed that article 27 ICCPR applies to non-citizens, irrespective of any particular degree of permanency on the state territory.<sup>132</sup>

As a fundamental element of minority status and minority rights is the ability to maintain a way of life and certain cultural practices, this is not simply to the benefit of the individual, but the minority group as well. As the debate on individual versus group rights has highlighted, a definition of a minority which provides for a combination of individual and group rights is most suitable in modern day life, as it is

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<sup>131</sup> Pentassuglia (2002), p.59.

<sup>132</sup> Human Rights Committee, *General Comment No. 23 on Article 27* (Geneva: UN, 1994), paragraph 5.2.

no longer possible to clearly separate the individual and group needs of a minority. Moreover, defining a minority in the context of a wider group or community would avoid the issue of *Locus Standi*. A definition with regard for both individual and group rights through the individual and the wider group provides for the fact that minorities tend to form part of a community which must be recognised to have rights as a group. Furthermore, supplementing individual human rights with minority rights provides greater scope for each country to have more influence on minority rights in their country, as the balance between general human rights and more specific minority rights will vary on a case by case basis.<sup>133</sup>

Benedikter has previously supported a two stage process at a regional level as proposed above, whereby states could identify minorities at the national level according to a definition and qualify them under an EU Charter of minority rights.<sup>134</sup> This could be adopted at an international level with a UN monitoring mechanism in order to avoid states abusing the flexibility provided by adopting a best practice and pragmatic approach to the definition. Broadening of the definition may provide for greater support among the international community as it combines the objective and subjective elements of a definition whilst providing for greater interpretation by each state. However, the attention given to minority rights following the Cold War has wavered, as will be demonstrated in the next chapter. It is essential that the international community demonstrate a commitment to minority rights and the monitoring of protections offered to minorities if this or any definition is to gain sufficient support and work effectively.

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<sup>133</sup> Kymlicka (2001), p.88.

<sup>134</sup> T. Benedikter, "Legal instruments of minority protection in Europe: an over view", 30 November 2006, [www.gfbv.it/3dossier/eu-min/autonomy-eu.html](http://www.gfbv.it/3dossier/eu-min/autonomy-eu.html) accessed 8 October 2012.



## Chapter Two: Minority Rights at an International and European level

### 1. Introduction

There is no binding definition of a minority, despite the various attempts that have been made at both International and European levels. In chapter one, various proposed definitions were examined and possible ways to develop these proposals into acceptable definitions were assessed. The failure to create a definition makes the application of minority rights difficult, with the uncertainty to who these rights apply. The international community has attempted to implement legislation and policies providing minority rights with varying levels of enthusiasm and success. The end of World War Two saw the emergence of human rights, but minority rights were widely excluded from the international agenda until 1989. As discussed in chapter one, it took the end of the Cold War and the resulting ethnic tensions from the collapse of both the USSR and Yugoslavia, to bring minority rights to the attention of Western democracies,<sup>1</sup> in particular the EU, with these tensions now on their doorstep. In the final part of chapter one, a two part definition was proposed, including subjective and objective elements, taking into account the individual and group dimensions of minority life. The definition called for a degree of 'best practice' or pragmatism in the application of the definition of a minority to provide states with a degree of discretion on the meaning of a minority in each state. Drawing upon the analysis in chapter one, this chapter will use the proposed solution to the question of 'what is a minority' as a tool for critique to analyse the existing minority right frameworks at both an International and European level.

This chapter will critically analyse the different mechanisms that have developed to protect minority rights. I assess whether International or European instruments provide more effective minority protection mechanisms in order to answer the first research

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<sup>1</sup> J. Jackson-Preece, "National Minority Rights vs. State Sovereignty in Europe: Changing Norms in International Relations", *Nations and Nationalism* 3.3 (1997), p.345.

question of this thesis: ‘Do there exist any effective mechanisms for the protection of minority rights in contemporary Europe?’. In the first part of this chapter, I critically analyse the minority rights provisions that exist at an International level. Whilst some background and context is provided with an analysis of minority rights in the League of Nations era, the first part of this chapter focuses on minority rights created by the UN. I will question the success of the UN, as the leading international organisation on human rights, to create a framework that provides adequate protections for minorities, analysing the application of article 27 of the International Covenant on Civil and Political Rights, 1966 (ICCPR). Moreover, it is suggested that the UN must transform the soft law protections found in the United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities into hard law, creating binding obligations for states, to provide effective minority right protections.

The second part of this chapter will consider the protection mechanisms offered at the European level, with analysis of the work of the EU, the Council of Europe and the Organisation for Security and Co-operation in Europe. I question whether regional minority right protections are more effective in providing protections to minorities compared to the International frameworks, by considering the various minority rights instruments created in the European Region, such as the Framework Convention on the Protection of National Minorities and the role of the High Commissioner of National Minorities. I conclude that due to the normative power of the EU, minority rights are best provided for at a regional level as they take into account regional variables for minority issues. However, at present effective minority rights are not provided for at either level.

## 2. International Level Minority Rights

### 2.1 Pre-League of Nations Mechanisms for Protection

The first attempt by the International community to develop minority rights was the creation of minority treaties, as highlighted in chapter one. It is believed that, the first

minority treaty was introduced in 1250 by Louis IX King of France to protect members of the Maronite Christians in the Holy Land, to ensure them the same rights as if they were citizens in France.<sup>2</sup> These treaties protected identified groups in specific geographical locations. Individuals outside the protection of these treaties were not guaranteed the same rights. These treaties remained the only form of minority protection until the Congress of Vienna in 1815. The Act of Congress shifted the traditional emphasis of minority rights away from religious groups, towards ethnic groups, widening the scope of minority rights. However, there were two limiting factors of this form of minority rights. Firstly, the Act only recognised the Belgians, Savoyards and Poles as ethnic groups in need of minority rights,<sup>3</sup> putting very clear limits on the application of the Act. Secondly, the Act lacked effective monitoring and implementation powers.<sup>4</sup> States were able to ignore their duties created by the Act with little to no consequence as the International community was powerless to enforce the obligations contained within it.

The treaties were the first expression of concern for the minority issue, but, the narrow scope of the treaties heightened tensions between the different minority groups; the differential treatment had the potential to create internal conflicts between minority groups. This was evidenced by the German-Polish Treaty of 1934 which came in the League of Nations era, that recognised the right of the ethnic-Polish people to preserve their culture and have their own institutions.<sup>5</sup> The multilateral guarantees in this Treaty offered greater protection for minorities, as states had greater incentive to fulfil obligations, due to increased political pressures. However, these protections were only for the Polish minority residing in Germany and failed to protect other long-standing minorities with ties to the territory, creating tensions between the different minority groups

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<sup>2</sup> P. Thornberry "Is There a Phoenix in the Ashes? International Law and Minority Rights", *Texas International Law Journal* 15 (1980), p.426.

<sup>3</sup> Thornberry (1980), p.426.

<sup>4</sup> Thornberry (1980), p.427.

<sup>5</sup> WWII Archives, "German-Polish Agreement of January 26, 1934", 26 May 2008, [http://www.wwiarchives.net/servlet/action/doc/Bbb\\_1](http://www.wwiarchives.net/servlet/action/doc/Bbb_1) accessed 15 June 2015.

## 2.2 League of Nations Minority Rights

The League of Nations was created at the end of World War One, tasked with the preservation of International peace. The key players in the League of Nations felt that they owed a responsibility to minority groups, following the sufferings of groups such as the Armenians, during World War One. In particular, President Woodrow-Wilson advocated minority rights, drafting an article on minority rights stating:

The League of Nations shall require all new states to bind themselves as a condition precedent to their recognition as independent or autonomous states, to accord to all racial or national minorities within their several jurisdictions exactly the same treatment and security, both in law and in fact, that is accorded to the racial or national majority of their peoples.<sup>6</sup>

This article was based on non-discrimination and placed an obligation on states to take steps to protect minorities. Whilst it gained some support, it was not included in any legally binding document.

The League of Nations chose to provide minority rights through the same minority treaties as in the pre-League of Nation era. The origin of these treaties at this time, varied from end of war peace treaties, special minority clauses such as those found in the treaties of peace with Austria, Bulgaria, Hungary and Turkey and binding declarations found in the League of Nations admissions declarations by Albania, Lithuania, Latvia, Estonia and Iraq. The treaties had supremacy at law, overruling any domestic legislation which may have been contrary to minority rights, “as fundamental laws invalidating all laws, regulations or official action in conflict with them”,<sup>7</sup> guaranteeing a minimum level of protection for minorities.

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<sup>6</sup> D. Miller, *The Drafting of the Convention Volume ii* (New York: G.B Putnam and Sons, 1928), p.91.

<sup>7</sup> Thornberry (1980), p.433.

The Permanent Court of International Justice called upon the League of Nations to ensure all nationals belonging to racial, religious or linguistic minorities have an equal footing of equality with the other nationals of the state.<sup>8</sup> The court suggested the introduction of mechanisms that preserved minority groups' racial peculiarities, their traditions and their national characteristics,<sup>9</sup> but this recommendation was not pursued. It has been suggested that "the failure of the minority protections....was ultimately a political failure at the highest level, in the company of the failure of the league itself and democracy".<sup>10</sup> The reliance of Treaties to provide minority rights and the failure to engage with the Courts requests for more effective minority rights frameworks emerged from a desire to avoid interference with state sovereignty. The territorial or bilateral minority treaties were created to ensure and maintain state control over the content. The League of Nations sought a balance between state sovereignty and the development of greater rights of the individual. However, this balance was not achievable due to state level fears that the development of international minority rights would lead to a relinquishing in state sovereignty. It was believed that International minority rights, through multilateral treaties could erode the control of the individual state, and it was felt that minority rights should be dealt with at state level and not by International organisations such as the League of Nations.

The League of Nations was unable to provide the protection it envisaged at its inception. Ringelheim suggests that the League of Nations framework of minority rights was not designed for general application but to facilitate a solution to minority rights in countries with particular issues.<sup>11</sup> The minority rights were designed for targeted application, suffering from the same weaknesses as the minority treaties that came before. Moreover, the minority rights guaranteed through these treaties relied on non-

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<sup>8</sup> *Minority Schools in Albania Application No.64* (Permanent Court of International Justice, 6 April 1935).

<sup>9</sup> *Minority Schools in Albania Application No.64* (Permanent Court of International Justice, 6 April 1935).

<sup>10</sup> P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Oxford University Press; 1991), p.48.

<sup>11</sup> J. Ringelheim, "Minority Rights in a Time of Multiculturalism—The Evolving Scope of the Framework Convention on the Protection of National Minorities", *Human Rights Law Review* 10:1 (2010), p.105.

discrimination policies and the undefined term of a minority, providing states with a wide margin of discretion. Whilst a degree of pragmatism is necessary, as outlined in chapter one, this weakened the overall effectiveness of these rights, as states were able to exclude most minority groups. Thus, minority rights become absorbed into the evolving human rights regime that followed after the Second World War.

### 2.3 The United Nations and Minority Rights

The UN placed human rights high on its agenda, in direct response to the severe violations which occurred during the Second World War. As a result, two leading documents on human rights were quickly adopted following the creation of the organisation; the UN Charter on the 26<sup>th</sup> June 1945 and the Universal Declaration of Human Rights (UDHR) on the 10th December 1948. The *Travaux Préparatoires* of the UDHR recognised the need for minority rights, stating:

In states inhabited by well-defined ethnic, linguistic or religious groups which are clearly distinguished from the rest of the population and which want to be accorded differential treatment, persons belonging to such groups shall have the right as far as compatible with public order and security to establish and maintain their schools and cultural or religious institutions, and to use their own language.<sup>12</sup>

At the third committee meeting of the UN, Denmark, Yugoslavia and the USSR all proposed specific minority rights to be included in the human rights documents. The Danish proposal focused on the right to education, the Yugoslav proposal on the right to nationality and equal political and social rights and the USSR proposal focused on the use of minority languages. The proposals were welcomed by some states, notably Eastern Europe, Belgium and India, but came under heavy criticism from others.<sup>13</sup> The difference between the minority rights issues found in the American continent, Europe and other

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<sup>12</sup> Article 46 of the Secretariat draft, in E/CN.4.21 (1947), annex A, 23.

<sup>13</sup> Thornberry (1991), p.135.

parts of the world<sup>14</sup> was highlighted as a cause for concern in developing an International standard of minority rights. In 1954, Kunz suggested that “at the end of World War Two international protection of minorities was the great fashion...recently the fashion has become almost obsolete”.<sup>15</sup> A separate resolution on minorities was to be drafted but it never gained sufficient momentum to materialise. This reflects the same difficulties faced in creating a definition of a minority, as analysed in chapter one.

The failure to agree on the specifics of minority rights resulted in neither the UDHR nor the Charter to contain any minority rights, leading to an over-reliance on non-discrimination principles. This is evidenced in article two of the UDHR, which provides “everyone is entitled to the rights and freedoms, set forth in this declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.<sup>16</sup> This is complemented by other rights provided for in the declaration including the freedom of thought, conscience and religion,<sup>17</sup> freedom of opinion and expression<sup>18</sup> and the right to freely participate in cultural life of the community,<sup>19</sup> but is focused on non-discrimination.

According to Ahmed, “basic non-discrimination provisions do not accommodate plurality and access to rights other than those available under equal citizenship”.<sup>20</sup> The effectiveness of non-discrimination to protect minorities is limited, as it does not take into account the need for special protections of minorities with individual and group elements. Non-discrimination rights, such as article two UDHR, also only provide for individual rights. However, as established in chapter one, the concept of minority rights requires an appreciation of both individual and group needs, which cannot be satisfied by non-

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<sup>14</sup>Thornberry (1991), p.135.

<sup>15</sup>J.L. Kunz, "The Present Status of the International Law for the Protection of Minorities", *American Journal of International Law* 48 (1954), p.282.

<sup>16</sup>UN, *The United Nations Universal Declaration of Human Rights* (Paris: UN, 1948), Article two.

<sup>17</sup>UN (1948), article 18.

<sup>18</sup>UN (1948), article 19.

<sup>19</sup>UN (1948), article 27.

<sup>20</sup>T. Ahmed, *The Impact of EU law on Minority Rights* (Oxford: Hart Publishing, 2011), p.17.

discrimination provisions. Moreover, non-discrimination principles simply require the state to ensure that minorities do not suffer from discrimination as a result of their situation; I argue that this does not amount to effective minority rights. In order to provide effective minority rights, it is necessary that states be required to ensure the preservation of minority culture and to ensure equal treatment compared to the majority. This cannot be achieved by a state simply ensuring non-discrimination, requiring the state not to do something, i.e. create legislation and policies that discriminate against a certain group. States must actively provide minority groups with the support and opportunities needed in order to preserve their culture, something that can only be achieved through positive action and specific minority rights.

#### A. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities

The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities<sup>21</sup> was created in 1947 by the Economic and Social Council. It was tasked with undertaking studies and making recommendations on the prevention of discrimination and the protection of racial, national, religious and linguistic minorities and any other functions which may be entrusted on it by the Economic and Social Council or the Commission on Human Rights. The sub-commission is comprised of twenty-six independent experts, selected by the Human Rights Commission. The seats are reserved on a geographical basis, with twelve Afro-Asian, six Western Europe, five Latin American and three Eastern European seats, to ensure representation of the diverse minority rights issues faced across the world. The aim of this quota was to avoid the criticisms of the minority rights proposed by this commission not being representative of the needs of all minority groups.

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<sup>21</sup>Renamed the Sub-Commission on the Promotion and Protection of Human Rights in 1999.



From its inception, the sub-commission mirrored UN practices, relying on non-discrimination policies. This was on the belief that “minority protections can be realised through the granting of human rights in combination with the non-discrimination principle...while no reference to protection of minorities needs to be made”.<sup>22</sup> In his work on minority rights, Capotorti identified the prevention of discrimination and special measures of minority protection as two elements of the same problem,<sup>23</sup> suggesting that non-discrimination could be used as a tool for minority rights. However, as indicated above minority protections should not be promoted solely through non-discrimination, as whilst the two principles are inseparable in effective rights, specific minority rights that go beyond basic non-discrimination policies are required. It is not enough to oblige a state to not interfere and prevent discrimination of minorities; a state must be required to take active steps to protect the minorities that reside in its territories. Effective protection of minority rights can be achieved through a combination of non-discrimination and specific minority rights, to ensure minorities have the same rights and guarantees as the majority, with the benefit of additional obligations on the state to provide minorities the means with which to preserve their culture, language and religion. This is in line with the definition proposed at the end of chapter one that, the group must seek to preserve their distinct cultural identity to the benefit of both the individual minority and wider group.

In 1950, the Commission drafted an article on specific minority right protections, providing that, “persons belonging to ethnic, religious or linguistic minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”.<sup>24</sup> The draft article gained support and formed the basis of article 27 ICCPR, the principal minority rights legislation at the International level.

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<sup>22</sup>E.W. Vierdag, *The Concept of Discrimination in International Law: With Special Reference to Human Rights* (The Hague: Nijhoff, 1973), p.158.

<sup>23</sup>F. Capotorti, *Study on the rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (New York: UN, 1979), paragraph 27.

<sup>24</sup>Capotorti (1979), paragraph 171.

## B. International Covenant on Civil and Political Rights, 1966

The previous section of this chapter highlighted that neither of the founding UN human rights documents included specific minority protections, with the focus of minority rights being through non-discrimination provisions. To date, the only International instrument to contain any specific reference to minority protection is article 27 ICCPR. It provides “in those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”.<sup>25</sup> The next part of this chapter will analyse to what extent this article provides effective minority rights.

### I. Purpose of Article 27 International Covenant on Civil and Political Rights

The purpose of article 27 should be clear; to provide minority rights. However, the *Travaux Préparatoires* highlighted strong opposition to the inclusion of article 27 and the protection of minority rights. The experts involved in the drafting process were in favour of minority provisions whereas political bodies were keen to reject such provisions.<sup>26</sup> The political bodies, including states, were reluctant to include minority rights in the international document, for fear that it would result in a loss of state sovereignty and an upsurge in claims of self-determination, similar to the fears associated with defining a minority analysed in chapter one. Nowark suggests that article 27 is formulated in an extremely vague manner, leaving many questions, for which an answer must be found by way of interpretation.<sup>27</sup> The vague wording makes it difficult to determine the real intention of article 27 and how wide (or not) the rights guaranteed by it are.

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<sup>25</sup> UN, *International Covenant on Civil and Political Rights* (New York: UN, 1966)

<sup>26</sup> U. Haksar, *Minority protection and International Bill of Human Rights* (Bombay: Allied Publishers, 1974), pp.55-57.

<sup>27</sup> M. Nowark, *UN Covenant on Civil and Political Rights-CCPR Commentary* (Kehl: NP Engel, 1993), p.485.

In an attempt to clarify the purpose of article 27, the Human Rights Committee issued General Comment No.23. Paragraph 9 which provides that:

The protection of (Article 27) rights is directed towards ensuring the survival and continued development of the cultural, religious, and social identity of the minorities concerned, thus enriching the fabric of society as a whole...these rights must be protected as such and should not be confused with other personal rights.<sup>28</sup>

This confirms that the aim of article 27 ICCPR is the protection and preservation of minority culture, with a particular emphasis on religion and language. The preservation of cultural attributes is essential to minority groups and more specifically to minority identity, as analysed in chapter one. Raz proposes that the autonomy and identity of an individual is tied up with their access to culture, the prosperity of their culture, and with the respect accorded to their culture by others.<sup>29</sup> The ability to protect and promote cultural traditions, such as language, can only be achieved through group rights. Therefore, whilst a right to minority identity is not explicitly provided for, it is possible to argue it is within the scope of article 27. Thornberry has relied upon this link between the right to protection and preservation of culture, to describe article 27 as “the claim to distinctiveness and the contribution of a culture on its own terms to the cultural heritage of mankind”,<sup>30</sup> which can be interpreted as the right to minority identity. As the concepts of identity and culture overlap, it is impossible to claim that article 27 provides for the preservation of one and not the other. This explanation to the purpose of article 27 fits comfortably with the definition proposed in chapter one, as it focuses on the need to preserve minority culture through a combination of individual and group rights.

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<sup>28</sup> UN Human Rights Committee, “CCPR General Comment No. 23: Article 27 (Rights of Minorities)”, 8 April 1994, <http://www.refworld.org/docid/453883fc0.html> accessed 5 January 2016, paragraph 9.

<sup>29</sup> J. Raz, “Multiculturalism”, *Ratio Juris* 11.3 (1998), pp.193-205.

<sup>30</sup> P. Thornberry, “Minority Rights”, *Collected Courses of the Academy of European Law* (1995), p.332.

## II. State obligations within the International Covenant on Civil and Political Rights

By ratifying the ICCPR, states are obliged to apply provisions contained therein at a domestic level. However, the vague wording of article 27 makes it difficult to determine exactly what obligations it places on states. One would expect to find an extensive literature on the substantive content of article 27, but the literature has focused on other minority questions. Due to the limited scholarly attention on state obligations, it is essential to consider the work of Åkermark, who has identified the minimalist and radical school, as two opposing views on the state obligations created by article 27.<sup>31</sup>

### a. The Minimalist School

The minimalist school suggests that article 27 places a narrow obligation on the state relating to minority rights, focusing on to use of negative language.<sup>32</sup> According to this school of thought, the negative language of article 27 means it cannot impose positive duties on a state to protect minorities; “Minority states are not required to enter into commitment to protect their minorities, beyond avoiding hindrances on the minority group enjoying their own language and developing their own culture”.<sup>33</sup> Tomschat states that article 27 may only give rise to positive state action through non-discrimination,<sup>34</sup> suggesting that article 27 imposes an obligation on states to not interfere with minority group enjoyment of their own culture, but imposes no positive obligation on the state to support the group in the preservation of culture.

Adopting a broader interpretation of the minimalist school, article 27 may place limited obligations upon state parties. Nowark interprets article 27 to place positive

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<sup>31</sup>A. Åkermark, *Justifications of minority protection in International Law* (London: Martinus Nijhoff Publishers, 1997), pp.119-197.

<sup>32</sup>C. Tomuchat, “Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights”, in R. Bermhardt (ed), *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler* (Berlin: Springer-Verlag Berlin Heidelberg, 1983), p.968.

<sup>33</sup>T. Modeen, *The International Protection of National Minorities in Europe* (Abo: Abo Akademi, 1969), p.108.

<sup>34</sup>Tomuchat (1983), p.968.

obligations on the state, when read in conjunction with article 2(1) ICCPR which obliges states to ensure the covenant rights to all individuals.<sup>35</sup> This requires states to take positive steps to ensure members of minority groups their rights, beyond refraining from interference. This approach presents positive obligations as an option, but does not fully endorse them either suggesting article 27 requires limited positive action, at best. Furthermore, the minimalist approach excludes collective rights being protected,<sup>36</sup> and thus does not fit with the definition of a minority proposed in chapter one.

#### b. The Radical School

In contrast, radical scholars adopt a broader interpretation of the state obligations under article 27. Capotorti suggests that article 27 requires active and sustained measures on the part of the state, to preserve minority identity,<sup>37</sup> and that the passive attitude of minimalist scholars would render article 27 inoperative.<sup>38</sup> Thornberry concludes an examination of article 27 leads to a “logical and literal reading in favour of positive obligations of states”.<sup>39</sup> As minorities often find themselves in a disadvantaged position compared to the majority, additional support is required to preserve their culture and non-discrimination principles do not suffice. I argue that the level of action required by the state is dependent on context and the situation. It is necessary for states to take positive measures to the extent that they are necessary to ensure that the disadvantages of minority status do not result in the negation of individual rights.<sup>40</sup> State obligations under article 27 are therefore qualified; it is necessary to balance the burden placed upon the state to act and the potential harm to minority groups caused by inaction. Article 27 requires active steps to ensure minority rights, though the extent that this is an absolute requirement, is subject to debate.

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<sup>35</sup> Nowark (1993), pp.502-504.

<sup>36</sup> Modeen (1969), p.108.

<sup>37</sup> Capotorti (1976), para. 588.

<sup>38</sup> Capotorti (1976), para. 217.

<sup>39</sup> Thornberry (1991), p.181.

<sup>40</sup> Thornberry (1995), p.337.

The radical school interprets article 27 in a way which fits most with the authors understanding of the intentions of the United Nations in the creation of article 27 to provide minimum guarantees for minority groups. This would be very difficult, if not impossible to achieve if states were merely obliged to ensure non-interference through non-discrimination and not to take active steps to promote minority culture and identity. Moreover, the radical school's interpretation of the obligations placed on states reflects the key elements of the definition of a minority proposed at the end of chapter one.

### III. Implementation of Article 27

The implementation and enforcement of the ICCPR is regulated by articles 28-45 and the first optional protocol. Article 28 is significant to minority rights as it establishes the Human Rights Committee, composed of eighteen independent members, collectively representing the different legal systems across the International community. The Committee has two key functions; to consider reports from state parties and to deal with individual and interstate complaints.<sup>41</sup> The Committee has produced an array of case law on the application of article 27, providing an insight to the aims and objectives of article 27 as well as an explanation and guidance for future cases. Nowark questions the benefits of analysing Committee case law, arguing that it "is only of limited assistance in interpretation".<sup>42</sup> However, I suggest that examining the legal application of article 27 can provide insight to the scope of the rights protected in the article.

The Committee have generally ruled in favour of minority groups, due to the specific reference to minority culture in article 27. In the case of *Lubicon Lake Band v. Canada*,<sup>43</sup> the Committee concluded that the historical inequalities and current threats to the culture of the Indian tribe were a violation of article 27. This reflects the radical school on the state obligations of article 27, requiring states to take positive action to

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<sup>41</sup> UN (1966), article 41.

<sup>42</sup> Nowark (1993), p.485.

<sup>43</sup> *Lubicon Lake Band v. Canada* Communication No.167/1984 (Human Rights Committee, 22 July 1987).

preserve traditional minority culture, as confirmed in the t case of *Lansman et al v. Finland*.<sup>44</sup> The Committee have also analysed the extent to which rights of an individual member of a minority group are guaranteed. In *Lovelace v. Canada*,<sup>45</sup> a woman born and registered as a Maliseet Indian lost her status and rights associated with being an Indian, upon marrying a non-Indian. After divorce, the applicant wished to return to the reserve but, following the loss of her legal status, could not claim the right to reside. The Committee questioned whether the requirement that minorities shall not be denied certain rights linked to their culture, included the right to return to the reserve. The Committee found that article 27 did not provide for the right to live on the reserve, but restrictions on individual rights must have a “reasonable and objective justification and be consistent with the other provisions of the Covenant”.<sup>46</sup> As denial of the right to reside had no reasonable and objective justification, article 27 had been violated. This confirmed that article 27 can be relied upon by both groups and individuals of a minority group, reinforcing the importance of both group and individual elements to the definition and protection of minority rights.

The case of *CLD v. France*<sup>47</sup> demonstrates the state’s ability to limit the application of article 27. The Committee confirmed it was not able to examine communications by the Breton Community due to a French declaration,<sup>48</sup> a decision that has been subject to widespread debate. On the one hand, some argue the Committee did have competency on this matter; Åkermark suggests that the French statement was simply a declaration, giving the committee discretion to review its own competency to hear the communications.<sup>49</sup> On the other hand, there is support for the Committee decision that the declaration amounts to a reservation. Horn states an excluding reservation amounts to a denial by the reserving state of the duty to perform the relevant act and an assertion

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<sup>44</sup> *Lansman et al v. Finland* Communication No. 511/1992 (Human Rights Committee, 14 March 1996).

<sup>45</sup> *Lovelace v. Canada* Communication No. 24/1977 (Human Rights Committee, 30 July 1981).

<sup>46</sup> *Lubicon Lake Band v. Canada* Communication No.167/1984 (Human Rights Committee, 22 July 1987), paragraph 16.

<sup>47</sup> *CLD v. France* Communication No. 228/1987 (Human Rights Committee, 18 July 1988).

<sup>48</sup> Multilateral Treaties deposited with the Secretary-General, status as of 31 December 1994, ST/LEG/Ser. E/13.

<sup>49</sup> Åkermark (1996), p.167.

that it will abstain from doing the act.<sup>50</sup> France's refusal to recognise minorities leaves international law at risk of being "subordinated to municipal law".<sup>51</sup> The ability to make reservations on international instruments allows states to limit the impact of international instruments to protect state sovereignty, which runs counter to universal and effective rights. This reinforces the need to reduce the discretion provided to the state at the expense of effective minority rights.

#### IV. Article 27 as a Principle of Customary Law

Article 27 applies to the 168 states that have ratified the document, with a further 7 states being signatories and 22 states taking no action.<sup>52</sup> Kelly and Vukas suggest article 27 is the codification of existing law through state practice.<sup>53</sup> If this is true, it can be argued that article 27 is customary law, making it applicable to all states.<sup>54</sup> This is supported by Dinstein who proposes that article 27 is "declaratory in nature and reflects a minimum of rights recognised by customary international law".<sup>55</sup> The acceptance of principles found in article 27, along with the fact that non-discrimination is widely regarded as part of customary law,<sup>56</sup> supports the position of article 27 as customary law. However, this concept is not without its critics. De Nova believes that the protection of minorities is only a technique for lessening internal and international tensions which should be used sparingly and cautiously and that there are no general normative rules

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<sup>50</sup> F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (Uppsala: Elsevier Science Ltd, 1988), p.84.

<sup>51</sup> P. Vuciriri Ramaga, "The Group Concept in Minority Protection", *Human Rights Quarterly* 15 (1993), p.576.

<sup>52</sup> April 2017.

<sup>53</sup> J. Kelly, "National Minorities in International Law", *Journal of International Law and Policy* 3 (1973), p.266. and B. Vukas "National Minorities in International Law General International Law and the Protection of Minorities", *Revue des droits de l'homme* (1975), p.41.

<sup>54</sup> G. Pentassuglia, *Minorities in International Law* (Strasbourg: CoE publishing, 2002), p.111.

<sup>55</sup> Y. Dinstein, "Collective Human Rights of Peoples and Minorities", *International and Comparative Law Quarterly* 25 (1976), p.118.

<sup>56</sup> Thornberry (1991), p.246.



relating to minorities, favouring minority protection to be applied on a case by case basis,<sup>57</sup> suggesting article 27 cannot be customary law.

In the first instance, Thornberry argued that article 27 granted minority rights without wider repercussions in customary law as there was a lack of evidence that domestic policies on minority rights are made on the basis of a general obligation.<sup>58</sup> However, Thornberry later claims that the “concept of an underlying customary law of minority rights should not be lightly dismissed”.<sup>59</sup> Comparatively, Capotorti suggested that “while this article is not a source of legal obligation for those states which have not yet ratified the covenant [... it] can be considered as forming an integral part of the system of protection of human rights and fundamental freedoms”.<sup>60</sup> On the one hand, this statement suggests that only those parties that have ratified the ICCPR are obliged to uphold its provisions, whilst on the other hand, suggesting that article 27 has some value as a general principle due to the fact as it has used by the UN General Assembly, indicating that it could form customary international law.

The shifting attitudes are inevitable given the debate which surrounds the existence of customary law itself. The use of article 27 as a general principle by the UN is evidence of progress towards the development of article 27 as customary law. However, there is a need for greater application of the principles in a domestic context by states. For this to occur, it is essential that the principles found in article 27 are incorporated into national legislation through specific minority rights. At present, this has not been achieved. Thus, whilst the emergence of customary law principles is a future possibility, at present, article 27 applies only in those states that ratify the Covenant.

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<sup>57</sup> R. De Nova, “The International Protection of Minorities and Human Rights”, *Howard Law Journal* 11 (1965), p.275.

<sup>58</sup> Thornberry (1991), p.246.

<sup>59</sup> Thornberry (1995), p.385.

<sup>60</sup> UN Doc E/CN.4/Sub.2/384Add.4, para.1.

C. The United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, 1992.

The Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities of 1992, developed from recommendations made by Capotorti on article 27 ICCPR. The preamble makes reference to international instruments such as the UDHR and regional instruments including the Copenhagen document, highlighting that it forms part of a wider network of minority rights. However, the declaration is not based on existing legislation.<sup>61</sup> The final stages of the drafting process saw participation by governments from across the international community,<sup>62</sup> reflecting the increased attentions given to ethnic tensions and minority rights following the end of the Cold War. The Declaration was approved in UN General Assembly Resolution 47/135 on 18 December 1992 with the aim to promote “more effective implementation of the human rights of persons belonging to minorities and more generally to contribute to the realisation of the principles of the Charter of the UN and of the human rights instruments”.<sup>63</sup>

The text contains eight operative clauses that reaffirm the protections and rights found in other international instruments. Article 1(1) provides a state duty to protect the existence and identity of minorities and to encourage conditions for the promotion of that identity, which is further elaborated in article 1(2) which provides that states shall adopt appropriate legislative and other measures to achieve those ends.<sup>64</sup> The Declaration recognises minority rights as the rights of persons belonging to minorities, comparable to article 27 ICCPR. The declaration also adds the term national to the list of minorities protected. The working group commentary suggests that this is not a departure from the

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<sup>61</sup> UN (2005), para. 3.

<sup>62</sup> Pentassuglia (2002), p.111.

<sup>63</sup> UN, *Final Text Of The Commentary To The United Nations Declaration On The Rights Of Persons Belonging To National Or Ethnic, Religious And Linguistic Minorities Of The Working Group On Minorities* (New York: UN, 2005), para. 3

<sup>64</sup> UN, *The United Nations Declaration On The Rights Of Persons Belonging To National Or Ethnic, Religious And Linguistic Minorities* (New York: UN, 1992).

traditional approach as national is simply usually incorporated within the other “types of minority”.<sup>65</sup> Moreover, the addition of the term ‘national’ brings this document in line with European minority rights, which will be analysed in this chapter.

Unlike the ICCPR, the Declaration explicitly requires states to take positive obligations to ensure minority rights; Article 2(1) replaces the negative terminology found in article 27, with the positive language, ‘have the right’. This places a duty on the state to take active measures to protect minorities. This is a significant step forward; placing an obligation on a state to act will ensure more effective minority rights. However, the fundamental weakness of the declaration is that it is not legally binding and so forms soft law, making it a weak framework for protection. “Soft law exerts varying degrees of political pressure on states, encouraging them to move towards particular outcomes and responses”.<sup>66</sup> Therefore, states only comply with the Declaration to the extent that they feel politically obliged. The non-legally binding nature of the Declaration also explains the lack of control mechanisms for this right. Article 9 provides that UN specialised agencies and other organisations “shall contribute to the full realisation of the rights and principles set forth in this declaration, within their respective fields of competence”.<sup>67</sup> However, there is no guidance of how this will ensure minority rights as it provides no monitoring or sanctioning power. Effective implementation and monitoring of the Declaration is impossible, whilst it is only politically binding. Thornberry has proposed that the Declaration has a special weight as it declares legal standards and since it was adopted by the UN General Assembly by consensus.<sup>68</sup> At present the Declaration is not effective in protecting minority rights as it is not legally binding. However, it creates a minority rights framework that could develop into legally binding principles, through a combination of state practice and incorporation of the key principles into treaties. As the Declaration was

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<sup>65</sup> UN (2005), para. 6.

<sup>66</sup> Ahmed (2011), p.45.

<sup>67</sup> UN (1992), article 9.

<sup>68</sup> Thornberry (1993), p.26.

approved by consensus there is hope that it “may be 'hardened through incorporation into treaties and emerge as customary principles”.<sup>69</sup>

## 2.4 Effectiveness of International Minority Rights

The International mechanisms’ ability to ensure minority rights and protections has been subject to academic debate. The vague wording of article 27 has left the rights open to interpretation, leading to two schools of thought on state obligations under this provision. Whilst case law demonstrates that article 27 has had some success in providing minority rights and protections it also demonstrates the limits of article 27. If International mechanisms are to provide the desired levels of minority rights and protections it is necessary that the International community develop a protection mechanism which reduces the discretion given to states but considers context and best practice. Furthermore, the International community must develop a legally binding document which transforms the UN Declaration into hard law. It is also necessary that states overcome their fears surrounding minority rights and embrace the developments which are necessary.

Despite the obvious weaknesses of the International instruments of minority rights, “the significance of these UN standards should not be underestimated”,<sup>70</sup> as it lay the foundation for minority rights. The work of the UN on minority rights confirmed that “most contemporary societies are internally diverse and claim that this diversity should be respected and allowed to flourish, rather than denied, suppressed or confined to the private sphere”.<sup>71</sup> This demonstrates an acceptance of the need for minority rights. These foundations in minority rights have been developed following the end of the Cold War, by European Institutions. The next part of this chapter will analyse the mechanisms of

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<sup>69</sup> Pentassuglia (2002), p.114.

<sup>70</sup> Jackson-Preece (1997), p.349.

<sup>71</sup> J. Rigelheim, “Minority Rights in a Time of Multiculturalism- The Evolving Scope of the Framework Convention in the Protection of National Minorities”, *Human Right Law Review* 10.1 (2010), p.168.

minority rights provided for in the European region and will question whether these are more suitable and effective than the International equivalents.

### 3. European Level Minority Rights

The International community has failed to develop minority rights that are effective and guarantee protections for minorities. This is in part due to the fact that states were able to hide minority questions during the Cold War. However, the end of the Cold War saw an upsurge in minority demands, which the UN failed to fully engage with. With this all occurring on the doorstep of Europe, “the domestic condition of national minorities was identified as a potential threat to European order and stability between 1990 and 1995”,<sup>72</sup> increasing the need for minority rights to be developed in the region. The following part of this chapter will critically examine the efforts of the European institutions that have taken active steps in the development of minority rights to assess whether regional European instruments provide more effective minority rights than International instruments.

#### 3.1 The Organisation for Security and Co-operation in Europe (OSCE)

The first European level institution to examine is the OSCE which was created by the Helsinki Final Act of 1975.<sup>73</sup> The organisation has 57 member states including all European states, plus the USA and Canada. The creation of the organisation in the wake of the Cold War caused minority rights to be a low priority on the agenda. However, paragraph four of Basket VI of the Helsinki Final Act provides that participating states afford minorities the full opportunity for the enjoyment of human rights and fundamental freedoms and will protect their legitimate interests.<sup>74</sup> The Helsinki Act demonstrated the desire of the OSCE to develop minority rights and acknowledged the relationship between

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<sup>72</sup>Jackson-Preece (1997), p.349.

<sup>73</sup> Originally called the Commission for Security and Co-operation in Europe.

<sup>74</sup>OSCE, *Helsinki Final Act* (Helsinki: OSCE, 1975).

minority rights and security. However, the rights included are comparable to article 27 ICCPR, placing only limited obligations upon participating states. Moreover, the Helsinki provisions are not legally binding, as participating states had no desire to commit themselves to international treaty obligations.<sup>75</sup> As soft law, states are able to uphold the parts of the document they chose, without any formal monitoring or control mechanism. As a result, it has proven more popular than the legally binding ICCPR. This is concerning as effective minority rights rely upon the development of comprehensive protection frameworks that are easy to understand and to implement. To assess these concerns, it is necessary to consider the development of minority rights as protected by the OCSE.

#### A. Copenhagen Document

The Copenhagen Document was the result of the meeting of the Conference on the Human Dimension of the CSCE in 1990. Through the Copenhagen document, states recognised the deep linkage between minority rights and democracy highlighting the duty of civil society to promote tolerance and cultural diversity relating to national minorities, reaffirming that minority rights form part of more general human rights and are crucial for peace and stability.<sup>76</sup> Chapter IV contains eleven paragraphs relating to national minorities. In particular, paragraph 31 provides that participating states adopt special measures ensuring persons belonging to national minorities' full equality,<sup>77</sup> creating a positive obligation upon states to take steps to ensure non-discrimination and equality of all individuals, in sharp contrast with article 27.<sup>78</sup>

The document provides for the right to belong to a national minority as a matter of individual choice; the state may not identify minorities in a way that is suitable for state policies.<sup>79</sup> This provides minorities with the right to choose to be part of a minority group,

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<sup>75</sup> Wright (1996), p.193.

<sup>76</sup> OSCE, *Copenhagen Document* (Copenhagen: OSCE, 1990), paragraph 30, sub-paragraph 3.

<sup>77</sup> OSCE (1990), paragraph 31.

<sup>78</sup> Wright (1996), p.196.

<sup>79</sup> OSCE(1990), paragraph 32.

rather than being associated with a minority group according to state policy. This freedom of choice is essential to minority status, as outlined in chapter one. The right to self-identification protected in the Copenhagen Document also provides protection from assimilation, as an individual cannot be placed into a group and be expected to comply with the culture and traditions of a group which they do not associate with. Moreover, the Copenhagen document provides for the possible establishment of appropriate local and autonomous administrations,<sup>80</sup> recognising both community and individual rights in the political participation. The right to political participation is essential to effective minority right standards in a country. Many countries claim to have good minority right standards and yet to fail to provide for the effective political participation of their minorities, as will be analysed in further detail in chapters four and five of this thesis, examining the political participation of minorities in Latvia and Bosnia. The recognition of both group and individual rights reflects the definition of a minority, proposed in chapter one, which emphasises the combination of the individual and group aspects of minority status.

The Copenhagen document gained widespread support as it is politically and not legally binding. States are willing to accept greater obligations when they are only politically binding, as the consequences which flow from a breach are only political in nature; Failure to comply could lead to diplomatic responses, public shaming or withholding or withdrawal of funding. Moreover, the Copenhagen document contains limitation and escape clauses.<sup>81</sup> States have complete discretion in applying the document, allowing for context and variables, relevant to the state. However, the difficulties this creates are two-fold. First, it is difficult to monitor the fulfilment of state obligations if there are no monitoring bodies. Second, it is difficult for states to be motivated to fulfil the obligations when there are limited consequences for failure to act. Along with the discretion afforded to the state through the limitation and escape clauses, this raises questions of the overall effectiveness of the Copenhagen document. There is

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<sup>80</sup> A. Herclides, "The CSCE and Minorities", *Helsinki Monitor* 3.3 (1992), p.11.

<sup>81</sup> OSCE (1990), paragraph 37.

little to be gained from minority rights that are unenforceable. However, despite its shortcomings, the Copenhagen document was a significant step in the development of minority rights as the first document to contain minority rights that was widely accepted.

## B. The Human Dimension Mechanisms

The Vienna Human Dimension Mechanism of 1989 was developed to provide monitoring mechanism to the commitments that participating states have undertaken in the field of human rights and democracy, including minority rights. It created four intergovernmental procedures to improve monitoring of rights; the exchange of information and requests for information and for representations, the right to hold bilateral meetings and the right of participating states to bring situations and cases in the human dimension of the OSCE to the attention of other participating states. Any participating state may provide information on the exchanges of information and the responses to its requests for information and to representation and on the results of bilateral meetings.<sup>82</sup> The creation of control mechanisms indicated a strong will of the participating state to implement the OSCE agreements<sup>83</sup> and a commitment to minority rights protection.

The Vienna mechanisms depend upon participating states' cooperation,<sup>84</sup> due to the lack of fact finding, investigating or verification power given to any external body. Therefore, if a state refused to provide the requested information, there was no way of collecting the necessary information, creating an obvious weakness. This was addressed in Moscow in 1991, where a resource list comprising of six experts, appointed by each participating state, was created with the mandate to undertake fact finding, reporting and advising.<sup>85</sup> The Moscow mechanism allows for ad-hoc investigations to be made by independent experts on human dimension issues. To date, the Moscow mechanism has

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<sup>82</sup> OSCE, *The Human Dimension of the OSCE: Vienna Mechanism* (Vienna: OSCE, 1989).

<sup>83</sup> Åkermark (1996), p.258.

<sup>84</sup> Wright (1996), p.199.

<sup>85</sup> OSCE, *The Human Dimension of the OSCE: Moscow Mechanism* (Moscow: OSCE, 1991).



been invoked seven times, with the most recent investigation looking into the presidential election of Belarus held in December 2010.<sup>86</sup> The limited use of the mechanism is a cause of concern, as it may suggest that it provides limited control. However, the mechanism is only used if activated by a participating OSCE member state. Thus, the limited use reflects the limited need for investigations, which can be considered a positive step for minority rights.

### C. High Commissioner on National Minorities (HCNM)

The creation and approval of the mandate of the HCNM was approved in 1992, after overcoming a number of obstacles. A similar role to the High Commissioner was first proposed by the Swedish government in 1990, but was rejected as it was deemed that such a role was not necessary. However, the collapse of the Yugoslavia and the lack of expertise to deal with the situation led to almost full consensus “that more effective conflict prevention tools were needed”.<sup>87</sup> The HCNM was tasked with the mandate:

To be an instrument of conflict prevention at the earliest possible stage and will provide “early warning” and as appropriate, “early action”...in regard to tensions involving national minority issues which have not yet developed beyond an early warning stage but...have the potential to develop into conflict.<sup>88</sup>

This mandate is very ambiguous and has not provided clear guidelines to the function of the role. Furthermore, the continued failure of International and European institutions to provide a definition of a minority has left the meaning of a minority, as included in the

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<sup>86</sup>OSCE, “OSCE Rapporteur's Report on Belarus”, 16 June 2011, <http://www.osce.org/odihr/78705> accessed 30 March 2015.

<sup>87</sup>A. Bloed, “The High Commissioner on National Minorities: Origins and Background” *Journal on Ethnopolitics and Minority Issues in Europe* 12.3 (2013), p.17.

<sup>88</sup>CSCE, *Helsinki document II: The Challenges of Change* (Helsinki: CSCE, 1992), p.9.

mandate, open to interpretation. As a result, the function of the HCNM is a “risky endeavour as it could easily result in disputes with participating states about how to interpret these issues”.<sup>89</sup> However, the flexibility of the mandate, “from a point of view of conflict prevention...is not necessarily a negative issue”,<sup>90</sup> as it may in fact widen the remit of the position of the HCNM.

The existing frameworks on minority rights in place at the time of the creation of the role provide limited minority rights. It was necessary for, Max van der Stoep as the first holder of the post, to be active in developing minority rights. This was achieved through the creation of a number of important recommendations, including the Lund Recommendations on the Effective Participation of National Minorities in Public Life.<sup>91</sup> The ambiguities of the mandate of the role, along with the desire of the first holder of the position to develop policies on minority rights have contributed to the success of the HCNM. Jackson-Preece argues that “if normative activity had remained outside the HCNM mandate, it is unlikely that the office of the HCNM would have achieved the credibility that it currently possesses”.<sup>92</sup> The aims of the High Commissioner are realised by collecting information regarding national minority issues and assessing the nature of the tensions and visiting participating states to promote dialogue, confidence and cooperation. This is achieved by the HCNM acting as a mediator in these situations.<sup>93</sup>

It is important to note that the recommendations of the HCNM are only that; a recommendation. Whilst they provide states with guidance on minority rights, the recommendations have no legal effect. This limits the role of the High Commissioner, as there are no enforcement mechanisms in place to encourage compliance with any recommendations made. Moreover, the mandate of the HCNM covers the fifty seven

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<sup>89</sup> Bloed (2013), p.20.

<sup>90</sup> Bloed (2013), p.18.

<sup>91</sup> J. Jackson-Preece, “The High Commissioner on National Minorities as a Normative Actor”, *Journal on Ethnopolitics and Minority Issues in Europe* 12:3 (2013), p.78.

<sup>92</sup> Jackson-Preece (2013), p.81.

<sup>93</sup> Wright (1996), p.202.

participating states from Europe, Central Asia and North America.<sup>94</sup> However, the substance of the mandate has restricted the work to a limited number of CEECs and central Asia, such as the missions in Bosnia, Moldova and Tajikistan. By limiting the High Commissioner to conflict prevention when a situation may escalate, this excludes cases where serious violence is already occurring, where the HCNM as a mediator, with an expert knowledge in minority rights issues, could be effective to bring ethnic violence to an end.

The creation of the High Commissioner is arguably the most significant step taken by the OSCE in the development of minority rights. Despite the obvious weakness of the role, there are three key areas in which the High Commissioner has continued to play a vital role. The first is the monitoring of escalating tensions. Minority rights situations require specialist knowledge and understanding of the drivers for escalation and de-escalation of this kind of situation.<sup>95</sup> The HCNM is able draw upon its existing experience to effectively engage with local, regional and supra-national governments to take appropriate preventative action. Secondly, the HCNM has a continued role in preventative or quiet diplomacy.<sup>96</sup> Unlike other agencies, the HCNM operates outside of the media radar, drawing upon its extensive knowledge to act as a facilitator of mediation for potential conflict areas. Thirdly, the HCNM has a future role in knowledge and policy transfer.<sup>97</sup> Through a combination of success and failures in conflict prevention, there are obvious opportunities for the HCNM to transfer this knowledge beyond the OSCE region. I argue that this represents the most significant role for the HCNM in the future. Drawing upon the numerous lessons learnt by the HCNM over the past twenty years, this normative framework could be invaluable to other regions, such as the Arab league.<sup>98</sup>

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<sup>94</sup> OSCE, "Factsheet: What is the OSCE?", 17 November 2015, <http://www.osce.org/whatistheosce/factsheet> accessed 4 January 2016.

<sup>95</sup> S. Wolff, "Twenty Years on and Twenty years ahead: The Continuing Relevance of the OSCE High Commissioner on National Minorities", *Journal on Ethnopolitics and Minority Issues in Europe* 12.3 (2013), p.64.

<sup>96</sup> Wolff (2013), p.64.

<sup>97</sup> Wolff (2013), p.65.

<sup>98</sup> Wolff (2013), p.65.

### 3.2 Council of Europe

The second institution in the European region to analyse is the Council of Europe, created after the Second World War as a political response to the divisions and conflicts in Europe. Minority rights have become a central part to the work of the Council of Europe and facilitated through the Committee of Ministers and the Parliamentary Assembly. Initial steps included Recommendation 1134<sup>99</sup> which highlighted minority rights as an essential factor for peace, justice, stability and democracy and called upon the Committee of Ministers to take measures to draw up a Protocol to the European Convention on Human Rights or a special Convention on minority rights.<sup>100</sup> The recommendation marked a shift away from non-discrimination towards special mechanisms to protect minorities, but was limited in substantive rights. The main obligations placed on states through the recommendation were to guarantee protection of national minorities and to eliminate prejudices, rather than requiring states to take measures to promote minority identity and culture. Furthermore, Recommendation 1177<sup>101</sup> saw the Parliamentary Assembly seek the adoption of an additional protocol to the European Convention on Human Rights and a declaration setting out basic principles relating to the protection of minorities to serve as parameters to assess new applications of membership. However, this recommendation never developed into a substantial policy.

#### A. European Convention on Human Rights

The protection of members of minority groups has traditionally fallen into non-discrimination policies; the same is evident in the European Convention in Human Rights. However, as highlighted throughout this chapter, non-discrimination provisions do not provide effective minority rights. Article 14 of the European Convention on Human Rights

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<sup>99</sup> October 1990.

<sup>100</sup> Pentassuglia (2002), p.127.

<sup>101</sup> February 1992.

provides that “the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.<sup>102</sup> An individual may only bring a claim concerning the violation of article 14, if brought in conjunction with violation of another substantive right of the Convention. “This is sometimes derided as a parasitic requirement”,<sup>103</sup> as it means article 14 cannot be relied upon as a standalone right. The application of article 14 was considered in the Belgian Linguistic case,<sup>104</sup> concerning French-speaking minorities in Belgium, wanting to educate children in French. Whilst the courts found no violation of article 14, the court did find a violation of article 2 protocol 1 in conjunction with article 14. However, there will be no breach of article 14 when the discrimination is in pursuit of a legitimate aim, there is an objective justification for the discrimination and the measures are proportionate to the aim sought to be realised. The permitted distinctions serve to protect the state, but in doing so limit the effectiveness of article 14 in protecting minorities from discrimination.

The addition of article one of protocol 12 was a development in minority rights as it provided for non-discrimination as a stand-alone right. The protocol provides that “the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.<sup>105</sup> There is specific reference made to the prohibition of discrimination on the basis of association with a national minority, demonstrating some progress in minority protection mechanisms, but it is still not sufficient. The purpose of non-discrimination principles is to

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<sup>102</sup> EU, *European Convention on Human Rights* (Strasbourg: EU, 1950), article 14.

<sup>103</sup> R. O’Connell, “Cinderella comes to the Ball: Art 14 and the Right to non-discrimination in the ECHR”, *Legal Studies* 29.2 (2009), p.215.

<sup>104</sup> Case “*Relating to Certain aspects of the laws on the use of Languages in Education in Belgium v. Belgium* Applications no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (European Court of Human Rights, 23 July 1968).

<sup>105</sup> EU, *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Rome: EU, 2000).

prohibit discrimination in the enjoyment of rights protected by the convention. This is “not a true guarantee of minority rights”<sup>106</sup> as the preservation of minority identity cannot be guaranteed by anti-discrimination provisions. Effective minority rights require active preservation of culture and minority identity that cannot be ensured through a promise not to discriminate. At present, the Convention does not provide adequate protections for minorities and it is time that steps were taken to address this.

#### B. The European Charter for Regional or Minority Languages 1992

The European Charter for Regional or Minority Languages was created by the Council of Europe in 1992. It consists of two main parts; one setting out the fundamental principles and objectives underlying state policies and practices on regional or minority languages and a more specific part on rights and protections in relevant areas including education, public services and culture. The extremely vague wording of the Charter allows for different interpretations, making consistent application very difficult. The Charter defines regional or minority languages as those “traditionally used within a given territory of a state”,<sup>107</sup> yet fails to define what is meant by traditionally used language. This can be seen as a positive as allows states to be pragmatic, allowing for context to be considered in identifying minorities. However, this also leads to confusion and uncertainty of the real effect of this provision. This scope for interpretation leaves some minority groups with limited protection of their rights. For example, Estonia distinguishes between national minorities and ethnic minorities, discriminating against minorities who arrived in the Soviet Era, when applying the Charter. Ultimately, the Charter is not a minority rights document; the main aim of the document is to protect regional and minority languages. As it does not aim to preserve minority culture in a wider sense, it does not support the

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<sup>106</sup>G. Gilbert, “The Council of Europe and Minority Rights”, *Human Rights Quarterly* 18 (1996), p.173.

<sup>107</sup>C. Johnson, “The Use and Abuse of Minority Rights: Assessing Past and Future EU Policies towards Accession Countries of Central, Eastern and South-Eastern Europe”, *International Journal on Minority and Group Rights* 13 (2006), p.30.

definition proposed in chapter one, and thus does not provide effective minority right protections.

### C. Framework Convention for the Protection of National Minorities

In 1993, the Council of Europe agreed on parliamentary resolution 1201, realising requests for the development of an additional protocol on the rights of national minorities to the European Convention on Human Rights. The resolution sought inspiration from existing minority right instruments including the Copenhagen document and the ICCPR. The resulting Framework Convention for the Protection of National Minorities was hailed as a major historical achievement,<sup>108</sup> as the first document to contain legally binding minority rights. It entered into force in 1998, with its implementation entrusted to an Advisory Committee. The convention consists of programme-type provisions which set out the objectives of the convention, as well as substantive provisions which outline rights and protections. The preamble contains similar provisions as the Copenhagen document, linking pluralist democracy to respect for the identity of persons belonging to a national minority and the creation of “appropriate conditions enabling them to express, preserve and develop this identity”.<sup>109</sup> From the preamble, the convention is required to protect the rights of minorities in Europe, following the increased diversity in its population following the Cold War, and the expansion of the southerly and easterly borders.

The convention confirms minority rights within the realm of a general human rights framework<sup>110</sup> and reiterates the principle of freedom of choice and the principal of individual as well as communal exercise of the rights,<sup>111</sup> imposing positive obligations

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<sup>108</sup>A. Eide, “International Cooperation for Group Accommodation through Minority Protection: A review of Standard Setting and Institution Building at Regional and Global Levels”, *International Journal on Minority and Group Rights* 13(2006), p.153.

<sup>109</sup>Pentassuglia (2002), p.133.

<sup>110</sup>Council of Europe, *Framework Convention for the Protection of National Minorities* (Strasbourg: Council of Europe, 1995), article 1.

<sup>111</sup>Council of Europe (1995), article 3.

upon states, as discussed in chapter one of this thesis. The duties imposed upon states through the convention include the duty to adopt special measures designed to achieve, full and effective equality<sup>112</sup> and to promote conditions to maintain and develop minority culture and to preserve the essential elements of minority identity.<sup>113</sup> The convention is significant as it represents the first time states were willing to commit to legally binding minority rights obligations, demonstrating progress and an acceptance of the need for minority rights beyond non-discrimination.

The failure to include a definition in the convention has resulted in an inconsistent application of the convention, the same fate seen by other instruments. The decision to adopt a pragmatic approach to minorities has been put down to the difficulties or even the impossibility of a definition capable of gaining the support of all members of the Council of Europe. In the first opinion on Portugal, it was confirmed that the “instrument was in fact conceived as a pragmatic tool to be implemented in very diverse legal, political and practical situations”.<sup>114</sup> This decision has been strongly criticised as an easy way to avoid a difficult decision, leaving it as a case by case ad-hoc decision rather than creating a clear definition. There exists some support for this approach, interpreting this omission in the convention as an opportunity for further debate<sup>115</sup> on the issue at hand, given the evolving and increasingly diverse membership of the Council of Europe. The pragmatic approach also allows for increased state support. Rather than working on an all or nothing basis, making states choose to follow all the convention or none of it, the pragmatic approach allows the state to interpret the convention in a way that best fits their domestic needs.

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<sup>112</sup> Council of Europe (1995), article 4, paragraph 2.

<sup>113</sup> Council of Europe (1995), article 5, paragraph 1.

<sup>114</sup> Council of Europe, *Advisory Committee on The Framework Convention For The Protection of National Minorities: Opinion On Portugal, Adopted On 6 October 2006* (Strasbourg: Council of Europe, 2007), p.8, paragraph 20.

<sup>115</sup> Craig (2010), p.308.



The convention demonstrates an increased awareness within the European region that “the protection of national minorities is essential to stability, democratic security and peace.”<sup>116</sup> Despite the positive steps made towards the development of minority rights, it lacks effective enforcement mechanisms. The only monitoring system established is regular state reports by the Committee of Ministers<sup>117</sup> with implementation of provisions achieved through “national legislation and appropriate governmental policies”.<sup>118</sup> The Parliamentary Assembly observed that “its implementation machinery is feeble and there is a danger, in fact, the monitoring procedures may be left entirely to governments”.<sup>119</sup> Placing monitoring in the hands of national policy removes the consistency required for effective minority rights protection. This policy has led to many states to limit the application of the convention, such as Germany restricting the scope of convention to groups with traditional or longstanding links.<sup>120</sup> Other states have identified which minority groups are protected by the Framework Convention.<sup>121</sup> As a result, the convention has been described not only as a weak first attempt but “the worst of all worlds”.<sup>122</sup> The ultimate success of the convention is reliant upon national legislation and government procedures to protect minorities; owing to the diverse attitude states adopt on minority rights, this does not inspire hope for either effectiveness or consistency.

### 3.3 Efforts of the European Union to Develop Minority Rights

The EU evolved from the European Economic Community created in 1957 following the Treaty of Rome. Whilst the aims of the EU have developed beyond economic integration, human rights fail to be a key focus of EU policy. Limited resources have been invested into the development of minority rights despite the EU making numerous commitments to diversity. Article 167 of the Lisbon treaty reaffirmed respect

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<sup>116</sup> Council of Europe (1995), preamble, para.6.

<sup>117</sup> Council of Europe (1995), articles 24-26.

<sup>118</sup> Gilbert (1996), p.174.

<sup>119</sup> Council of Europe, *Parliamentary Assembly Recommendation 1255* (Strasbourg: Council of Europe, 1995).

<sup>120</sup> Austria, Estonia, Latvia and Switzerland.

<sup>121</sup> Frisians in the Netherlands.

<sup>122</sup> Gilbert (1996), p.189.

for national and regional diversity, requiring the community to take cultural aspects into account in its actions under other provision of the treaty. The respect for diversity is an integral part of minority rights and Thornberry states that the EU respect for diversity has the “potential to assist in transforming subsidiarity into practice for sub-national groups”.<sup>123</sup> The rights on respect for diversity have potential to develop into substantial minority rights. However, at present, there is little evidence of this becoming a reality. The EU has failed to provide any specific minority rights and had only offered limited resources to transform proclamations of respect for diversity into active policy.

#### A. The European Union’s Charter of Fundamental Rights

The EU Charter of Fundamental Rights relies on non-discrimination principles to provide minimum safeguards for minorities. Pentassuglia proposes “the minimalist anti-discrimination approach of the charter may not adversely affect the developing EU minority rights...and should not in general prevent...a wider and more adequate vision of the issue of minorities from being fully embraced”.<sup>124</sup> Whilst this demonstrates optimism for further developments, in reality, the EU has little motivation to employ resources into the development of minority rights. EU member states are bound by other minority protections, such as article 27 ICCPR, reducing the need for the EU to develop its own minority rights. However, this relies on these documents providing adequate protections for minorities, which is subject to debate. The EU should not rely on other institutions to provide protections for minorities residing within its member states; it should take steps to develop comprehensive minority rights. Furthermore, the reluctance of some member states to acknowledge minorities, let alone protect those, makes it difficult to see the benefit of EU minority rights. However, minority rights are a sensitive issue, that the international community has been unable provide a solution to and the normative power of the EU may place it in the ideal position to promote effective minority rights.

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<sup>123</sup>Thornberry (1995), p.331.

<sup>124</sup>Pentassuglia(2002), p.151.

## B. The European Union as a Normative Power

The emergence of the EU as one of the key institutions involved in minority rights standards and providing for effective minority rights protections makes it necessary to evaluate the authority that the EU has to influence and encourage reform. The influence of the EU has grown significantly following on the end of the Cold War and the geographical and political changes that came about as a direct result of the independence of both the CEEC and Western Balkan states. Whilst the influence that the EU has to promote norms and reforms on minority rights through the principle of EU conditionality in the integration process will be analysed in chapter three of this thesis, it is first necessary to consider the broader influences that the EU may have, beyond the integration process. It is necessary to analyse the influence that the EU has on all states and international institutions on foreign and security policies, including minority rights, as a normative power. Historically, all states and international actors could be perceived as normative actors as they influenced international norms and policies. However, in 2017, simply influencing norms no longer makes an international actor a normative power. In the introduction to her recent study, Tocci stated that

The EU sees itself as both an emerging global actor, and one that clearly identifies itself in principle with certain norms and values.... But we have to see what it does, as well as what it says. Is it true that the EU is a 'normative' foreign policy actor in practice?<sup>125</sup>

In this section, I will analyse the ways in which the EU has been perceived as an international actor since its inception in order to begin to answer Tocci's question about whether the EU really is a normative actor, able to influence norm adoption. This question will be further considered with regards to the EU's actions towards Latvia and Bosnia in chapters four and five of this thesis, focusing on the field of minority rights.

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<sup>125</sup>N. Tocci, *Who is a normative foreign policy actor? The European Union and its global partners* (Brussels: Centre for European Policy Studies, 2008), p.i.

## I. How the European Union is Perceived as an International Actor

Since its inception, the EU has evolved into its role as an actor in foreign policy. It is evident that, "in both academic debate and policy discourse, the EU has traditionally been considered as a distinctly 'different' type of international actor".<sup>126</sup> The question for this thesis is how this role as an international actor has evolved to the current claims of the EU as a normative actor and what this means in regards to the influence that the EU exerts in the creation of policy norms. Duchêne described the EU as a civilian power with the ability to exert influence in International Relations and foreign policy.<sup>127</sup> By referring to the EU as a civilian power, Duchêne is highlighting that the EU was able to pursue domestication or 'normalisation' of International Relations by taking international problems within the sphere of contractual politics without the use of military force.<sup>128</sup> However, this perception of the EU in its earlier stages was not universally held. In 1982, Bull dismissed the idea of the EU as a civilian power, arguing that "'Europe' is not an actor in International affairs, and does not seem likely to become one".<sup>129</sup> These different views of the EU are indicative of the uncertainty that surrounded the EU as both scholars and international actors waited to see what functions the EU would take on.

The EU has since become to a player in foreign policy. Nye suggests that the EU's form of foreign policy influences relies upon co-option, multilateral cooperation, institution-building, integration and power of attraction,<sup>130</sup> placing further emphasis on the ability of the EU to develop policies which are adopted and supported without the need to resort to military action. This does make the EU fairly unique in its position as a foreign policy actor. In 2002, Manners identified the EU as a normative actor as a foreign

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<sup>126</sup> Tocci (2008), p.1.

<sup>127</sup> F. Dûchene, "The European Community and the Uncertainties of Interdependence", in M. Kohnstamm and W. Hager (eds), *A Nation Writ Large? Foreign Policy Problems before the European Community* (London: Macmillan, 1973), p.19.

<sup>128</sup> Duchêne (1973), p.19.

<sup>129</sup> H. Bull, "Civilian power Europe: a contradiction in terms?", *Journal of Common Market Studies* 21.2 (1982), p.151.

<sup>130</sup> J. Nye, *Soft Power: The Means to Success in World Politics* (Public Affairs: New York, 2004), p.5.

policy actor intent on shaping, and 'normalising' rules and values in international affairs through non-coercive means.<sup>131</sup> In the Lisbon Treaty 2009, the EU identified itself as normative actor.<sup>132</sup> However, the idea of the EU is a normative power is not uncontested. In order to engage in this debate, it is first necessary to establish what is meant by a normative actor.

## II. What is a Normative Actor?

In establishing whether the EU is a normative actor it is first necessary to determine what a normative actor is. According to Manners, to refer to something as normative means that it is considered to be normal in International affairs. From this definition, to be a normative actor requires an international actor to undertake standard setting and there is an expectation of non-deviance rather than moral imperative.<sup>133</sup> In criticism, Sjursen suggests that Manner's definition would make all International actors normative foreign policy actors as they all contribute to what is a norm in International Relations.<sup>134</sup> Thus, Sjursen proposes that normative foreign policy has to be in line with existing universal legal norms and the foreign policy actor has to bind itself to these International legal principles.<sup>135</sup> This is compatible with Manner's view that normative foreign policy requires an external reference point and cannot be simply defined and interpreted.<sup>136</sup> In terms of the EU and minority rights, it can be argued that this is achieved by the Copenhagen Criteria which is a reflection of International minority rights and making the ratification of the legally binding Framework Convention on National Minorities a requirement for accession of new member states.

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<sup>131</sup> See I. Manners, "Normative Power Europe: A contradiction in terms?", *Journal of Common Market Studies* 20.2 (2002), pp.235-258.

<sup>132</sup> See Article III-193(1), Article I-2 and I-3) Lisbon Treaty.

<sup>133</sup> Manners (2002), p.253.

<sup>134</sup> H. Sjursen, "Doing Good in the World? Reconsidering the Basis of the Research Agenda on the EU's Foreign and Security Policy", RECON Online Working Paper, 15 September 2007, [www.reconproject.eu](http://www.reconproject.eu) accessed 14 August 2016.

<sup>135</sup> H. Sjursen, "The EU as a 'normative' power: how can this be?", *Journal of European Public Policy* 13.2 (2006), p.249.

<sup>136</sup> I. Manners, "The European Union as a Normative Power: A Response to Thomas Diez", *Millennium* 35.2 (2006), p. 170.

Manners elaborates upon his concept of the EU as a normative actor and identifies a normative actor as an actor who develops foreign policy which is good or ethical. However, what is good or ethical is subjective and what one actor sees as good or ethical policy may not be universally held. Tocci argues this understanding “is not only problematic in and of itself, but would also lead us back to a definition of normativity which is inextricably tied to power and power-based relations,”<sup>137</sup> which goes against the key element of a normative actor, which is based on norm setting through non-coercive means. Rather, Tocci proposes that in determining whether an International actor is a normative actor in foreign policy, it is necessary to consider three dimensions of foreign policy to determine whether it is acting in a normative way.<sup>138</sup> It is first necessary to question what an actor wants, which requires an analysis of the goals of the International actor. Second, it is necessary to consider how the actor acts in order to bring its policies into effect, and finally it necessary to consider whether or not the actor achieves what it sets out to, and the overall impact of these actions. According to Tocci, a normative actor “justifies its foreign policy actions by making reference to its milieu goals that aim to strengthen international law and institutions and promote the rights and duties enshrined and specified in international law...by respecting its internal and international legal obligations.”<sup>139</sup>

### III. Is the European Union Really a Normative Actor?

In scholarly activity, there are a number of positions that have been adopted to determine whether or not the EU is a normative actor. Manners and Whitman propose that in determining whether the EU is a normative actor, it is necessary to consider what the EU is to explain what it does and how it acts beyond its own borders as an actor in

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<sup>137</sup> Tocci (2008), p.4.

<sup>138</sup> Tocci (2008), p.5.

<sup>139</sup> Tocci (2008), p.12.

foreign policy.<sup>140</sup> In other words, it is necessary to look at the institutional set up and the way in which the EU works in order to determine whether it is a normative power. On the one hand, scholars such as Smith have placed an emphasis on the multilayer institutional set up of the EU in order to identify it most closely with a normative power.<sup>141</sup> The authority of the EU is spread across a number of different institutions, including the European Parliament and the European Court of Justice, as well as domestic level institutions, including member state governments, parliaments and courts. Smith claims that this creates a set of constraints that makes a normative power, the most appropriate description of the EU. On the other hand, Lavenex has placed greater emphasis on the EU's institutional function and rules of working to describe it as a normative power. She emphasises that the Union's foreign policies are influenced by the interests of the member states, meaning that the EU's internal governance is transposed externally.<sup>142</sup> As there is minimal resistance to its policies, as they are created with the member states interest in mind, this fits with the concept of a normative power.

However, it has been suggested that it is almost impossible for an International actor to act as a normative power at all times. Rather than asking whether an institution is or is not a normative power, we should have regard for context in which foreign policy has been developed and question the degree to which it is normative. In regards to the contextual issue of the EU as a normative actor, Tocci suggests "while it can certainly influence the external context, particularly in its neighbourhood where it has real foreign policy presence, it is bound to also rely on fortuitous external circumstances to effectively assert its normative power".<sup>143</sup> This indicates that the power of the EU to shape norms is dependent on a number of circumstances outside of its control. Therefore, we should disregard the power of the EU if it fails to gain support on a single policy area.

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<sup>140</sup> I. Manners and R. Whitman. "Towards identifying the international identity of the European Union: A framework for analysis of the EU's network of relationships", *Journal of European Integration* 21.3 (1998), pp.231-249.

<sup>141</sup> H. Smith, *European Union Foreign Policy: What It Is and What it Does* (London: Pluto Press, 2002), p.271.

<sup>142</sup> S. Lavenex, "EU External Governance in Wider Europe", *Journal of European Public Policy* 11.4 (2004), pp.680-700.

<sup>143</sup> Tocci (2008), p.3.

Furthermore, Hamilton supports an analytical framework for judging “the degree to which a global actor is normative both in particular circumstances and over time”.<sup>144</sup> This literature recognises that it may be possible to be a normative actor, despite some of its actions not being perceived as normative. With this in mind, I propose that the EU is a normative power, but not in all foreign policy decisions that it makes. Chapters four and five of this thesis will consider to what extent the EU acted as a normative actor with regards to minority rights in Latvia and Bosnia.

#### 4. International vs. European Protections

In the past, it has taken the violation of minority rights to prompt the development of new protection mechanisms; the steps taken by the UN to develop minority rights came as a direct result of the violations of human rights seen in World War Two, whereas rights instruments such as the Copenhagen document and the Framework Convention for the Protection of National Minorities were developed in the post-Cold War era. The objective of this chapter was to analyse the principle International and European instruments which provide protection mechanisms for minority rights. The focus of part one of this chapter was the work of the UN. The provisions found in article 27 ICCPR are the foundations of minority rights protections, serving as a source of inspiration to later instruments. The second part of this chapter considered the efforts made by European institutions including the EU, the Council of Europe and the OSCE and compared the effectiveness of the instruments created by these regional organisations. Some competition between organisations to develop rights is not a bad thing as it creates a desire to create the most comprehensive instrument. However, there is a danger that organisations may adopt conflicting standards; any conflicts in principles would be detrimental to the protection of national minorities.<sup>145</sup>

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<sup>144</sup>D. Hamilton, “The United States: A Normative Power?”, *CEPS Working Document* 291 (Brussels: CEPS, 2008).

<sup>145</sup>A. Bloed (eds), *The Conference on Security and Co-operation in Europe: Analysis and basic documents, 1972-1993* (Dordrecht: Martinus Nijhoff Publishers, 1993) pp.100-101.



Minority rights are a sensitive issue, for which the United Nations has been unable to provide an effective solution. Pentassuglia states that the different international and regional “structures do not stand in isolation to each other; they should be taken cumulatively as being part of a wider network of state and non-state actors that are committed to the internal diffusion of minority standards”.<sup>146</sup> However, I argue that regional protections would provide more effective minority rights guarantees. There is evidence of diverse minority rights issues across Europe, and states have varied positions on minorities. Until a universal approach to minorities is adopted, the EU will struggle to provide effective minority protection mechanisms. It is essential that the region overcomes these difficulties, as the diversity of minority issues in the region is much smaller when compared to the minority issues faced globally. As a result, regional protection mechanisms are able to engage at a deeper level with minority issues of the local area providing more effective minority rights. However, “the granting of certain rights to minorities and the protection of these rights basically is a domestic matter in each country, dependent upon the political and legal structures of the country, the will of the government and the will of the people”.<sup>147</sup> Until either an International or European instrument is developed or amended which limits the discretion given to states on minority issues, neither level of protection will provide adequate minority rights protections.

The main failing of the minority rights instruments aimed at protecting minorities is the lack of a binding definition of the term minorities. Whilst the International instruments focus upon the elements of language and, religion, European instruments adopt the definition of national minorities. As examined in chapter one, the lack of a definition creates difficulty in the application of the protection systems available, owing to the wide margin of discretion afforded to states to decide who they believe are beneficiaries of these instruments. There is a fine balance to be reached between a

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<sup>146</sup> Pentassuglia (2009), p.194.

<sup>147</sup> E. Chaszar, *The International Problem of National Minorities* (Toronto: Matthias Corvinus, 1999), p.32.

pragmatic approach to minority rights that provides states with a degree of discretion and ensuring a minimum standard for minorities. The implications of this omission from the documents are increased by the minimal control mechanisms which are in place for these instruments. Despite the reluctance of the EU in the development of minority rights to date, due to its normative power, the Europe Union is in a stronger position to influence its member states than the United Nations, and so should become more proactive in finding a solution to minority issues. The next chapter of this thesis will analyse what influence the EU has on member states in the pre-accession period through the tool of EU conditionality, and the impact this has on the status of the EU as a normative actor.

## Chapter Three: The Role of EU Conditionality in Norm Adoption

### 1. Introduction

The early 1990s saw the collapse of the Soviet Union and the Socialist Federal Republic of Yugoslavia, leaving a number of weak states in search of guidance through the democratisation process. On the door step of these states was the EU, emerging, arguably, as a normative power in relation to democracy, prosperity and freedom. For these states, “the combination of stability, prosperity, security and personal freedoms provided a successful alternative model combined with a framework of support for the reforms to get there, crowned with the possibility of joining a powerful and rich regional club”.<sup>1</sup> To aid these states in the democratisation process, the EU had to ensure these states met certain standards and were strong enough to support the Union. The ability of the EU to successfully influence policy and law runs parallel to the wider EU enlargement process for reform in a variety of areas, including minority rights, and is essential for successful EU integration. The 2004 and 2007 enlargements saw change in enlargement policy, requiring states to bring their national legislation in line with the *acquis communautaire* prior to membership, in a way that had never been required in earlier enlargements.

The extensive enlargement policy resulted in the accession process of the CEECs, “claimed to be the most successful foreign policy of the EU”.<sup>2</sup> According to Schimmelfennig, the reforms made in the CEECs towards EU membership “contributed to democratic consolidation, respect for human rights, minority protection, conflict resolution and stability”,<sup>3</sup> something that was not always seen as achievable, following the Cold War. The key tool of the EU to ensure reform in the enlargement process is EU

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<sup>1</sup> H. Grabbe, “Six Lessons of Enlargement ten years on: The EU’s Transformative Power in Retrospect and Prospect”, *Journal of Common Market Studies* 52 (2014) p.40.

<sup>2</sup> F. Schimmelfennig, “EU political accession conditionality after the 2004 enlargement: consistency and effectiveness”, *Journal of European Public Policy* 15.6 (2008), p.918.

<sup>3</sup> Schimmelfennig (2008), p.918.

conditionality. It must be noted that the use of EU conditionality is not limited to the enlargement process and it has been used successfully in trade, concessions, aid and political contacts.<sup>4</sup> However, it has proven most successful as a tool for reform in the enlargement process. In chapter two, the concept of the EU as a normative actor was analysed. Noutcheva suggests that the normative power and conditionality debates have developed in parallel as there are a number of links between the two concepts.<sup>5</sup> It is often difficult to distinguish between the conditionality enlargement policies and the Foreign and Security Policies reflective of a normative power. Neither tool is entirely suited to explaining the EU's impact on the state structures, thus it is necessary to consider the impact of both in regards to the accession process.

In the second research question of this thesis, I question the influence of EU conditionality on norm adoption in states with EU aspirations and ask if this influence has diminished since 2008, following the CEEC accessions. The case study of Latvia will provide evidence that EU conditionality and the reward of EU membership was the key impetus for a change towards minority-friendly legislation.<sup>6</sup> On the other hand, the case study of Bosnia and Herzegovina (Bosnia) highlights the dwindling impact of EU conditionality on policy reform. In the first part of this chapter, I will examine the development of the principle of EU conditionality through the EU enlargement process. I will examine the different models that have developed to explain the success of EU conditionality, concluding that the external incentives model, developed by Schimmelfennig and Sedelmeier,<sup>7</sup> is the most suitable for explaining the success of conditionality in EU enlargement. The enlargement process in Europe has created academic debate on the existence of 'double standards' in the minority rights required of member and non-

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<sup>4</sup> H. Grabbe, "European Union Conditionality and the "Acquis Communautaire"", *International Political Science Review* 23.3 (2002), p.250.

<sup>5</sup> G. Noutcheva, "Fake, partial and imposed compliance: the limit of the EU's normative power in the Western Balkans", *Journal of European Public Policy* 16.7 (2009), p.1065.

<sup>6</sup> J. Kelley, *Ethnic Politics in Europe: A Power of Norms and Incentives* (NJ: Princeton University Press, 2004).

<sup>7</sup> F. Schimmelfennig and U. Sedelmeier "Governance by Conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe", *Journal of European Public Policy* 11.4 (2004), pp.669-687.

member states.<sup>8</sup> An assessment of EU conditionality will begin to consider this hypothesis and will allow for further examination of this debate in later parts of this thesis.

The second part of this chapter will begin to examine the issue of inconsistency in EU requirements by examining the effectiveness of EU conditionality on reform among the CEECS. This is achieved by critically analysing the Accession Partnerships which set out the EU requirements to allow the CEEC to gain membership in the EU. Focusing on the case study of minority rights reform in Latvia, I conclude that in the 2004 and 2007 enlargements, EU conditionality was an effective tool for policy reform, despite the weaknesses of the Accession Partnerships. In the final part of this chapter, I will analyse the future of EU conditionality through the development of the Stabilisation and Association Process, using the case study of Bosnia to frame my analysis. I will conclude that EU conditionality has to date, not been successful in the Western Balkan states to adopt the dual strategy of EU integration and member state building. This is in part owing to the failure of the EU to have full appreciation of the turbulent history of these states and the fact that attempts to apply a 'one size fits all' package of reform are not conducive to reform. There has been limited research conducted into the overall effectiveness of EU conditionality in policy and law reform due to the difficulty in "isolating the effect of international factors from the domestic incentives for legal, institutional or behavioural change".<sup>9</sup> This chapter provides support for the difficulty of isolating the effects of different factors that impact EU conditionality. I will identify political, social and institutional factors which have some impact upon the success of conditionality to promote domestic reform, but conclude that it is not possible to isolate the impact of these factors on domestic change.

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<sup>8</sup> A. Moravcsik and M. Vachudova, "National Interests, State Power and EU Enlargement", *East European Politics & Societies* 17.1 (2003), p.46.

<sup>9</sup> G. Sasse, "The politics of EU conditionality: the norm of minority protection during and beyond EU accession", *Journal of European Public Policy* 15.6 (2008), p.844.

## 2. Models of EU Conditionality

Schimmelfennig and Sedelmeier have highlighted the development of democratic conditionality and *acquis* conditionality. Democratic conditionality refers to the transfer of the fundamental principles of the EU, in particular norms on human rights and democracy into domestic policy, whereas *acquis* conditionality is the transfer of the rules found in the *acquis communautaire* into domestic policy.<sup>10</sup> These are only two of the numerous categories of conditionality that have been identified in the literature on European integration. However, for the purpose of this thesis the distinction between the different forms of conditionality is not important; together the categories create the general concept of norm and law adoption that is relevant in the context of EU conditionality, referred to in this thesis. EU enlargement has allowed for external governance on an unprecedented scale through EU conditionality. The “desire of most CEECs to join the EU combined with the high volume and intrusiveness of the rules attached to membership”,<sup>11</sup> provided the EU with the ability to influence the CEECs on issues from public policy to the structure of domestic institutions. There are three leading models of conditionality that have been proposed to explain the success of EU conditionality of a tool for reform, which shall be analysed to determine which model best explains the success of EU conditionality.

### 2.1 The External Incentive Model

The leading model used to explain the success of EU conditionality is the external incentives model or the carrot and stick approach to conditionality,<sup>12</sup> developed by Schimmelfennig and Sedelmeier.<sup>13</sup> Based upon the rationalist bargaining model, it proposes that the EU sets conditions which aspiring members must fulfil in order to

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<sup>10</sup>Schimmelfennig and Sedelmeier (2004), p.669.

<sup>11</sup>Schimmelfennig and Sedelmeier (2004), p.661.

<sup>12</sup>B. Steunenberg and A. Dimitrova, "Compliance in the EU enlargement Process: The limits of conditionality", *European Integration Online Papers* 11.5 (2007), p.4.

<sup>13</sup>Schimmelfennig and Sedelmeier (2004), pp.661-679.

receive the reward of membership status.<sup>14</sup> The strength of this model is determined by the fulfilment of the following conditions; adoption costs, determinacy of the conditions, the size and speed of rewards and the credibility of threats and promises.<sup>15</sup>

According to the external incentives model, the first criterion for success is the condition of costs. This refers to the costs which occur as a direct result of the adoption of EU policy. The higher the costs, the less likely that EU conditionality will be successful. It must be noted that not all adoption costs are financial and extend to forgoing alternative rewards offered by adopting other rules and welfare or power costs for private and public actors.<sup>16</sup> For example, the adoption of a certain policy may impact upon the likelihood of re-election of a state government, which amounts to an adoption cost. In theory, these costs are balanced by the benefit and rewards of EU membership. However, if a veto player (often in the form of the opposition party) or even the government considers the cost of compliance too high, then it is unlikely that the policy will be adopted. The adoption cost hypothesis proposes that rule adoption decreases with the number of veto players incurring net adoption costs from compliance.<sup>17</sup> The more parties considered to suffer as a direct result of the policy, the less chance there is of it being adopted. Thus, the lower the adoption costs, the more likely EU standards will be adopted.

This model relies upon the carrot and stick approach to explain EU conditionality; the second condition for successful conditionality according to this model is the determinacy of compliance whereby, compliance must be used as a condition for reward. In the case of EU conditionality, fulfilling these conditions usually results in the reward of membership. The determinacy hypothesis suggests the effectiveness of rule transfer increases, if rules are set as conditions for rewards and the more determined they are.<sup>18</sup> For conditionality to be successful, the EU must provide clear and precise conditions of

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<sup>14</sup>Schimmelfennig and Sedelmeier (2004), p.663.

<sup>15</sup>Schimmelfennig and Sedelmeier (2004), p.663.

<sup>16</sup>Schimmelfennig and Sedelmeier (2004), p.666.

<sup>17</sup>Schimmelfennig and Sedelmeier (2004), p.667.

<sup>18</sup>Schimmelfennig and Sedelmeier (2004), p.664.

what is required by the candidate countries and also provide clear details of the associated reward for compliance. The occurrence of the moving target and ever changing requirements on candidate countries by the EU, which shall be examined in this chapter, along with the fact that the reward of membership is not guaranteed, weakens the determinacy of conditions and the overall strength of EU conditionality.

The third condition of size and speed of the reward are central to the success of EU conditionality, as effective rule transfer increases with the size and speed of rewards.<sup>19</sup> A non-member state will take more steps to ensure rule adoption when the reward for compliance is powerful enough. The longer a state is unsure of the reward and how quickly it will be delivered, the slower the state will be in adopting the rule or policy, due to a lack of motivation to make these reforms. EU conditionality is more effective the quicker the reward of membership is offered to an aspiring member state on the condition of compliance with the requirements set by the EU.

The final condition of the external incentives model provides that the likelihood of rule adoption increases with credible conditional threats and promises.<sup>20</sup> It is essential that the EU has less-vested interest compared to the aspiring member state and that the EU is able to withhold reward or even impose sanctions, at minimal cost to itself. This was seen in 1997 when the EU excluded Slovakia from the first round of membership negotiations as the only candidate country not to meet the democracy criteria, at minimal cost to itself.<sup>21</sup> The threat to delay membership is not the only credible condition available to the EU as it can also choose to stop aid and financial support for failure to comply;

Where an element that is essential for continuing to grant pre-accession assistance is lacking....the Council... may take

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<sup>19</sup>Schimmelfennig and Sedelmeier (2004), p.665.

<sup>20</sup>Schimmelfennig and Sedelmeier (2004), p.665.

<sup>21</sup>Grabbe (2002), p.257.



appropriate steps with regard to any pre-accession assistance granted to an applicant state.<sup>22</sup>

The ability to withhold rewards at limited expense to the EU is essential to EU conditionality. Without credible threats, aspiring members have no incentive to make the required reforms, if they believe that there is a chance they could still benefit from the reward of membership despite failing to make the required changes.

## 2.2 The Social Learning Model

The second model that has been used to explain EU conditionality is the social learning model.<sup>23</sup> Based on social constructivism, this model assumes that states adopt a logic of appropriateness in determining whether to adopt any policy. Actors are motivated by internalised identities, values and norms and must choose a law or policy that is most appropriate or legitimate for their needs.<sup>24</sup> The perceived domestic utility of EU membership is usually enough to convince the state that they should aspire to membership and the adoption of EU laws will benefit the state. Under the social learning model, a state adopts EU policy norms if it is persuaded that it is the most appropriate, in the context of the state's policy position. This assumption underlies the primary weakness of this model; the assumption that the EU is the principle source of policies and norms for non-member states. As the EU grows in South and Eastwardly directions, the EU is not the only source of policy norms for the states seeking membership. The case of Turkey demonstrates that both the EU and the Middle East are important sources for state policy. This weakens the suitability of the social learning model to rationalise and explain the

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<sup>22</sup>European Council, "Council Regulation (EC) No 1267/1999 of 21 June 1999 establishing an Instrument for Structural Policies for Pre-accession", 26 June 1999, [http://ec.europa.eu/regional\\_policy/sources/docoffic/official/regulation/content/en/02\\_pdf/00\\_8\\_ispa\\_1\\_en.pdf](http://ec.europa.eu/regional_policy/sources/docoffic/official/regulation/content/en/02_pdf/00_8_ispa_1_en.pdf) accessed 3 February 2016.

<sup>23</sup>Schimmelfennig and Sedelmeier (2004), p.667.

<sup>24</sup>Schimmelfennig and Sedelmeier (2004), p 667.

success of EU conditionality, as it fails to have due consideration for the alternative sources from which states may get inspiration for policies.

### 2.3 Lesson-Drawing Model

The final model used by academic scholars to analyse the principle of EU conditionality is the lesson-drawing model. This model presupposes that a non-member state adopts EU rules with no incentives or persuasion to do so, but in direct response to domestic dissatisfaction with the status quo, whereby a state seeks EU rules to solve the domestic policy problems.<sup>25</sup> The lesson-drawing model requires that there is some form of dissatisfaction that prompts the need to reform the domestic policy.<sup>26</sup> Whilst the principle of EU conditionality encourages reform and policy change, this is not usually as a result of domestic dissatisfaction with their internal policies. Rather, it usually comes about following an internal conflict and is used to encourage reform due to EU dissatisfaction with state policy. Moreover, the lesson-drawing model assumes that the state will turn to the EU as a source for policy and institution reform and the key to successful EU conditionality is rule transferability.<sup>27</sup> A state must regard EU policy as one that can be transferred into their domestic setting. If the policy does not fit with the domestic position, according to the lesson-drawing model, the state will not adopt the EU policy. The assumptions made by this model mean that it is not a suitable framework to explain the effectiveness of EU conditionality.

The different models that have been developed in regards to EU conditionality have their weaknesses and strengths. The Social learning and Lesson-drawing models both rely on the EU being the leading source of inspiration for policy. However, this is no longer the case as the geographical location of candidate countries moves further South and East, increasing the likelihood of other organisations providing policy norms

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<sup>25</sup>Schimmelfennig and Sedelmeier (2004), p.668.

<sup>26</sup>Schimmelfennig and Sedelmeier (2004), p.668.

<sup>27</sup>Schimmelfennig and Sedelmeier (2004), p.668.

and standards. I suggest that the external incentives model provides the most appropriate model of EU conditionality, as “the conditional incentive of EU membership was the main force driving the incorporation.... rather than an alternative process such as persuasion, identification or social learning”<sup>28</sup> in the 2004 and 2007 enlargements. In the context of this thesis, having considered the models of conditionality, it is necessary to analyse the development of EU conditionality as a tool for reform.

### 3. The Development of EU Conditionality.

The early stages of EU enlargement only required candidate countries to make limited changes to domestic policy and legislation, adopting minimal European policy prior to accession. As the EU enlarged to include countries from less traditional backgrounds, such as Latvia and Estonia, conditionality became an essential tool. It ensured that aspiring states adopt legislation and policies that reflected EU norms and standards, prior to membership. The principle of conditionality was first used as a tool for reform and integration in relation to the aid programmes designed for Eastern Europe, such as the PHARE programme. States were required to reform domestic policy and laws to be eligible for receipt of aid. As the enlargement of the EU became a realistic possibility, conditionality subsequently developed in the accession process of states seeking membership. The focus of conditionality has since shifted away from aid towards the promotion of democracy, rule of law and respect for human rights.<sup>29</sup>

#### 3.1 The Copenhagen Criteria

The shift from aid towards the promotion of democracy, rule of law and respect for human rights<sup>30</sup> as tools for the enlargement process is demonstrated in the 1993

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<sup>28</sup>T.Böhmelt and T. Freyburg, "The temporal dimension of the credibility of EU conditionality and candidate states' compliance with the *acquis communautaire*, 1998–2009", *European Union Politics* 14.2 (2013), p.251.

<sup>29</sup>A. Jesse- Perkovic "National Heroes vs. EU Benefits: Croatia and the EU Conditionality", *CEU Political Science Journal* 8.2 (2013), p.181.

<sup>30</sup>Jesse-Perkovic (2013), p.181.

Copenhagen criterion. This introduced three requirements that states must fulfil to be eligible to apply for membership. First, states are required to have stable institutions that can guarantee democracy, rule of law, human rights and respect for the protection of minorities.<sup>31</sup> As highlighted in chapter two, this was an important milestone in the development of minority rights, marking the first acknowledgement of minority rights at an EU level. The inclusion of respect for minority rights came as a direct result of the link made between minority rights and internal stability and security, following the Cold War. Second, the state is required to have a functioning market economy with the capacity to cope with competitive pressure and market forces within the union.<sup>32</sup> As the EU is first and foremost an economic community, the need for a strong economy to join the EU is essential. This requirement has become even more important following the 2008 financial crisis and the financial difficulties seen in current member states, such as the Greece financial crisis in summer 2015. The EU does not want states joining that could further jeopardise the current fragile economic stability of the Union as a whole. Third, states must demonstrate an ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.<sup>33</sup> In essence, this requires states to comply with all EU norms and standards as per the *acquis communautaire*. Only after a state has complied with all three conditions will it be considered for membership.

The aims of the criteria were two-fold. On the one hand, it was hoped introducing criteria for membership would reduce opposition to enlargement by existing member states. Candidates would have made significant reforms to their domestic structures prior to membership, minimising the risk of these new states becoming politically unstable and economically burdensome.<sup>34</sup> On the other hand, it served as a checklist for states, to ensure they were sufficiently prepared to make their membership application,

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<sup>31</sup> European Council, *Copenhagen Criteria* (Copenhagen: European Commission, 1993)

<sup>32</sup> European Council, (1993).

<sup>33</sup> European Council, (1993).

<sup>34</sup> Grabbe (2002), p.251.

demonstrating full compliance with EU rules and norms. The Copenhagen criteria sought to strengthen the state institutions and internal political position of the countries prior to membership, bringing them in line with EU standards. The criteria marked a positive step in the development of EU conditionality and strengthened the EU's ability to promote reform. However, the language used in the criteria is very vague. For example, the failure to include clear definitions of key terms, such which is meant by a 'functioning market economy', creates difficulties for aspiring states to meet the requirements. There are benefits to the EU being pragmatic and allowing each state to make the reforms required to bring its own standards to a level suitable for EU membership. However, without clearly defined criteria, there is no clear indication of what the final standards should be.

### 3.2 The Accession Partnerships

The Copenhagen Criteria served as an adequate introduction of EU conditionality into the EU enlargement process. However, weaknesses prompted the development of further guidance to the requirements for membership. The publication of the EU's Agenda 2000 and Opinions on each aspiring country in 1997 marked the next stage of EU conditionality. This was accompanied by the first Accession Partnerships being presented to applicants in March 1998. The Accession Partnerships move away from generic towards country-specific requirements for membership. The aim of the partnerships was to consolidate EU conditionality requirements into a single framework with priorities outlined in a timetable, providing clear guidance to states on what reforms were necessary.

The Commission subsequently published annual reports on each candidate's preparations for accession, outlining the achievements to date and detailing the areas in need of further reform. These reports proved to be the "EU's key instrument to monitor and evaluate the candidate's progress towards accession",<sup>35</sup> providing a form of

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<sup>35</sup> Sasse (2008), p.847.

monitoring, that was previously lacking. Whilst the reports were not legally binding, they carried significant political weight and encouraged states to engage in the necessary reforms to proceed in their journey for membership. The partnerships transformed how EU conditionality worked in the enlargement process, turning the Copenhagen Criteria into a quasi-legal obligation through the establishment of a control procedure and a system of sanctions,<sup>36</sup> making the criteria a key instrument for governing EU-CEEC relations.<sup>37</sup>

Whilst the Accession Partnerships increased the scope of EU conditionality, covering the full reform programme required by each state, it suffered from a number of weaknesses. Despite, transforming the Copenhagen Criterion into a quasi-legal obligation, the partnerships themselves were only unilateral EU measures and not legally binding. The Partnerships were mere guidelines for reform and policy development, as opposed to strict conditions. Despite not being legally binding, the influence of the partnerships was unprecedented in the enlargement process; this level of political pressure and the political sanctions for failing to fully engage with the reform requirements can prove more effective than legal sanctions. The Accession Partnerships have also been criticised for their vague nature, leaving a number of requirements open to interpretation. Whilst interpretation is pragmatic and provides flexibility, which can be a positive feature allowing for an appreciation of context and the unique position of each state, the extent to which the partnerships lacked clear definitions provided too much discretion to both the state and the EU itself, leaving the conditions open to interpretation and even abuse. Both the state and EU could choose to interpret certain policy requirements either too widely or too narrowly, creating further issues of double standards in the EU.

Moreover, the Accession Partnerships are neither fixed nor definite with the commission able to add new conditions and remove others; “EU conditionality may

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<sup>36</sup> H. Grabbe, *The EU's Transformative power: Europeanization through Conditionality in Central and Eastern Europe* (Basingstoke: Palgrave Macmillan, 2006), p.12.

<sup>37</sup> Grabbe (2006), p.12.

appear as something fixed and constant but its chameleon-like characteristics can turn it into a dynamic process itself”.<sup>38</sup> Whilst this allows for changes to be made when necessary, it creates a moving target. Not only are states unclear about what they must achieve in order to apply for membership, but the moving target issue “has implications for the relative strength in negotiating terms as the Union is a referee as well as player in the accession process”,<sup>39</sup> as states question if the reward for compliance will ever be realised, as the conditions are ever changing. The involvement of the EU in determining the conditions for membership reduces its credibility, as the body with the ultimate decision on membership. Ultimately, aspiring states remained unsure of what was expected of them as it was either unclear or constantly changing.

#### 4. Minority Rights and EU Conditionality

The development of minority rights through EU conditionality evolved to create a “powerful cognitive framing device for both international institutions and domestic actors in the accession countries”,<sup>40</sup> in three key stages. First, the development of the Copenhagen Criteria containing the specific clause on minority rights, as discussed above. This was followed by the creation of monitoring and assessment of minority rights through the commission’s annual reports, and thirdly, the creation of the Accession Partnerships and later the Stabilisation and Association Agreements which were developed to include the minority rights in the political context of EU membership.<sup>41</sup> The political sensitivity of minority issues would lead one to expect that EU conditionality would not be a successful tool to ensure policy reform and development and that an “international emphasis on minority protection and political minority representation would deepen rather than bridge the gap in minority-majority relations”.<sup>42</sup> This expectation is on the basis that minority issues are at the core of deeper structural issues

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<sup>38</sup>Sasse (2008), p.843.

<sup>39</sup>Grabbe (2002), p.251.

<sup>40</sup>Sasse (2008), p.842.

<sup>41</sup>Sasse (2008), p.846.

<sup>42</sup>Sasse (2008), p.854.

that are not addressed by conditionality, meaning that behavioural changes are not possible.<sup>43</sup> However, minority rights have had the same mixed success as other policy issues, with claims that “ambiguous principles and varying demands have promoted more diverse outcomes enhanced by the EU's aim of integration through permissive policies towards collective protections”.<sup>44</sup>

The focus of EU attention on minority issues has generally focused upon either the Russophone minority in Latvia and Estonia or the Roma population across Europe, neglecting other minority communities. This policy decision reflects the EU's soft security concerns<sup>45</sup> and raises questions behind the real motivations of the EU minority right reforms. According to Gordan, the overreaching geopolitical relationship of members with Russia and the potential stability and economic consequences of Roma migration to Western member states,<sup>46</sup> are the real motivation behind the increased rhetoric on minority rights. This is evidenced by the criticism made by Russia that the International Community, in particular the EU, are turning a blind eye to the infringement of the rights of Russian speaking minorities in Estonia and Latvia,<sup>47</sup> before and after these countries becoming members. The Commission spokesman stated that there is ample evidence that the Baltic States improved their treatment of ethnic Russians as part of their preparations for membership.<sup>48</sup> However, the Commission failed to consider all claims for protections of the Russian-speaking minority in Latvia and Estonia, provoking negative reactions in the Duma. This raised concerns that there would be violent clashes between the Latvian and Russophone groups, similar to those that had occurred in Moldova.<sup>49</sup> This

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<sup>43</sup>Sasse (2008), p.854.

<sup>44</sup>G. Schwellnus, "Looking back at ten years of EU minority conditionality vis-a-vis Central and Eastern European candidate states", *European Yearbook of Minority Issues Online* 4.1 (2004), p.339.

<sup>45</sup>Sasse (2008), p.847.

<sup>46</sup>C. Gordan "EU conditionality and the Protection of Minorities in the Post-Communist Region", *European Yearbook of Minority Issues* 7.1 (2007), p.281.

<sup>47</sup>P. Van Elsuwege, Russian-Speaking Minorities in Estonia and Latvia: Problems of Integration at the Threshold of the European Union", *ECMI working paper* 20 (Flensburg: European Centre for Minority Issues, 2004), p.35.

<sup>48</sup>D. Cronin, "Ethnic Russian status must improve", *European Voice*, 27 February 2003.

<sup>49</sup>D. Galbreath, "European Integration through Democratic Conditionality: Latvia in the Context of Minority Rights", *Journal of Contemporary European Studies* 14.1 (2006), p.72.



suggests that the development of minority rights did not result from a desire to protect the minorities per se, but for the security and stability reasons.

The Accession Partnerships and the Regular Reports published by the Commission as per article 49a of the Treaty of the EU failed to provide clear benchmarks for minority rights, as they are not based on a single EU standard. As a result, it is claimed that “the minority condition is neither consistent nor credible”.<sup>50</sup> It is not consistent owing to the difference in the application of minority rights across the countries without a single standard of minority rights. A key feature of EU conditionality in the area of minority rights is the creation of ‘double standards’ between member states and candidate countries. The minority rights standard required for accession into the EU are significantly different and much harder to achieve than the minority rights standards provided for in the Framework Convention for the Protection of National Minorities and other relevant minority rights documents. These different standards will be further explored in chapters four and five of this thesis.

Minority rights within the framework of EU conditionality are not based on a single, internal minority standard, but are the direct result of an increased awareness of minority rights and its possible link to political stability and internal security, as discussed in chapter two. Therefore, aspiring states are expected to meet standards beyond those expected of existing member states leading to concerns about the potential lack of legitimacy in the area of minority rights.<sup>51</sup> Minority rights at the European level have been contained within general human rights, therefore, any minority rights which go beyond the general human rights policies are not required in the original member states, as they do not form part of the *acquis communautaire*. There is also inconsistent application of the minority rights within each member state, as evidenced in chapter four of this thesis, in regards to the differential treatment of minorities found in Latvia.

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<sup>50</sup>Sasse (2008), p.846.

<sup>51</sup>Schwellnus (2004), p.322.

## 5. A Success Story for Conditionality: Latvia

The case study of Latvia is an example of the development of minority rights through successful legal and constitutional changes, as a result of EU conditionality. Tugdar proposes that “the EU's impact on minority protection is one of the most vivid cases of successful EU conditionality”.<sup>52</sup> It is estimated following the Soviet Occupation of Latvia, the Russian speaking minorities amounted to approximately 42%<sup>53</sup> of the population. However, following independence, the Latvian government did not support the rights of the Russian minority, only granting Latvian citizenship automatically to those residents who were citizens prior to the Soviet Occupation in 1940. Moreover, it enacted laws on the use of the Latvian Language, which discriminated against the non-Latvian speakers.<sup>54</sup> The naturalisation process for Russian-speaking minorities in Latvia was very strict, requiring individuals to pass tests in state language, history and constitution and have sixteen years residency accompanied by a window quota system that limited the number of applications.<sup>55</sup> This combination of policies resulted in 30% of the population (predominantly the Russian-speaking minority) being left stateless.<sup>56</sup> However, Sasse boldly claims that “Latvia is the strongest test case for the EU's ability to assert direct influence and encourage the adoption of an EU-promoted norm associated with democratic conditionality”,<sup>57</sup> as significant reforms were made to minority rights on the promise of EU membership. The validity of this assertion will be questioned, through an evaluation of the reforms made in the area of minority rights in Latvia, as a result of the use of EU conditionality.

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<sup>52</sup> E. Tugdar, "Europeanization of Minority Protection Policies in Latvia: EU Conditionality and the Impact of Domestic Factors on the Rights of Ethnic Russians", *CEU Political Science Journal* 1 (2013), p.37.

<sup>53</sup> Sasse (2008), p.848.

<sup>54</sup> A. Pabriks, *From Nationalism to Ethnic Policy: The Latvian Nation in the Present and in the Past* (Berlin: BIAB, 1999), p.151.

<sup>55</sup> Schwellnus (2004), p.337.

<sup>56</sup> F. Schimmelfennig, S.Engert, and H.Knobel, "Costs, Commitment and Compliance: the Impact of EU Democratic Conditionality on Latvia, Slovakia and Turkey", *Journal of Common Market Studies* 41.3 (2003), p.510.

<sup>57</sup> Sasse(2008), p.844.

The use of EU conditionality to develop Latvian minority rights occurred in several stages, due to the large number of reforms required by the EU and the reluctance of the Latvian government to make the reforms. The initial step taken by the EU was to align their recommendations with the High Commissioner of National Minorities, Max Van der Stoel, who demanded that the naturalisation process and the non-official use of language be regulated as liberally as possible,<sup>58</sup> in order to accommodate the Russian minority. This alignment allowed the EU to create a double-edged sword, relying on the expert evidence and advice of the High Commissioner and its own social influence to make Latvia comply with its minority rights requirements. In December 1993, the EU used the 'carrot and stick' approach to inform Latvia it would not be made a member, if it did not amend the discriminatory citizenship laws. At the time, this threat was not strong enough to entice Latvia to make the required reforms and the discriminatory law remained in place.

In accordance with article 49a of the Treaty on the EU, in July 1997 the Commission presented its opinions on Latvia's application together with Agenda 2000. The Commission found Latvia to be fulfilling the general political criteria for admission, but reflected the High Commissioner's concerns about the Russian-speaking minority and demanded Latvia "take measures to accelerate naturalization procedures to enable the Russian-speaking non-citizens to become better integrated into Latvian society".<sup>59</sup> It was made clear that EU membership was not possible due to the cumbersome nature of the naturalisation process for the non-Latvia population and the window system of applications.<sup>60</sup> According to the external incentives model, the conditions in Latvia were favourable for effective EU conditionality as domestic adoption costs were low and the conditions referred only to a single policy issue rather than fundamental political practices.<sup>61</sup> Moreover, the Latvian elite felt threatened by Russia and regarded European

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<sup>58</sup> Schimmelfennig, Engert and Knobel (2003), p.510.

<sup>59</sup> European Commission, *Agenda 2000- Summary and conclusions of the Opinions of the Commission concerning the Applications for Membership to the European Union Presented by the Candidate Countries* (Brussels: European Commission, 1997), p.21.

<sup>60</sup> Tugdar(2013), p.41.

<sup>61</sup> Schimmelfennig, Engert and Knobel (2003), p.511.

integration as a guarantee of Latvian independence,<sup>62</sup> and understood the political benefits of compliance.<sup>63</sup> This combination of conditions provided for an effective platform for Latvia EU conditionality, to make the reforms required by the EU.

The use of conditionality in Latvia achieved some positive results, despite the initial reluctance of the Latvian government. EU refusal of Latvian membership led to amendments being made to the citizenship laws. In June 1998, the Latvian parliament paved the way for the abolition of the window system, which imposed a restrictive timetable on citizenship applications. A successful referendum in October 1998 officially abolished the window system and confirmed the right of children of non-citizens to obtain citizenship.<sup>64</sup> Schimmelfennig Engert and Knobel suggest it was “only when the demands of the High Commissioner on National Minorities were linked to Latvia's accession....did the Latvian government and parliament reluctantly give in to international conditions”.<sup>65</sup> The EU involvement was essential to the changes in minority rights.

### 5.1 Post-accession Compliance in Latvia and the CEECs

There is concern surrounding the EU's ability to ensure enforcement of the *acquis communautaire* post-accession.<sup>66</sup> According to the external incentives model, “as soon as membership status is (almost) secured, candidate countries have considerably less incentive to comply with the *acquis*”,<sup>67</sup> as the carrot and stick are removed. “In absence of high conditional external benefits, domestic structures such as adoption costs, veto players and resonance which were superseded by conditionality will gain causal impact”.<sup>68</sup> Those opposing EU policy will regain their voice above the rhetoric of

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<sup>62</sup>Schimmelfennig, Engert and Knobel (2003), p.511.

<sup>63</sup>Schimmelfennig, Engert and Knobel (2003), p.511.

<sup>64</sup>Sasse (2004), p.849.

<sup>65</sup>Schimmelfennig Engert and Knobel (2003), p.512.

<sup>66</sup>U. Sedelmeier, "After conditionality: post-accession compliance with EU in East Central Europe", *Journal of European Public Policy* 15.6 (2008), p.806.

<sup>67</sup>Böhmelt and Freyburg (2013), p.256.

<sup>68</sup>Schimmelfennig and Sedelmeier (2004), p.676.

membership and avoiding the high adoption costs will take precedence over compliance with the EU requirements; once the carrot and stick are removed, the need to comply with the requirements is also removed.

To ensure post-accession compliance, it is essential to create “enough momentum in the pre-accession period through sustained rhetoric and involvement with domestic actors, which carries over into the post-accession period”.<sup>69</sup> If the union is able to use conditionality effectively to ensure pre-accession compliance, it is possible that compliance will remain the norm with the governments post-accession. Moreover, the Union’s ability to be involved in minority rights is reduced by the limited engagement that the EU has had with this issue. As outlined in chapter two, the EU has relied upon other European Institutions to use their expertise and resources; it depends on the OSCE and the Council of Europe as the only institutions with a direct mandate on minority issues in Europe.<sup>70</sup> However, the transformative power of the EU as a normative power and the principle of EU conditionality highlight the potential of the EU to engage and improve minority rights at a regional level.

The issue of double standards of minority rights within the EU may impact post-accession compliance of member states. It is possible that “new member states may not be willing to further accept the rules of ‘*enlargement acquis*’ which are designed for accession countries but not binding on full Members”,<sup>71</sup> post-accession. Moreover, the irony that a democratically deficient body such as the EU telling states how to become functioning democracies has not been missed by Eurosceptics.<sup>72</sup> It is undeniable that following the CEEC enlargement, levels of Euroscepticism has continued to rise, as demonstrated in the Brexit referendum on June 23<sup>rd</sup> 2016. The impact of this increased scepticism will be briefly examined in regards to the success of EU conditionality in the

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<sup>69</sup>Sasse (2008), p.843.

<sup>70</sup>Sasse (2008), p.856.

<sup>71</sup>Schimmelfennig and Sedelmeier (2004), p.676.

<sup>72</sup>Grabbe (2002), p.266.

Wester Balkans. With connection to the CEECs, it must be acknowledged that growing Euroscepticism will weaken the impact of EU conditionality and the ability of the EU to encourage reform and compliance in states post-accession.

Whilst the case study of Latvia demonstrates the effective use of conditionality as a tool of the EU to encourage reform, it is bold to claim that it was a complete success. The 1999 Latvian language law has been a cause for concern for the EU in Latvia's post-accession period. The law was devised in response to fear of the loss of Latvian identity and a prevailing need to preserve Latvian culture following the Soviet occupation. The language law made the use of the Latvian language mandatory in the public sector, as a direct result of Latvians feeling that they were in an adverse economic position, after the Russian language had dominated the economy and administration for decades.<sup>73</sup> The Latvian government undermined the requirements of EU conditionality, placing limits on its reforms. The success of EU conditionality on the reform of Latvia's minority protection policies is also questioned by Latvia's refusal to ratify the Framework Convention for the Protection of National Minorities as part of its accession process, despite being a requirement for membership. On ratifying the Framework convention on the 6<sup>th</sup> June 2005, just over one year after accession into the EU, Latvia was able to include a number of reservations to the convention which "effectively attempt to curtail meaningful minority protection".<sup>74</sup>

The 2003 official reports, just prior to accession, stated that Latvia still had important short fallings in terms of incorporating the full *acquis* and Latvia was encouraged to accelerate the speed of the naturalisation procedures and promote the integration of the Russian minority,<sup>75</sup> which were still not meeting the required European level. It is possible to conclude that "while Latvia followed the demands of the EU, the

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<sup>73</sup>Tugdar (2013), p.40.

<sup>74</sup>Human Rights Without Frontiers, "Rights of Persons Belonging to National Minorities, Baltic States, Citizenship and Language Rights of Russian-speaking Minorities", 29 September 2014, <http://www.osce.org/odihr/124483?download=true> accessed 03 September 2015.

<sup>75</sup>Tugdar (2013), p.46.

primary aim of EU conditions, full integration of all Russian speakers remains unfulfilled”,<sup>76</sup> putting limits on the overall success of the EU conditionality programme on minority rights in Latvia. The most recent Advisory Opinion in on Latvia’s progress and implementation of the Framework Convention on the Protection of National minorities, in 2013, states that Latvia does not fully implement the standards required by the convention. The Committee found there had been “no significant changes regarding the legislative framework pertaining to the protection of national minorities”.<sup>77</sup> Furthermore, the Advisory Committee expressed its concern “by reports from minority representatives that the main focus of government support is to promote Latvian language knowledge among minority communities”.<sup>78</sup>

There are similar trends in weak post-accession compliance in other policy areas, as seen in Romania and Bulgaria. At the time of the accession of these states, concerns were raised to shortcomings in the areas of judicial reform and the fight against corruption. As a result, the EU created post-accession benchmarks for Bulgaria and Romania through the Cooperation and Verification Mechanism (CVM), to encourage post-accession compliance and further integration. The 2015 progress report of Bulgaria, highlighted that “monitoring by the Commission and cooperating with the work of the Bulgarian authorities to promote reform has had a concrete impact on the pace and scale of reform”,<sup>79</sup> though it concluded that considerable reform is still required. The CVM demonstrates there are mechanisms available to the EU in the post-accession period to ensure reform. The CVM may also prove to be a useful tool in the future to get states to through the accession process quicker whilst providing the EU with the safety net of post accession monitoring, to further improve integration.

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<sup>76</sup>Schwellnus (2004), p.337

<sup>77</sup>Council of Europe, *Advisory Committee on the Framework Convention for the Protection of National Minorities: Second Opinion on Latvia* (Strasbourg: Council of Europe, 2013), p.4.

<sup>78</sup>Council of Europe (2013), p.18.

<sup>79</sup> European Commission, *Report From The Commission to the European Parliament and the Council On Progress in Bulgaria under the Co-Operation and Verification Mechanism* (Brussels: European Commission, 2015), p.2.

## 6. The Future of EU Conditionality: EU and Western Balkan Relations

Following the relative ease of political transition of the CEECs<sup>80</sup> into the EU, with the primary tool used to facilitate this being conditionality, the EU's enlargement policy shifted its focus towards the Western Balkan states. Unlike the generally peaceful dissolution of the Soviet Union, the weak and often contested states of the Western Balkans emerged from the violent dissolution of Yugoslavia. However, the "region's reputation as Europe's 'trouble making periphery' promised to change in the 2000s, when the EU expanded its concept of enlargement to include all Balkan countries".<sup>81</sup> The EU's 'unequivocal' support along with the development of tailored enlargement policy through the SAP, were widely promoted as the anchor of future reforms.<sup>82</sup> The EU has drawn upon the experience it gained in the last enlargement process and how it used the principle of conditionality to develop the requirements for the Western Balkans. There is an overall perceived success of conditionality in transforming the CEEC, as outlined in this chapter with the case of Latvia. However, the ongoing issues in Romania and Bulgaria highlight that improvements to the use of conditionality could be made. Thus, as the EU learns lessons on enlargement, it can and does adjust the requirements it makes of applicants; it will also make adjustments based on the standing of particular applicants.<sup>83</sup>

According to Keil and Perry, "getting it right is extremely important for the prospects of democracy promotion and state-building, but getting it right is always context and actor specific".<sup>84</sup> This has led to a notably different experience of EU enlargement and the use of conditionality in the Western Balkans when compared to the

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<sup>80</sup> S. Keil, and V. Perry, *State-building and Democratization in Bosnia and Herzegovina* (Abingdon: Routledge, 2016), p.1.

<sup>81</sup> A Elbasani, "Europeanization travels to the Western Balkans: Enlargement, strategy, domestic obstacles and diverging reforms" in A. Elbasani (ed), *European integration and transformation in the Western Balkans: Europeanization or business as usual?* (Abingdon: Routledge, 2013), p.3.

<sup>82</sup> Elbasani (2013), p.1.

<sup>83</sup> E. İçener and D. Phinnemore, "Building on experience? EU enlargement and the Western Balkans" in S. Keil, and Z. Arkan (eds), *The EU and Member State Building: European Foreign Policy in the Western Balkans*, (Abingdon: Routledge, 2014), p.32.

<sup>84</sup> Keil and Perry (2016), p.1.



CEEC. The need to acknowledge context and individual applicants, alongside the need to aid in the consolidation of fragile states, has resulted in the EU developing a dual strategy of member state building and European integration,<sup>85</sup> supported through the use of EU conditionality. However, the principle of conditionality as a tool of state building has been largely ineffective, in part due to the lack of commitment of political elites to EU integration and the persistence of status issues on the policy agenda.<sup>86</sup> This section will analyse the difficulties that the EU has encountered in the Western Balkans where enlargement and conflict prevention policies converge and often produce conflicting results.

### 6.1 Times have changed: CEEC vs Western Balkans enlargement

According to Elbasani, the CEEC and Western Balkans share the main features that have arguably animated the celebrated success of the EU conditionality, notably, the substantial rewards underpinning the EU demands and the strategy of reinforcement by reward. However, in contrast to the CEECs, most Western Balkan countries consist of border-line cases of transformation or 'deficient democratizers' with unfavourable domestic conditions and poor reform records.<sup>87</sup> The Western Balkans presented a new challenge to the EU; the "violent disintegration of the Federal Republic of Yugoslavia saw the emergence of new polarized and variegated nation states, plagued by limited democratic experience and weak institutions".<sup>88</sup> The role of the EU in the Western Balkans is not simply to ensure norm adoption and democratisation, but to act as a member state builder. This is due to three trends among the Western Balkans: they all

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<sup>85</sup> F. Bieber, "Building Impossible States? State-Building Strategies and EU Membership in the Western Balkans, *Europe-Asia Studies* 63:10 (2011), p.1783.

<sup>86</sup> Bieber (2011), p.1783.

<sup>87</sup> Elbasani (2013), p.5.

<sup>88</sup> G. Stefaj, "From Rags to Riches: Croatia and Albania's EU accession Process Through the Copenhagen Criteria and Conditionality", *Fordham International Law Journal* 37.5 (2014), p.1700.

aspire to EU membership, they all have weak state structures, with some states including Bosnia and Kosovo classed as contested states, and they are all young democracies.<sup>89</sup>

It must be acknowledged that the relationship between the Western Balkans and the EU goes beyond a relationship based on conditionality and membership. The EU “was also the most important foreign actor in the reconstruction and reconciliation processes after the wars and has been one of the biggest aid donors”.<sup>90</sup> As a result the relationships between the two are more complex, impacting the integration process. It must be noted that following the sense of inevitability of the CEEC enlargement, the same inevitability about EU enlargement to include the Western Balkans does not exist. The case of Turkey acts as a clear indicator that the success of an application for membership is not guaranteed.

The difference in the backgrounds of the CEECs and the Western Balkans is not the only factor which has resulted in a difference in the relations of these groups of states with the EU. It is necessary to acknowledge several differences in the EU’s position towards the states in question, and enlargement as a whole. First, the EU’s commitment towards enlargement and the Western Balkans is more ambiguous compared its commitment to the CEECs.<sup>91</sup> The collapse of Soviet rule and the end of the cold war was seen as a historical opportunity to ‘reunite Europe’ and was surrounded by a narrative of it being the CEEC’s destiny to join the EU.<sup>92</sup> In contrast, there are no narratives about the Western Balkans or any responsibility of the EU to enlarge and unify Europe.<sup>93</sup> Rather, Western Balkans integration is driven by a desire to avoid further conflict. This is evident in the ambiguous language used towards the region. Unlike, the continual references to

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<sup>89</sup> S. Keil, “Europeanization, state-building and democratization in the Western Balkans”, *Nationalities Papers* 41.3 (2013), p.343.

<sup>90</sup> Perkovic (2013), p.177.

<sup>91</sup> D. Phinnemore, “The Stabilization and Association Process. A Framework for European Union Enlargement?” in A. Elbasani(ed), *European integration and transformation in the Western Balkans: Europeanization or business as usual?*. (Abingdon: Routledge, 2013), p.23.

<sup>92</sup> Phinnemore (2013), p.26.

<sup>93</sup> İçener and Phinnemore (2014), p.34.

membership of the CEEC, the EU comments about the Western Balkan's avoid referring to membership. In 2000, the EU stated that the aim remains the fullest possible integration of the countries, with no mention of membership, a sentiment that was repeated in Zagreb and Thessaloniki. In 2008, the European Council declared the remaining potential candidates should achieve the status of candidate status according to their own merits, with EU membership as the ultimate goal. However, there is still a significant sense of ambiguity surrounding the EU's commitment to the integration. Moreover, as highlighted below, there is no longer the sense of inevitability about membership. This overall lack of narrative suggests that the EU's commitment towards the Western Balkans is significantly reduced, when compared to the commitment it had towards the CEECs.

Second, the EU has sought to deal with the two groups of states in different ways. It dealt with the CEEC quickly and 'en bloc', creating a sense that they were all part of a single package.<sup>94</sup> In the early stages of EU engagement with the Western Balkans, it was also expected that future enlargement would include all the Western Balkans, adopting a regional approach. The aim of the regional approach was to reconcile and rehabilitate relations between the countries, by introducing European values and standards such as democracy and the rule of law, in order to foster transition to a peaceful, stable and prosperous region.<sup>95</sup> Whilst this regional approach was adopted, any sense that the countries might be admitted 'en bloc' evaporated and instead each potential candidate is being considered far more on its own merits, which is firmly in line with EU policy.<sup>96</sup>

Third, it is necessary to consider the European Commission's position on integration and enlargement. Prior to the 2004 enlargement, there was significant activism, with the European Commission being an effective advocate for enlargement; there has since been a tangible shift. During the CEEC enlargements, Verhaegen, the

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<sup>94</sup> Phinnemore (2013), p.29.

<sup>95</sup> E. Vajzovic "Bosnia and Herzegovina in the EU integration Process: A carrot-and-stick Marathon" in B. Radeljić (ed), *Europe and the post-Yugoslav space* (Farnham: Ashgate, 2016), p.168.

<sup>96</sup> Phinnemore (2013), p.29.

Commissioner for Enlargement, prioritised the political desirability of enlargement over preparedness. In contrast, the successors of this role, Rehn and Füle, have stressed the need to meet conditions before progress. Moreover, Barroso, the European Commission President, has also displayed less enthusiasm about enlargement compared to Prodi, the President during the CEEC enlargement.<sup>97</sup> This shift in European Commission policy has led to a very different experience in the integration and conditionality process for the Western Balkans. However, this shift is linked to a number of other changes that have occurred both subsequently and as a result of the 2004 and 2007 enlargement.

Since the enlargements of 2004 and 2007, the EU has been faced with a number of challenges impacting its transformative power. It is evident that “politics within the EU have affected enlargement policy much more, changing it from an elite-led and largely consensus-based project before 2004 to a much more contested one”,<sup>98</sup> as debate has arisen over the scope for further enlargement. This is in part due to the composition of the EU itself. At the time of the CEEC accession, the EU was a much leaner and arguably fitter entity. Moreover, the integration process was smoother and EU was enjoying sustained economic growth. Since the mid-2000s this has all changed as the EU has more than doubled its membership and the European economy has experienced recession.<sup>99</sup> The enthusiasm for enlargement which dominated during the CEEC process has been replaced with enlargement fatigue, with questions raised about Europe’s integration capacity. There has been a decline in EU member states’ enthusiasm for further enlargement. Whilst no member state has expressed explicit opposition to further enlargement, there is evidence that members are willing to block and delay enlargement, as seen by Slovenia putting a hold on Croatia’s membership over access to the Adriatic in 2008 and 2009. Moreover, in response to the difficulties seen in the accession of Bulgaria and Romania, the EU has increased its conditionality requirements and will not accept members who are not fully prepared.

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<sup>97</sup> Phinnemore (2013), p.32.

<sup>98</sup> Grabbe (2014), p.41.

<sup>99</sup> Phinnemore (2013), p.26.

The EU appears to be in state of comparative crisis.<sup>100</sup> The 2008 global economic crisis had a negative impact upon the EU, including political and financial uncertainty, evidenced by the Brexit decision in June 2016, affecting “the consistency and credibility of the accession process for would-be joiners”.<sup>101</sup> All these factors have caused the EU to be more cautious in its approach to enlargement. The focus is now on ensuring a far more rigorous and carefully managed process where conditionality is respected, rationales are communicated to voters and due attention is paid to the EU’s own absorption or integration capacity.<sup>102</sup> However, these steps to improve the enlargement policy may have also resulted in the power of the EU to transform the Western Balkans region to be significantly reduced.

## 7. EU conditionality and State Building in the Western Balkans

In 1999, the EU launched the SAP as the new foundation of relation between itself and the Western Balkans. The conditions in the SAP are not that dissimilar from the conditions required of the CEECs; the SAP includes the Copenhagen Criteria, regional cooperation, return of refugees and cooperation with the ICTY. However, the SAP did provide the EU an opportunity to demonstrate a renewed interest in minority rights, which was essential for success in the Western Balkans due to the extent of ethnic and minority issues in the region. The SAP framework provided tailor-made programmes for each country creating targeted requirements for membership and strengthening minority rights protection, among other reforms. It included one general condition on human rights and minority protection, but also created a number of specific minority rights, including the right to create and maintain educational, cultural and religious institutions, organisations and associations and reasonable possibilities for minorities to use their

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<sup>100</sup> Phinnemore (2013), p.26.

<sup>101</sup> Grabbe (2014), p.41.

<sup>102</sup> İçener and Phinnemore (2014), p.43.

language before tribunals and public authorities.<sup>103</sup> These minority rights requirements marked a significant improvement, as previously there were limited protection of minority rights in both EU norms and conditionality.

Whilst many of the conditions which applied to the CEEC also form part of the EU enlargement policy towards the Western Balkans, the way in which conditionality and reform is assessed is much stricter. It is no longer the case that candidates can wait until accession before implementing the *acquis communautaire*- they need to have a proven track record of compliance before accession negotiations can be closed.<sup>104</sup> Thus, not only have the range of conditions which the Western Balkan states must meet been extended, but the thresholds for compliance have been raised. For the Western Balkans to progress in the membership process the points at which the criteria need to be met have been brought forward and the conditionality demands are now being made at more regular assessment points.<sup>105</sup> This increase in conditionality reflects the widespread caution which has developed amongst EU member states and the European institutions themselves, regarding premature promises in an attempt to avoid premature membership being granted before a state is fully prepared, alongside the desire to manage the expectations of would-be members more effectively.<sup>106</sup>

This shift in the application of strict conditionality has made the EU enlargement process a more open-ended process, providing the EU with greater opportunities to intervene when progress is not made. Firstly, failure to make progress in the reforms advocated by the EU in the economic, political and social spheres can lead to Community Assistance for Reconstruction, Development and Stabilisation to be frozen.<sup>107</sup> According to the external incentives model, the threat of loss of financial assistance should ensure

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<sup>103</sup> Gordan (2007), p.282.

<sup>104</sup> İçener and Phinnemore (2014), p.37.

<sup>105</sup> İçener and Phinnemore (2014), p.40.

<sup>106</sup> İçener and Phinnemore (2014), p.32.

<sup>107</sup> D. Chandler, "EU State Building: Securing the Liberal Peace through EU Enlargement", *Global Society* 21.4 (2007), p.602.

compliance with conditions. Secondly, the EU can use the promise of rewards (usually membership), to ensure that the state meets specific conditions relevant to a certain project's success. This reflects the external incentives model as the EU sets conditions that aspiring member states must fulfil in order to receive reward of potential membership. Thirdly, the EU may intervene directly by supporting political parties, laws and actions or by intervening in the political process as is seen by the High Representative in Bosnia and Herzegovina.<sup>108</sup>

The use of conditionality in the Western Balkans means that the states must demonstrate a greater level of compliance with a wider set of conditions, on a more frequent basis. This stricter application of conditionality is not only to better prepare states for membership, but is designed to contribute to the member state building process, as the EU has become an active state builder in the Western Balkans.<sup>109</sup> According to Sisk, state building involves the creation or recovery of the authoritative, legitimate, and capable governance institutions that can provide security and the necessary rule of law conditions for economic and social development.<sup>110</sup> Through member state building, the EU aids in the Western Balkans with consolidating statehood and democracy and prepares these countries for the conditions for EU membership. The addition of member state building to the enlargement process has further extended the scope of EU conditionality, as this further impact on the internal dynamics of political engagement in candidate countries. However, the EU continues to rely upon economic incentives to improve political engagement in both EU enlargement and state building processes, as indicated by the ability to freeze community assistance, as identified above.

The EU enlargement policy and state building in the Western Balkans is not without its weaknesses. With regards to EU state building, the transformative power of the EU

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<sup>108</sup> Keil (2013), p.348.

<sup>109</sup> S. Keil and Z. Arkan, "The limits of normative power? EU Member State-building in the Western Balkans", in S. Keil and Z. Arkan (eds). *The EU and Member State Building: European Foreign Policy in the Western Balkans. Intervention and Statebuilding* (London: Routledge 2014), p.16.

<sup>110</sup> T. Sisk, *Statebuilding* (Cambridge: Polity, 2013), p.1.

requires functional states. Thus, the limited statehood in the region seems to be the main cause of ineffective implementation of EU-induced reforms and the decoupling between formal institutional changes and rule-inconsistent behaviour.<sup>111</sup> This has resulted in the EU developing a set of ad hoc policies for member state building, which cannot be treated as a coherent long-term strategy. These ad hoc policies are designed to address short-term rather than long-term weaknesses in the political and economic systems of the region and so are not effective for state building.<sup>112</sup> Moreover, through the EU enlargement policy, the EU is permitted to change its conditions after negotiations have concluded. This occurred between 2000 and 2003, when a number of additional conditions were incorporated into the SAP framework, as will be discussed with reference to Croatia in this chapter. This creates the problem of a moving target, making it difficult for countries to know exactly what reforms are required.

The prolonged accession process of the Western Balkans has the potential to increase the effectiveness of conditionality,<sup>113</sup> as the EU will have increased influence over the states to improve both the effectiveness of conditionality and post-accession compliance. Moreover, the extended process should help alleviate concerns of those in opposition to further enlargement, by providing states with greater opportunity to demonstrate full compliance with EU norms and policy prior to accession. However, according to the external incentives model, compliance is affected by a failure of the EU to provide a defined timeline. States become disillusioned by the process and the road to accession seems arbitrary slow and laborious. The moving target, along with the additional requirements and undefined time line, has seen the SAP criticised for being “more forceful and intrusive, more comprehensive and complex”.<sup>114</sup> The heightened

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<sup>111</sup> T. Börzel, "When Europe Hits Limited Statehood. Europeanization and Domestic Change in the Western Balkans." KFG Working Papers No. 30 September 2011, [http://www.diss.fu-berlin.de/docs/receive/FUDOCs\\_document\\_000000011699](http://www.diss.fu-berlin.de/docs/receive/FUDOCs_document_000000011699), accessed 1 April 2017, p.9.

<sup>112</sup> Keil and Arkan (2014), p.22.

<sup>113</sup> Gordan (2007), p.271.

<sup>114</sup> R. Mihaila, "Europeanisation faces balkanisation: Political Conditionality and Democratisation- Croatia and Macedonia in Comparative Perspective", *Journal on European Perspectives of the Western Balkans* 4.1 (2012), p.15.



levels of interference with state sovereignty and the increasingly complex nature of the requirement conflicts with the external incentives model, as they are unclear and undetermined. In order to analyse the effectiveness of the SAP, the following sections of this chapter will analyse when the SAP has successfully led to EU integration in the case of Croatia, and when SAP is failing to achieve reform in Bosnia and Herzegovina (Bosnia).

### 7.1 SAP – When it Works, to an Extent: The Example of Croatia

It has been questioned whether the success story of CEECs can be repeated in the Western Balkans, as the only state to have gained membership, to date, is Croatia, having successfully complied with the criteria for membership set out in the SAP, outlined above. Cooperation with the ICTY required Croatia to find and hand over the Croatian General Gotovina, a national war hero. This proved to be highly contentious and was not welcomed by many citizens, highlighting that "national identity significantly influences the effectiveness of external democratisation by political conditionality".<sup>115</sup> The reluctance of Croatia to cooperate with the ICTY demonstrated the influence that national interests and public opinion have upon the adoption of EU norms and highlights one of the leading challenges to the transformative power of the EU in the Western Balkans.<sup>116</sup> Croatians opposed handing over a national hero and the EU failed to acknowledge the impact that social recognition and public support could have upon actions of the political leaders to comply. Drawing upon the external incentives model, political leaders are unlikely to comply with the EU requirements with high adoption costs, in the form of political consequences, if adoption of the policy lacks the necessary public support.

In 2013, Croatia was the first state to successfully engage in the dual strategy of conditionality and EU member state building to become a member state. However, Keil and Arkan propose that Croatia's membership has "less to do with the impact of the EU

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<sup>115</sup> Perkovic (2013), p.180.

<sup>116</sup> A. Wiener, "Enacting meaning-in-use: qualitative research on norms and international relations" *Review of International Studies* 35 (2009), p.179.

and more to do with domestic changes”,<sup>117</sup> suggesting that reform in Croatia was sparked by the change of government in 2000 and the transformation of the HDZ, becoming pro-European. Until 2000 and the death of Tudjman, Croatian politics were dominated by the HDZ, whose position on the EU at the time, were mixed, at best. There was evidence of hostility towards the EU, based on the alleged lack of EU support for Croatian independence.<sup>118</sup> However, there was also evidence of some support of the EU membership perspective rhetorically.<sup>119</sup> The death of Tudjman in 2000 provided the opportunity for the social democrat SDP, which led to a number of reforms to be made. These were triggered by the emerging EU-membership perspective, observations on other EU candidate countries, and by the deterring development of non-EU candidate Serbia.<sup>120</sup> However, it was the HDZ’s victory at the 2003 general elections that saw the key shift for change and reform in Croatia. Political realignment in the HDZ and the new prime minister Ibo Sanader resulted in the party adopting a pro-EU course, and being willing to cooperate with the ICTY.<sup>121</sup> Thus, whilst the SAP influenced the reform and state building in Croatia with the carrot of membership, the reforms were only possible due to the shift domestic policy, raising questions about the overall impact of the EU.

Despite the removal of the primary sanction for failure to comply, delay or refusal of membership, the continued threat of financial and political sanctions has been sufficient to ensure compliance in Croatia, following membership in 2013. The newer member states, including Croatia, have demonstrated that “compliance on laws and policies is surprisingly long lasting.”<sup>122</sup> There has been only one concern over Croatian minority rights, when over 500,000 signatures were collected in support of an anti-minority referendum to limit the use of minority languages in public life. Current

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<sup>117</sup> Keil and Arkan (2014) , p.28.

<sup>118</sup> D. Jovic, “Croatia and the European Union: a long delayed journey”, *Journal of Southern Europe and the Balkans* 8:19 (2006), p.89.

<sup>119</sup> T. Haughton and S. Fisher, “From the Politics of State-Building to Programmatic Politics: The Post-Federal Experience and the Development of Centre—Right Party Politics in Croatia and Slovakia”, *Party Politics* 14.4 (2008), p.449.

<sup>120</sup> Jovic (2006), p.92.

<sup>121</sup> Jovic (2006) p. 88.

<sup>122</sup> Grabbe (2014), p.42.

legislation provides that minorities can use minority languages in public life in municipalities where they make up at least one third of the population; the referendum called for this law to change, requiring the minority population to be over 50%. At the same time, government signs on official buildings that were in both Croatian and Cyrillic, were destroyed or damaged. Despite the citizen-led demand for legislative changes in minority rights, the Croatian Constitutional Court quashed the decision to hold a referendum, as it was not in line with the minority rights adopted prior to accession.<sup>123</sup> Therefore, whilst Croatia has taken steps to ensure that it complies with the minority rights standards required by the EU, there are still ongoing concerns. Whilst the political elite have shifted to generally be pro-EU, through the influence of conditionality and membership, the sensitive nature of minority rights and the impact of social recognition and cultural norms, have meant that EU norms are not fully supported in Croatia.

## 7.2 SAP – Where there is Room for Improvement: The Example of Bosnia and Herzegovina

It has been claimed that “Europeans deluded themselves that the independence of Bosnia in April 1992 would calm down the ultranationalists, bring about an acceptable compromise and, more importantly, prevent large-scale violence”.<sup>124</sup> What in fact followed were three years of civil war, which only came to an end though the heavily brokered Dayton Peace Agreement (DPA) in 1995. It created a delicate and complex power-sharing system with reserved seats and veto powers for each of the major ethnic groups, which became known as the constituent peoples. Moreover, the DPA developed an ethnic federal structure, creating two entities; the Republika Sprska (RS) and the Federation of Bosnia and Herzegovina, each with self-governing rights. This federal structure was a compromise to the separatist claims of the Serb population but was

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<sup>123</sup> Minority Rights Group International, “Parliament decision regarding a controversial proposal for referendum brings hope for minorities in Croatia”, 24 July 2014, <http://minorityrights.org/2014/07/24/parliament-decision-regarding-a-controversial-proposal-for-referendum-brings-hope-for-minorities-in-croatia/> accessed 28 September 2015.

<sup>124</sup> B. Radeljić (ed), *Europe and the Post-Yugoslav space* (Farnham: Ashgate, 2016), p.19.

opposed by the Bosniaks and Croats, who were aggrieved they were not granted the same rights.

It is undeniable that the DPA was essential to providing an immediate solution to the ongoing crisis in Bosnia. However, it did not establish an executive with the authority or responsibility for policy making and problem solving; rather it contributed to the already deep divisions within Bosnian society.<sup>125</sup> The long term consequences of creating the power sharing framework were not fully considered and it is only in the post-Dayton era that these consequences have been realised. The consequences of the DPA have had a knock-on effect on the transformative power of the EU in Bosnia and the effectiveness of EU conditionality:

[t]he political conditionality of the EU in Bosnia and Herzegovina had to respond to issues of challenged statehood and the dysfunctionality of state structures, challenges that had not been the subject of EU conditionality in earlier enlargement rounds.<sup>126</sup>

It has not proven an easy task for the EU to persuade the leaders of any of the three communities to commit themselves to compromise with each other and reform. Thus, in the absence of domestic political will or internal incentives for reform and for the three ethnic groups to cooperate, there is a heightened reliance on reform expectations among external actors.<sup>127</sup> As a result, Bosnia has developed into a semi-protectorate with institutions including the OHR taking responsibility for many of the key decision making tasks that have occurred following the implementation of this framework. Moreover, since 2000 the EU has put itself forward as the leading institution for development in Bosnia, offering the biggest carrot, the possibility of membership. According to Keil and Perry, "the EU has consistently shown itself willing to bend over backwards to ensure a

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<sup>125</sup> Radeljić (2016), p.20.

<sup>126</sup> V. Džihic and A. Wieser, "Incentives for democratisation? Effects of EU conditionality on democracy in Bosnia & Hercegovina", *Europe-Asia Studies* 63, no.10 (2011), p.1806.

<sup>127</sup> Keil and Perry (2016), p.33.

suitable margin of appreciation for Bosnia and Herzegovina as it prepares various reforms”.<sup>128</sup>

In the first post-war period in Bosnia (1996-2000), EU policies were characterized by regrouping, determining the parallel truths in public discourse and infrastructure reconstruction with the assistance of the international community.<sup>129</sup> The principle of EU conditionality was first used in Bosnia to encourage the country to engage in democratic reform only shortly after the end of the war. The Commission understood that the Western Balkans region would require a tailored approach given its complexities and ethnic tensions and in 1996 adopted the regional approach, which served as the “basis for a coherent and transparent policy towards the development of bilateral relations, in the field of trade, financial assistance and economic cooperation, as well as contractual relations”.<sup>130</sup> In 1997, the Commission extended the regional approach to include political and economic conditions to the regional approach to be fulfilled be the target countries,<sup>131</sup> making the regional approach almost identical to the Accession Partnerships. As a result, it suffered the same weaknesses as the Accession Partnerships in Latvia, with unclear benchmarks, inconsistencies and moving targets.

The limited success of the regional approach sparked the development of the SAP in 1999. The SAP sought to give the local authorities the opportunity to strengthen the central level of government in order to become closer to the EU, in an attempt to improve the likelihood of the political elite engaging in the reform requirements of the EU. The Thessaloniki European Council meeting in 2003 extended conditionality in Bosnia to include cooperation with the ICTY, reform of governance, reform of public administration

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<sup>128</sup> Keil and Perry (2016), p.33.

<sup>129</sup> Vajzovic (2016), p.167.

<sup>130</sup> B. Dobrikovic “EU conditionality in post conflict states: a comparative analysis of Bosnia and Herzegovina and Cyprus”, 2012, [www.etd.ceu.hu/2012/dobrikovic\\_bianca.pdf](http://www.etd.ceu.hu/2012/dobrikovic_bianca.pdf) accessed 1 September 2015, p.35.

<sup>131</sup> Dobrikovic (2012), p.35

and the judiciary and the protection of human rights.<sup>132</sup> In addition, following the ruling of the *Sejdić and Finci v Bosnia and Herzegovina*,<sup>133</sup> amending the constitution to allow ethnic minorities to run as candidates for key positions of government was added as a condition for membership, along with the adoption of the 2012 budget.<sup>134</sup> The EU signed the Stabilisation and Association Agreement in June 2008, but overall the pace of reform has been slow as the political representatives lack a shared vision of how to implement the reforms.

“The Europeanization approach, assuming that the Bosnian authorities would fully commit themselves to the necessary transformation, inspired by potential membership of the EU has failed to materialize”.<sup>135</sup> Ethnic divisions and fragmentation continue to dominate internal politics, creating a fragile status quo. As a result, to date, there has been limited success of conditionality in Bosnia. The political leaders are reluctant to make reforms proposed by the EU, as an external actor, for fear that it may damage the status quo and believe that they will lose out in the democratisation process. According to the external incentives model, a state will only make the proposed reforms if there are limited costs which come as a direct result of the adoption of policy. However, “these costs increase the more the EU conditions negatively affect the security and integrity of the state, the government's domestic power base, and its core political practices of power preservations”.<sup>136</sup> Thus, a cost-benefit assessment does not suggest Bosnia has a political environment conducive to successful EU conditionality as the political elite feel that they have too much to lose if they implement many of the reforms. This fear has outweighed the benefits of membership, failing to entice the leaders to make the reforms.

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<sup>132</sup> G. Aybet, and F. Bieber, "From Dayton to Brussels: the Impact of EU and NATO conditionality on State Building in Bosnia & Herzegovina", *Europe-Asia Studies* 63.10 (2011), p.1920.

<sup>133</sup> *Sejdić and Finci v. Bosnia and Herzegovina* Application nos. 27996/06 and 34836/06 (European Court of Human Rights, 22<sup>nd</sup> December 2009).

<sup>134</sup> Dobrikovic (2012), p.36.

<sup>135</sup> Radeljić (2016), p.22.

<sup>136</sup> Schimmelfennig, Engert and Knobel (2003), p.22.

In 2003, the, European Commission informed Bosnia that it was required to tackle crime, requiring police reforms, for progression in the membership process. The required reforms included a relocation of budgetary and legislative decisions to state level, redrawing policing districts on technical grounds and elimination of political interference.<sup>137</sup> These reforms were proposed on the basis of high crime rates and the belief that the creation of a single police force would eliminate fragmentation and reduce the number of criminals escaping.<sup>138</sup> Whilst a number of ways to enforce these reforms were proposed, all initiatives failed to gain sufficient support. The national interest veto rights of each of the constituent peoples meant that any reform that conflicts with any of the political elites' interests would not be approved. This validates the claim that "where the accession process runs against the political tide in a country; it cannot gain momentum to overcome domestic obstacles consistently to achieve systematic transformation."<sup>139</sup> Despite attempts made by the EU to highlight the benefits to Bosnia of making these reforms, rather than presenting the police reforms as a sacrifice,<sup>140</sup> the reward did not balance the loss of exclusive control of the police in the eyes of the Bosnian leaders. This was especially in the case of the Bosnian Serbs, who were not willing to lose exclusive control of the RS police, claiming that the reforms required by the EU were unconstitutional.<sup>141</sup>

The political leaders' refusal to engage in the police reform resulted in the police forces themselves becoming disengaged from the entire debate. I question how it is possible to reform the police force without active engagement of the key institutions involved. The political leaders' failure to engage in the debates highlights the limits to the scope of EU influence in Bosnia. Moreover, the police reform in Bosnia and Herzegovina was driven by external bodies; Aybet and Bieber proposed that any agreement for reform

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<sup>137</sup> European Commission, *Report from the Commission to the Council on the Preparedness of Bosnia and Herzegovina to Negotiate a Stabilisation and Association Agreement with the European Union* (Brussels: European Commission, 2003), p.25.

<sup>138</sup> Noutcheva (2009), p.1072.

<sup>139</sup> Grabbe (2014), p.44.

<sup>140</sup> Noutcheva (2014), p.1072.

<sup>141</sup> Vasilev (2011), p.59.

of the police would only be achieved through pressure and coercion by the EU.<sup>142</sup>

However, the weaknesses of the Bosnian constitution, highlight the limits of state-building through external pressures in Bosnia and more generally. Effective reforms to the police system and tackling of crime can only be achieved through an internally debated agreement. Moreover, the “failed police reforms show that when the locus of power becomes more important than the substance of reform and when the requirements lack credibility, the EU is bound to fail”.<sup>143</sup>

The principle of EU conditionality has also been used in Bosnia in an attempt to ensure the country complies with the judgment of Sejdić and Finci. However, due to the extensive reforms required to the constitutional set up of the country to comply with the judgment, EU conditionality has had limited success. Whilst a number of reform proposals have been made, as will be discussed in chapter five of this thesis, most of these have been proposed by external bodies and not the political elite and have not received sufficient support. When assessing minority rights it is necessary to have an awareness of political, social and institutional conditions that may be relevant. It is clear that external bodies are not able to have a full appreciation of these factors, in particular the ethnic tensions in Bosnia. The Commission expressed disappointment that the political leaders of Bosnia missed the first deadline for making the Constitution of Bosnia comply with the Sejdić and Finci judgment, which required improvements to the political participation of minorities by 31 August 2012.<sup>144</sup> This is an ongoing failure of EU conditionality, as Bosnia constitution continues to discriminate against minorities, as no reforms have been agreed upon, despite ongoing support from the EU. In particular, the Chancellor of Germany,

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<sup>142</sup> Aybet and Bieber (2011), p.1925.

<sup>143</sup> Vajzovic (2016), p.177.

<sup>144</sup> Council of Europe, “Statement by Commissioner Štefan Füle and Secretary General of the Council of Europe Thorbjørn Jagland on the Road Map for Bosnia and Herzegovina's EU membership application and the execution of the European Court of Human Rights’ “Sejdić and Finci”- judgment”, 03 September 2012, [http://europa.eu/rapid/press-release MEMO-12-641\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-12-641_en.htm?locale=en), accessed 03 August 2013.



Angela Merkel, has attempted to engage in extensive discussions with Bosnia, in order to create the political environment for reform, with no success.<sup>145</sup>

The 2008 progress report highlights the failings of Bosnia to make sufficient reforms in most policy areas and expresses extreme concern over the suitability of Bosnia for EU membership,<sup>146</sup> an opinion that has been repeated in subsequent reports. The EU has clearly identified its concerns for the country and offered its solution to the situation. However, any hopes that EU accession might provide a platform for broader constitutional reforms have been misplaced, as in reality the EU's role in comprehensive reform to date, have been limited. This is evidenced by a review of annual progress reports which have in fact shown a steady decline in the number of references to or recommendations for constitutional reform efforts.<sup>147</sup>

There are three principle challenges that have contributed to the EU's failed approach towards Bosnia. According to Tzifakis, these include the EU's failures to recognise the difficulty of state building and European integration in an ethnically divided state, the weakened credibility of EU conditionality and the issue of the triple transition.<sup>148</sup> First, it is apparent that "Europeans have overlooked the difficulties surrounding the Europeanization process of ethnically-divided state, in which all three ethnic communities, although supportive of the country's EU path, are not ready to make compromises".<sup>149</sup> Due to the dissatisfaction felt by all ethnic groups of the outcome of the DPA, the different ethnic groups remain focused on advancing their own national interest at the expense of the best interests of Bosnia as a whole. The EU's attempts to improve the ethnic leader's interactions with one another have not proven successful, as the

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<sup>145</sup> Balkan Insight, "Merkel Takes Soft Line on Bosnia's Crisis", 10 July 2015, <http://www.balkaninsight.com/en/article/eu-unleashes-diplomatic-descent-on-bosnia> accessed 3 March 2016.

<sup>146</sup> Commission of the European Communities, *Bosnia And Herzegovina 2008 Progress Report* (Brussels: Commission of the European Community, 2008).

<sup>147</sup> Keil and Perry (2016), p.33.

<sup>148</sup> N. Tzifakis, "Bosnia's Slow Europeanisation", *Perspectives on European politics and society* 13.2 (2012), pp.137-141.

<sup>149</sup> Radeljić (2016), p.22.

incentive of membership have failed to present a powerful antidote to unruly conduct among ethnic leaders.<sup>150</sup> It is necessary that the political elite take ownership of the reforms needed. However, “it is important to ask if ownership is at all possible in a divided, post-war society like Bosnia”.<sup>151</sup> With three competing national interests, it is difficult to determine what the best interests of the country are.

Second, despite the stricter application of conditionality in the Western Balkans, the credibility of conditionality in Bosnia has reduced, as a result of the EU signing the SAA despite Bosnia failing to comply with the condition of police reforms. Thus, “Bosnians do not believe that they have to stand behind a single uncontested position; and more worryingly, Brussels has demonstrated that it is ready to reward even partial or limited compliance.”<sup>152</sup> Ultimately, the EU has failed to provide a clear message on the need to meet with EU standards and there is an increasing sense that anything is negotiable and that conditionality is flexible,<sup>153</sup> and that by failing to comply with the requirements that the politicians do not want to comply with will have no implications on the availability of membership. This is essentially undermining the entire principle of conditionality. Finally, is the issue of the triple transition of Bosnia “from war to peace, humanitarian aid to sustainable development and from socialist political systems and centrally planned economies to democracy, civil society and a free market economy.”<sup>154</sup> It has proven difficult for the EU to successfully address these interrelated and complex challenges.

Thirdly, the EU continues to make the mistake of avoiding official institutions of the state and focusing their attentions on negotiating with the ethnic leaders. This is in contrast to the way in which the EU has negotiated with other former Yugoslav republics,

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<sup>150</sup> Vasilev (2011), p.59.

<sup>151</sup> V. Perry and S. Keil, “The OSCE Mission in Bosnia and Herzegovina: Testing the limits of ownership”, *Nationalities Papers* 41.3 (2013), p.386.

<sup>152</sup> Tzifakis (2012), p.139.

<sup>153</sup> Keil and Perry (2016), p.33.

<sup>154</sup> Radeljić (2016), pp.22-23.

conducting these negotiations only with state officials and not political leaders.<sup>155</sup> If the EU were to follow the same policy for all negotiations to be with state institutions and not the political leaders, it may be possible that greater levels of reform could be achieved in Bosnia. However, as the political elite dominate the state institutions, this may not be the case. Of all the Western Balkan states currently seeking membership in the EU, Bosnia is arguably the weakest candidate, having fulfilled the fewest of the conditions required for membership. A balance is required between the EU providing guidance on the reforms required to reach the necessary standard and allowing Bosnia to determine what reforms to make in order to reach these standards.

#### 8. The Overall Effectiveness of EU Conditionality

The ability of the EU to influence aspiring member states to make the necessary reforms to create domestic policy and state building to develop institutions that are both stable and strong enough for membership into the EU is essential to a successful enlargement programme. The enlargement process itself provides the EU the best opportunity to ensure that reforms are made by aspiring states to bring them in line with European norms, through the process of EU conditionality. This chapter questioned the influence that EU conditionality has upon minority rights standards in states with EU aspirations, and whether that influence has diminished since 2007. Kempe and Van Meurs propose that EU conditionality is the most important instrument for implementing certain EU objectives in the Western Balkans.<sup>156</sup> However, current implementation of EU conditionality through the SAP has had varied success. According to Börzel and Risse, EU membership has not motivated “Balkan leaders very strongly to undertake the necessary reforms as was the case in Central and Eastern Europe, where regime transformation had

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<sup>155</sup> Vajzovic (2016), p.177.

<sup>156</sup> I. Kempe and W. Van Meurs, “Europe Beyond EU Enlargement”, in W. Van Meurs (eds), *Prospects and Risks Beyond the EU Enlargement: Southeastern Europe: Weak States and Strong International Supports* (Opaladen; Leske & Budrich, 2003), p.19.

been peaceful".<sup>157</sup> I argue that this is in part due to the fact that the EU enlargement policy in the Western Balkans fails to have due regard for the social, political and institutional factors which exist in the region in the aftermath of conflict.

The transformative power of the EU through conditionality depends on consistency and credibility. The ability to include additional requirements before a state will be considered for membership has led to membership becoming a moving target within an "evolving process that is highly politicized, especially on the EU side."<sup>158</sup> This is evidenced in the case of Croatia where the European Commission added implementation of the European Arrest Warrant to membership requirements, just weeks prior to its accession into the EU. Whilst the Croatian Parliament did adopt national laws implementing the European Arrest Warrant, just three days prior to accession; it highlights the difficulties of the moving target on the accession process. It is evident that EU conditionality is plagued by the weaknesses of lacking fluidity, being inconsistent and suffering from the moving target problem.<sup>159</sup> Thus, whilst attempts to improve the conditionality aspect of the enlargement process have been made, they have not overcome the difficulties.

I propose that setting the date for accession is a key factor to the overall effectiveness of EU conditionality. EU conditionality is more effective when the date of accession is not set, as candidates continue to have an incentive to make the changes required by the EU. Once the date of accession is set, the EU will no longer be able to rely upon EU conditionality and the candidate country will slow its implementation of domestic reforms that are required for membership.<sup>160</sup> The moment a date is set, this incentive disappears. It is therefore logical to assume that the "the EU will keep the period between announcing the date of accession and the actual accession as short as

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<sup>157</sup>T.A. Börzel and T. Risse, "One size fits all! EU policies for the promotion of human rights, democracy and the rule of law", *Workshop on Democracy Promotion 4* (2004), p.15.

<sup>158</sup> Grabbe (2008), p.252.

<sup>159</sup> Gordan (2007), p.273.

<sup>160</sup> Steunenberg and Dimitrova (2007), p.11.

possible”,<sup>161</sup> in order to maximize its ability to influence reform. The points at which the criteria need to be met have been brought forward and the conditionality demands in the Western Balkans are now being made at more regular assessment points in the accession process.<sup>162</sup> This provides the EU with greater influence over the states in the adoption of EU enlargement and state building policy, and maintains the incentive to make the required reforms, as not doing so stops the country progressing in the membership process.

The effectiveness of the EU enlargement policy in the Western Balkans has been further reduced by the clear inability of the EU to transfer accession conditionality to state building; rather the state building policies adopted by the EU have been disjointed and haphazard.<sup>163</sup> The EU has not been consistent in its member state building policies as there is no clear criteria for EU member state building as the *acquis communautaire* is weak. The effectiveness of conditionality is severely impaired if the EU lacks clear rules and if clear conditions are absent.<sup>164</sup> Furthermore, the EU itself remains divided in regard to state building between different Union institutions and member states. The overall lack of clarity with regards to the EU member state building policy derives from the fact that the EU gives little guidance as to what kind of state can join the EU and the complexity of the international presence and of the EU obscures any clear state-building conditionality.<sup>165</sup>

In the introduction to this chapter, it was highlighted that there has been limited research conducted into the overall effectiveness of EU conditionality due to the difficulty in “isolating the effect of international factors from the domestic incentives for legal, institutional or behavioural change”.<sup>166</sup> Where the EU has used conditionality to change

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<sup>161</sup> Steunenbergh and Dimitrova (2007), p.11.

<sup>162</sup> İçener and Phinnemore (2014), p.40.

<sup>163</sup> Bieber (2011), p.1785.

<sup>164</sup> Bieber (2011), p.1793.

<sup>165</sup> Bieber (2011), p.1793.

<sup>166</sup> Sasse (2008), p.844.

domestic policy, it is not always possible to isolate EU conditionality as the principle factor resulting in domestic reform, due to events which occur at the domestic level. This is highlighted in the example of the internal domestic shift in Croatia that occurs at the same time that the country began to reform along EU enlargement policy lines. This must be considered when examining the overall effectiveness of EU conditionality in individual countries. As discussed in section one, the external incentives model sets the conditions of adoption costs, determinacy of the conditions, the size and speed of rewards and the credibility of threats and promises as necessary for effective EU conditionality. However, the perceived interference of the EU in newly independent states could create a deadlock in democratic reform as governments fear that by complying with the EU reforms they risk losing their independence.

Whilst the SAP was developed in response to the weakness of the Accession Partnerships, neither mechanism has proven entirely effective in ensuring compliance with general EU requirements either pre or post-accession. The case study of Latvia has demonstrated the success of EU conditionality through the Accession Partnerships in the area of minority rights, often being cited as the most successful example of EU conditionality,<sup>167</sup> though there have been questions raised in regards to its post-accession compliance as minority rights remain a cause for concern. Moreover, the SAP has not proven successful in ensuring reform in the Western Balkans. The nature of the minorities issue in the Western Balkans is distinct to the area, and is further complicated by each country having its own distinct ethnic make-up and associated tensions. Whilst the EU has acknowledged this problem in creating the SAP, they do not go far “enough to tackle the distinctive nature of the problem of minorities in Western Balkans”.<sup>168</sup> Furthermore, despite the stricter application of conditionality, the EU’s approach to minority protection continues to suffer from a lack of clear and unified benchmarks and standards,<sup>169</sup> which aggravates the failure of the EU to develop a single minority standard. This leads to

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<sup>167</sup> See Kelley (2004).

<sup>168</sup> Gordan (2007), p.283.

<sup>169</sup> Gordan (2007), p.284

difficulties in measuring progress, despite the creation of the annual reports and ill-targeted activities.<sup>170</sup>

To date, Croatia is the only Western Balkan state to have gained membership, and the difficulties faced in achieving domestic reform in Bosnia and Herzegovina highlights the resistance that EU conditionality is being faced with in the region. The SAP has attempted to create a tailored programme of reform for the region but has failed to acknowledge the distinct needs of each state within the region. In considering the second research question of this thesis, what influence does EU conditionality have upon minority rights standards in states with EU aspirations, the weaknesses of the SAP and the limited success that it has had in encouraging reform and in member state building would indicate that the EU's ability to influence aspiring states has reduced since the 2004 and 2007 enlargements. Unlike the CEECs who were relatively quick to make the required reforms, the Western Balkans display greater resistance to EU norm adoption.

The EU is inconsistent in its pursuit of compliance between the different states in the region, adopting rigorous assessment of compliance in some states, whilst being adaptable and pragmatic in other instances.<sup>171</sup> This double standards highlighted in chapters one and two of this thesis, weakens EU conditionality as a tool to encourage compliance with EU policy and norm. The fact that the EU has established requirements which are not shared by all member states is most obvious in the policy area of minority rights, with the case studies of Latvia and Bosnia and Herzegovina serving as an excellent comparison in chapters four and five. The need for an awareness and appreciation of context in each state is essential if the EU is to be successful as a transformative power in the Western Balkans. Whilst the end result that the states are working towards should be consistent so as to avoid the increasing issue of double standards, the path which states take to reach the end result cannot be a single road. If the EU hopes to be a truly

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<sup>170</sup> Gordan (2007), p.284.

<sup>171</sup> Anastasakis (2008), p.366.

transformative power in the Western Balkans it cannot continue to group the region into a single pathway. All the states may be heading for the same destination of EU membership, but the same journey is not suitable for all states. The EU needs to be pragmatic in its approach to the Western Balkans and go further than creating a tailored Europeanisation programme for the region, creating more effective individual state paths to membership.



## Chapter Four: The Relationship between Minority Rights in Latvia and European Union Membership.

### 1. Introduction

In chapter two of this thesis, I concluded that the EU does not provide the necessary frameworks and legislation for adequate minority rights. This is in part owing to the fact that the term minority is omitted from any formal requirement of the EU. Whilst article 6 of the Maastricht treaty (TEU) states that liberty, democracy, respect for human rights and fundamental freedoms and the rule of law are the foundational principles of the EU,<sup>1</sup> it makes no specific reference to the term minority, which has resulted in the only protection of minority rights being found in the principle of non-discrimination. In chapter two, it was highlighted that the EU's reliance on non-discrimination as the basis for minority rights was not sufficient. Whilst the Treaty of Lisbon has made some minor changes to the minority rights mechanisms, the treaty did not come into force until 1<sup>st</sup> December 2009, after the CEECs gained entry into the EU and so cannot be considered in relation to the accession process of the CEECs, but will be analysed in Chapter five which analyses the minority rights standards required in Bosnia and Herzegovina (Bosnia).

The process of democratisation of the CEECs following the dissolution of the USSR in 1992, led to immediate tensions between the well-established democratic states in Western Europe and the newly democratised CEECs. In chapter three, it was highlighted that, the CEECs felt as though they were being held to a higher standard than the rest of Europe. Moravcsik and Vachudova stated that "many of the changes the East has been forced to make do not reflect the laws of the West".<sup>2</sup> Furthermore, "the accession process imposes something of a double standard in a handful of areas, chiefly the protection of ethnic minority rights, where candidates have to meet standards that the

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<sup>1</sup>European Union, *Maastricht Treaty* (Maastricht: EU, 1992), article 6(1).

<sup>2</sup> A. Moravcsik and M.A. Vachudova, "National Interests, State Power and EU Enlargement", *East European Politics & Societies* 17.1 (2003), p.46.

EU-15 have never set for themselves”.<sup>3</sup> The double standards between the EU-15 and the CEECs at this enlargement, across many policy areas, have been heavily researched and so it is not the purpose of this chapter to do any more than summarise the existing literature on this issue. Rather, in this chapter I will begin to explore the issue of double standards in minority rights obligations beyond CEEC enlargement and ask the question, ‘is the EU consistent in the minority rights standards it requires in aspiring and member states?’ Drawing upon the work of Kochenov, I argue that within the CEECs there were two very different standards of minority rights required for membership, which weakened the principle of EU conditionality. Moreover, the development of these two sub-categories of states reinforced the link between minority rights and security highlighting the wider geopolitical factors at play, with Russia being a key influence to the creation of the second sub-group, as well as the importance of cultural norms and social recognition on minority rights issues. I will examine whether the claims of Brubaker<sup>4</sup> and Smith<sup>5</sup> of a triadic or quadratic nexus can be used to justify these different minority rights standards.

In this chapter, I examine the minority rights standards in Latvia, analysing the reforms that Latvia were required to make prior to accession, concluding that many of these requirements were only met at a superficial level and that in practice minority issues remain. This will serve as a platform for comparison to the minority rights obligations for Bosnia, as an aspiring member state in the proceeding chapter. Drawing upon the claims made in chapter two that the EU is a normative power on some occasions but not all, in the final section of this chapter, I will analyse whether or not the EU acted as a normative power towards the CEECs and Latvia. An analysis of the actions of the EU led to the conclusion that the EU did act as a normative power in the minority rights requirements it placed on Latvia during the accession process.

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<sup>3</sup> Moravcsik and Vachudova (2003), p.46.

<sup>4</sup> R. Brubaker, *Nationalism reframed: Nationhood and the National Question in the New Europe* (Cambridge: Cambridge University Press, 1996)

<sup>5</sup> D. Smith, “Framing the national question in Central and Eastern Europe: A Quadratic Nexus?”, *Global Review of Ethnopolitics* 2:1 (2002), 3-16.

## 2. Discrepancies between CEEC Minority Rights Obligations at the Time of Accession

Through the enlargement process, the EU-15 created minority rights obligations for the CEEC's that they themselves were not prepared to be held accountable to. According to Keil, it is "more likely that the EU will focus on areas where there are no European standards and consequently its conditionality and reform suggestions might conflict not only with local traditions, but also with practices in some EU member states".<sup>6</sup> This has certainly been the case for minority rights. The purpose of this thesis is not to highlight the weaknesses of minority rights in the EU-15 nor the obvious double standards between the minority rights standards found in the EU-15 and in the CEECs during the accession process, as this has already been done in the existing literature. However, it is necessary to highlight that a number of the EU-15 are very restrictive in the minority rights that they adopt. This can be evidenced by a number of restrictive policies adopted across the region; Germany does not include the Turkish minority as national minorities. Moreover, France, Greece and the Netherlands have refused sign any treaty on the protection of minorities without any consequence, despite the fact that ratification of the FCNM forms part of the accession requirements for candidate countries.

The failure of the EU to establish an internal minority standard is in part to blame for this double standard at the time of the CEECs accession as the EU has neither developed minority rights within the *acquis communautaire* nor do the member states subscribe to a single standard. Chandler suggests that double standards issues emerged from the fact that the EU "had no conception of how to apply such policies in relation to their own minorities or accepting such a level of international regulations in the affairs of the state".<sup>7</sup> It would be naïve to suggest that there were no minority issues in the EU-15. For example, in chapter one, the position of the Breton community in France was

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<sup>6</sup> S. Keil, "Europeanization, state-building and democratization in the Western Balkans", *Nationalities Papers* 41.3 (2013), p.349.

<sup>7</sup> D. Chandler, "The OSCE and the Internationalisation of National Minority Rights" in D. Forsythe (eds), *Human Rights in the New Europe* (Lincoln: University of Nebraska Press, 1994), p.66.

analysed where it was highlighted the Breton language is now classified as severely endangered by the UNESCO Atlas of the World's Languages in Danger.<sup>8</sup> However, it would be fair to conclude that any issues surrounding minority rights in the EU-15 are low level and easily dealt with internally, in comparison to the minority issues in the CEECs.

The double standard in minority rights between the EU-15 and the CEECs were evidenced prior to the 5<sup>th</sup> and 6<sup>th</sup> enlargements. However, I propose that different minority rights standards also developed between the CEECs themselves, as Wiener and Schwellnus suggest that “minority protection conditionality varies greatly across accession states”.<sup>9</sup> Despite all the CEECs going through a similar process of democratisation at the end of the Cold War, the minority situation varied significantly across the states, each having its own unique minority needs. As a result, each state required different reforms to bring their minority rights to an acceptable standard. This was inevitable given the diverse minority rights issues across the CEECs. For example, the minority issue in Latvia and Estonia was dominated by the Russian minority as a result of the Soviet occupation, whereas the minority issues in Bulgaria focused on the ethnic Turks. This level of pragmatism on the part of the EU shows an awareness that each CEEC would need to make different reforms. However, these reforms should all lead to the same end point: In practice, there was no clear final standard of minority rights applied to the CEECs.

As analysed in chapter three, the external incentives model of EU conditionality requires an objective assessment of all candidate countries to the same set of standards, as outlined by the Luxembourg European Council Presidency Conclusions.<sup>10</sup> The double

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<sup>8</sup> UNESCO, “Atlas of the World’s Languages in Danger”, 21 March 2011, <http://www.unesco.org/new/en/communication-and-information/access-to-knowledge/linguistic-diversity-and-multilingualism-on-internet/atlas-of-languages-in-danger/> accessed 1 December 2015.

<sup>9</sup> A. Wiener and G. Schwellnus, "Contested norms in the process of EU enlargement: non-discrimination and minority rights", 16 April 2004, [https://www.wiso.uni-hamburg.de/fileadmin/sowi/politik/governance/ConWeb\\_Papers/conweb2-2004.pdf](https://www.wiso.uni-hamburg.de/fileadmin/sowi/politik/governance/ConWeb_Papers/conweb2-2004.pdf) accessed 27 May 2015, p.15.

<sup>10</sup> European Parliament, “Luxembourg European Council 12 And 13 December 1997 Presidency Conclusions”, 13 December 1997, [http://www.europarl.europa.eu/summits/lux1\\_en.htm](http://www.europarl.europa.eu/summits/lux1_en.htm) accessed 12 May 2016.

standards created in the CEEC accession undermined this principle, as different degrees of pressure, scrutiny and monitoring were applied to the two groups. This is demonstrated by the different meaning given to the term minority and the requirements for self-government and political participation, which will be discussed below. Not only are two standards of minority rights incompatible with the principle of conditionality, but it also raises questions about the extent to which political considerations, such as Latvia and Estonia's links with Russia were more important in the enlargement process than, the development of minority rights to a single standard.

The first minority standard was applied to states including Bulgaria, Romania, Slovakia, Hungary and the Czech Republic. This standard was based on cultural autonomy and advocated for wider inclusion of the minority populations in all areas of public life, through non-discrimination.<sup>11</sup> The aim of these policies were to provide the minority populations in this group of countries with extensive rights to develop and preserve their own culture whilst residing in another state, encompassing the essence of article 27 ICCPR, as analysed in chapter two of this thesis. The use of non-discrimination in these countries did not require the development of any minority rights for the accession process and thus reflected the general EU policy on minority rights through non-discrimination principles. Whilst a number of minority groups in these states were identified, including the Roma, ethnic Hungarians and ethnic Turks, there was no requirement to develop rights aimed exclusively at these groups, as minority rights reforms were seen as part of the general human rights requirements. In this group of states, minority rights did not form an integral part of the accession process. The minority rights of this group of states were generally held to be at a reasonable standard, which required only minor amendments, such ratification of the Framework Convention for the protection of National Minorities prior to membership to raise minority rights to an acceptable standard.

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<sup>11</sup>D. Kochenov, "Commission's Approach to Minority Protection During the Preparation of the EU's Eastern Enlargement: Is 2 Better than the Promised 1?", *European Diversity and Autonomy Papers* 2 (2007), p.10.

The second group was much smaller, consisting of only Latvia and Estonia, where specific minority rights were required to be developed through the accession process, focusing on the improvement in the rights of the Russian-speaking minority. Whilst the accession process of Latvia and Estonia was dominated by demands to improve the minority situation, as will be analysed in this chapter, the standard of minority rights at the time of accession in this group was much lower than the minority rights found in the first group. The EU seemed to turn a blind eye to the way minorities were discriminated in these countries. Both Latvia and Estonia were permitted to introduce minority rights based on assimilation policies, trying to make the Russian-minority adopt the Latvian and Estonian way of life rather than allowing them to preserve their minority culture. This was evidenced by the fact that most minority rights policies were based around improving the Russian minorities' language skills in Latvia and Estonia, and then requiring very high language levels for naturalisation and access to political life.

## 2.1 What is a Minority?

In order to demonstrate the two different standards of minority rights in the CEECs it is first necessary to consider the different ways the term minority was defined in the two groups identified above. The failure of the International community to define a minority has resulted in countless difficulties in the development of minority rights, as analysed in chapters one and two. Traditionally, Europe has interpreted the term minority to mean national minorities, adopting a much narrower approach of the term than that adopted in article 27 ICCPR, which extends the term minorities to include ethnic, religious or linguistic minorities. The EU applied its traditional definition of a national minority to the first group of CEECs; for example, it paid particular attention to the national Hungarian minority found in Slovakia and Romania. However, the minorities in Latvia and Estonia were largely identified as being the Russian-speaking minority, placing an emphasis on them as a linguistic minority.

The failure to apply a uniform definition to the meaning of a minority in the CEEC accession process had a two-fold effect; not only did this conflict with the principle of conditionality, it had implications for the non-Russian speaking minorities in Latvia and Estonia. The broad term national minority as applied to the first category includes all minority groups, whereas the focus on Russian-speaking minorities disregards the need to protect minority groups in Latvia and Estonia that are not Russian speaking.<sup>12</sup> By not using the traditional national minority concept adopted by the EU for all the states seeking membership, the commission reinforced the creation of double standards of minority rights and implied that not minorities are worthy of equal protection. In chapter one of this thesis, I concluded that pragmatism and flexibility are essential to defining a minority, stating that the state must adopt best practice, taking the local political situation into consideration to ensure that all those in need of specific minority rights are protected. However, by defining minorities differently in the two groups of states, the commission downgraded the importance of some minorities.<sup>13</sup> The term linguistic minority has a much narrower meaning than a national minority with different needs and requirements associated with the different categories of minority.

## 2.2 The Right to Self-Govern and Political Participation

The second element of minority rights which highlights the different standard of minority rights in the two groups of the CEECs is the minority group's right to self-govern and political participation. The ability of minority groups to self-govern is usually found in a state with high standards of minority rights. In the first group of CEECs, the commission was attentive to minority representations in government and minority self-government. Minority participation was required throughout the hierarchy of the army and police<sup>14</sup>

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<sup>12</sup>Kochenov (2007), p.13.

<sup>13</sup>Kochenov (2007), p.13.

<sup>14</sup> P. Van Elsuwege. "Russian-speaking minorities in Estonia and Latvia: Problems of integration at the threshold of the European Union", *ECMI Working Paper 20* (Flensburg: European Centre for Minority Issues, 2004), p.21.

and access to the labour market was carefully monitored.<sup>15</sup> Minorities in Bulgaria, Romania, Slovakia, Hungary and the Czech Republic could form political parties, as evidenced by the Most–Híd in Slovakia, an inter-ethnic political party in Slovakia, promoting cooperation between the ethnic Slovaks and the Hungarian minority. Moreover, political parties could use their language in communication with the authorities and were granted a degree of self-government.<sup>16</sup> In Latvia and Estonia, measures for self-government could be described as minimal, at best, as the Commission only acknowledged the linguistic minority. Most measures recommended facilitating minority political participation by improving language skills. The standard did not allow for self-government, but used language as a tool for integration and complete assimilation,<sup>17</sup> in contradiction with article 5(2) of the FCNM.<sup>18</sup> This was not a concern for Latvia as it refused to ratify the Convention until after it became an EU member, and was able to enter a number of reservations, including one against article 5 and the protection of minority languages.

The Russian-speaking minority faced difficulties in participating in political life due to strict language requirements, as demonstrated by the case of *Podkolzina v Latvia*.<sup>19</sup> Despite possessing the required language certificate, Podkolzina was struck from the list of electoral candidates after failing a linguistic check administered at the work place with no prior notification. The European Court of Human Rights (ECtHR) found Latvia violated claimants' right to free election, as protected by article 3 of the first protocol. Shortly after this ruling, the Saeima, the parliament of Latvia, reduced the language requirements for national and local elections. However, the use of assimilation policies meant that citizenship legislation could be used to create ethnic electorates. The citizenship

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<sup>15</sup> Kochenov (2007), p.27.

<sup>16</sup> Kochenov (2007), pp.27-28.

<sup>17</sup> Kochenov (2007), p.28.

<sup>18</sup> Article 5(2) provides that without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.

<sup>19</sup> *Podkolzina v. Latvia* Application No. 46726/99 (European Court of Human Rights, 9 April 2002).



legislation in Latvia led to “the inability of nearly one third of the population to participate in elections”,<sup>20</sup> which cannot be seen as compatible with EU norms of equal rights in political participation. Whilst the first group of countries provided clear political participation right to minorities whilst protecting their own culture, the second group failed to follow suit, instead adopting policies to assimilate the minorities into wider society, at the expense of providing them with clear political participation rights that protected their minority status.

### 3. Latvia: A Success Story of Conditionality, a Failure for Minority Rights?

In chapter three, Latvia was described as a success story for EU conditionality. Whilst this process was not without its weaknesses, I concluded that reform would have not occurred, but for, the incentive of EU membership. The Russian-speaking minority and reforms surrounding their treatment were a main focus of Latvia’s pre-accession journey, as according to the EU Ambassador to Riga, Gunther Weiss, it was impossible to consider Latvian accession without considering Latvian-Russian relations and the status of Latvian non-citizens.<sup>21</sup> At the time of Latvian independence in 1991, the Russian-speaking minority represented approximately 42% of the population but only 17.8% of the citizenry.<sup>22</sup> The Soviet occupation saw the Russian-speaking population significantly increase but most failed to gain citizenship.<sup>23</sup> This change in demographics was not reflected in the legislation of the Latvian Parliament, the Saeima, who chose to restore the pre-occupation citizenship policies from 1922. This placed an emphasis on knowledge of the Latvian language as a requirement for citizenship, at the expense of large numbers of

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<sup>20</sup>A. Hannerman, “Independence and Group Rights in the Baltics: A Double Minority Problem”, *Virginia Journal of International Law* 35 (1995), p.519.

<sup>21</sup>Baltic States, "Latvia: Ulmanis: Riga Ready for Talks on EU Membership", Moscow INTERFAX in English, 1735 GMT 20 March 1996. *FBIS-SOV-96-057*, Daily Report, 20 March 1996.

<sup>22</sup>United Nations Development Programme, *Latvian Human Development Report 1997* (Riga: UNDP, 1997), p.49.

<sup>23</sup>Due to the Soviet policy, population census details were not published after World War Two and so it not possible to determine the exact change in population. See Central Statistical Bureau of Latvia, “Previous census information” 19 January 2012, <http://www.csb.gov.lv/en/statistikas-temas/previous-census-information-33603.html> accessed 14 April 2014.

Russian-speaking minorities. During the Soviet occupation there was no requirement for the Russian minority to apply for Latvian citizenship. However, this changed after 1991 as the Russian minority were not automatically entitled to Latvian citizenship regardless of long-term legitimate residency during the occupation.

The main objective of the policy to return to pre-1922 legislation was to strengthen the country's independence and ensure that it was irreversible, through steps such as making the Latvian language compulsory throughout public life. However, the restoration of these citizenship and language policies was highly discriminatory towards the long-term resident Russian-speaking minority, which resulted in tensions between the ethnic Latvians and the Russian-speaking minority to run high. The native Latvians sought revenge for the Soviet occupation that left them discriminated in their own country, whereas the Russian minority felt discriminated against, in the place that they had been long-term residents and had come to call home. The Latvian minority rights issues created political tensions between Latvia and Russia, highlighting the direct link between a risk to security and stability, as demonstrated in previous chapters of this thesis.

Following independence, the difficult process of transforming Latvia from Soviet occupation to a Western democracy saw Latvia willing to accept support from European and International institutions to help develop its domestic policies in key areas of the *acquis communautaire*, including minority rights. Latvia's Soviet past meant it did not have experience with dealing with human rights issues, forcing the government to turn to other institutions for guidance in developing internationally acceptable human rights. With membership aspirations, the EU was the obvious institution to guide Latvia through this process. Moreover, the strength of the EU as a normative power enabled it to fulfil this position and Latvian politicians regarded European integration and membership as the ultimate security guarantee.<sup>24</sup> The Latvian government turned to the EU for the protection and stability it could offer, after its independence. However, the restoration of

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<sup>24</sup> M. Jubulis, "The external dimension of democratization in Latvia: the impact of European Institutions", *International Relations* 13.3 (1996), p.68.

policies that failed to have due regard to the change in population led to accusations of human rights abuses.<sup>25</sup>

### 3.1 From Soviet Occupation to EU Membership: The Development of Latvian Minority Rights.

According to Germane, the Latvian government sought to seek justice for the oppression suffered by native Latvians during the Soviet Occupation. This policy was used to justify the restoration of the citizenship laws which excluded the Russian minority, in order to ensure the protection of Latvian-ness.<sup>26</sup> The Latvian government sought to demonstrate the strength of Latvia and the Latvian people to withstand the occupation by returning to its former position.<sup>27</sup> It is evident that these laws were the “primary source of ethnic-tensions in Post-Soviet Latvia”.<sup>28</sup> The citizenship law created a large number of stateless persons, as it left the Russian minority with no nationality or state that would protect them. As a direct response, President Ulmanis sent amendments to the citizenship law to the Saeima, urging it to include the recommendations. This marked a shift in Latvian policy, whereby they displayed a political awareness of the link between EU aspirations and the need to comply with its recommendations, supporting the external incentives model of conditionality. It highlighted the positive impact of the carrot and stick approach to EU membership adopted by Latvia, as analysed in chapter three.

The Saeima eventually approved the new citizenship law of 1994, which laid down provisions for naturalisation, introducing the window system for naturalisation. The window system placed a quota on the number of applications for naturalisation that could be submitted each year, to prevent a floodgate of applications that could damage a weak bureaucracy. The law also extended citizenship to pre-1919 residents, Soviet-era Estonian

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<sup>25</sup> Jubulis (1996), p.68.

<sup>26</sup> M. Germane, "Civic or ethnic nation? Two competing concepts in interwar Latvia", *Nations and Nationalism* 18.3 (2012), p.440.

<sup>27</sup> Germane (2012), p.339.

<sup>28</sup> Germane (2012), p.440.

and Lithuanian residents and non-Latvian residents who completed Latvian secondary school.<sup>29</sup> Further improvements were made in 1995, permitting non-citizens to travel to admit their spouses and dependents into Latvia, along with the right to preserve their language and culture and have access to translation services in court proceedings.<sup>30</sup> The actual impact of these changes to the individual was, however, minimal. The administrative fees remained too high for most and there were insufficient resources available to support those taking the mandatory language exams. Moreover, the window system of naturalisation deterred families from applying for citizenship. There were quotas set the number of naturalisations that could be accepted annually, which created fear amongst families that part of the family would not be successful in their application, leaving part of the family with citizenship and part without. Therefore, naturalisation rates remained low.

The Russian-speaking minority, who were residents but not citizens of Latvia, felt alienated from the government; any reforms to improve the situation of the minority population were insufficient and seen as too little, too late. The Saeima repeatedly ignored the High Commission on National Minorities suggestions in practice through the early stages of Latvian independence. The 1997 European Commission Agenda report identified the citizenship laws, the window system, poor minority protections and the general policy of discrimination, as key contributing factors to the exclusion of Latvia from the first wave accession countries in December 1997.<sup>31</sup> Significantly, the report called for the abolition of the window system. The original function of the quota system was to prevent a floodgate of applications as the newly established bureaucratic system would struggle to meet the demands of processing large numbers of applications. However, as the application numbers remained low, this rendered the window system a void policy.<sup>32</sup>

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<sup>29</sup> Saeima, *Citizenship Law* (Riga: Saeima, 1994).

<sup>30</sup> Saeima, *Law on the Status of those Former U.S.S.R. Citizens who do not have the Citizenship of Latvia or that of any Other State* (Riga: Saeima, 1997).

<sup>31</sup> European Commission, *Agenda 2000 - Commission Opinion on Latvia's Application for Membership of the European Union* (Brussels: Office of Official Publications of the European Communities, 1997), p.114.

<sup>32</sup> European Commission (1997), p.19.

Thus, the report recommended that the naturalisation process be accelerated, to reduce discrimination and the number of stateless children in Latvia.<sup>33</sup> The Council of Europe stressed that a short-term goal for Latvia had to be, to take measures to facilitate the naturalisation process to better integrate non-citizens.<sup>34</sup>

In direct response to the Commission report, the Latvian Cabinet ministers reduced the naturalisation fee for certain groups and abolished the fee altogether for some groups, including orphans, to promote naturalisation and reduce statelessness in Latvia. Furthermore, the developing relationship between the Saeima and the High Commissioner of National Minorities, demonstrated a shift towards acceptance of European level policies. The Foreign Minister, Birkavs, urged the Saeima to comply with the recommendations, for fear that Latvia would risk losing allies in Europe and the United States,<sup>35</sup> highlighting the perceived value of EU support and membership. The reforms that began to take place in the late 1990s, occurred only in the quest for EU membership, demonstrating the strength of conditionality in encouraging reform and the development of policy. A referendum, held in October 1998, resulted in the Saeima amending the citizenship law, abolishing the window system and establishing the right of children of non-citizens to gain citizenship.<sup>36</sup> The “referendum showed Latvia's commitment to the EU and that, given Latvia's economic and political progress, their accession should be supported”.<sup>37</sup> This was a turning point in Latvian political thinking towards integration and more inclusive citizenship policies. The Saeima was able to see the clear link between cooperating with the EU and membership. However, the timing of the referendum raises questions behind the real motivation of Latvia to make these

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<sup>33</sup> European Commission (1997), p.19.

<sup>34</sup> European Council and Council of the Union, *Council Decision of 30 March 1998 on the Principles, Priorities, Intermediate Objectives and Conditions in the Accession Partnership with the Republic of Latvia* (Strasbourg: Council of Europe, 1998), annex 3.

<sup>35</sup> F. Schimmelfennig, S. Engert, and H. Knobel, "Costs, Commitment and Compliance: the Impact of EU Democratic Conditionality on Latvia, Slovakia and Turkey", *Journal of Common Market Studies* 41.3 (2003), p.513.

<sup>36</sup> OSCE, "Republic Of Latvia Parliamentary Election And National Referendum 3 October 1998 Assessment Mission", 3 November 1998, <http://www.osce.org/odihr/elections/latvia/16242> accessed 26 May 2016.

<sup>37</sup> H. Morris, "EU enlargement and Latvian Citizenship policy", *Journal of Ethnopolitics and minority issues in Europe* 1 (2003), p.24.

reforms. The referendum and amendments to the citizenship law were made just prior to the EU annual reports. Thus, I question whether Latvia had a real commitment to the reforms or that the reforms were a box-ticking exercise, to stay in favour with the EU.

The reforms were received with varying degrees of support. Those opposed to the reform cited European pressure as undue interference. This was seen as simply a replacement of the power exercised by the Soviet Union over Latvia with the EU exercising power over Latvia and limiting Latvia's recent sovereignty and independence. Those in favour of the reforms and the EU involvement worked on the assumption that there was no alternative but for Latvia to join the EU,<sup>38</sup> and so it was best simply to make to required reforms, as quickly as possible. Both opinions focused on the involvement of the EU but paid little regard for the actual impact of the reforms on the citizenship and naturalisation policies to deal with the minority issues in Latvia.

It can be seen that some areas of reform including abolishing the ban on some professions for non-citizens in Latvia was inevitable due to requirements imposed by the World Trade Organisation, which had much stricter criteria in the field of free competition than the EU. This relates back to the social learning model of conditionality, as analysed in Chapter three, raising questions about the ability of the EU to prompt reform. Under this model, a state adopts European policy norms if it is persuaded that it is the most appropriate for that State. The strength of larger International organisations, such as the World Trade Organisation, may have overshadowed the EU as more appropriate or even more important, in the context of the development of domestic policy. This highlights the possible limits of conditionality and the overall impact of the EU to prompt these reforms. This suggests that the EU may not be as powerful as evidence, at first glance would suggest, at ensuring reform in aspiring member and current member states.

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<sup>38</sup> Morris (2003), p.23.

Despite the developments made to the citizenship law and the naturalisation process, the Saeima continued to face criticism from European institutions, including the EU, the OSCE and the Council of Europe. The Saeima faced criticism for the drafting of the language bill, requiring the use of Latvian in the public sector and sought that private bodies and enterprises to conduct their activities only in Latvian, discriminating against those who could not speak fluent Latvian. In April 1999, the High Commissioner and the EU both warned that this bill might impair Riga's chances of integration<sup>39</sup> as the drafting of the language bill raised concerns of Latvia returning to the 'old ways'.<sup>40</sup> Despite this clear warning, the majority of the Saeima chose to vote in favour of the law. However, President Vike-Freiberga refused to sign and ratify the language bill and urged that the Saeima to amend the law to ensure that it comply with EU legislation. The attempts by the President to prevent the law passing did not stop the Saeima voting in favour. This sent a clear message and reiterated Latvia's lack of commitment to the minority requirements required for membership. I question whether President Vike-Freiberga would have refused to ratify such law, but for the external pressures from the High Commissioner and the EU. The Saeima passed a revised language law in December 1999, just prior to the Helsinki summit, where the opening of accession negotiations was one of the key topics on the agenda. I suggest that the acceptance of the amended language bill was another politically timed decision, to coincide with the summit. This would have given the illusion of commitment to reform and minority rights, ahead of discussions on accession. On the basis of these actions, Latvia was invited to begin accession talks in 2000.

Morris proposes that the "Latvian desire to join the European Union has been instrumental in the liberalisation of their nationality policy".<sup>41</sup> I agree with this statement and propose that the drive towards membership was the sole reason for nationality and minority rights reform. It is evident that the Latvian government displayed an obvious

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<sup>39</sup> Schimmelfennig, Enget and Knobel (2003), p.513.

<sup>40</sup> Morris (2003), p.24.

<sup>41</sup> Morris (2003), p.27.

disinterest in, and little regard for, the actual policies and their implications for such a large percentage of the residents in Latvia and only made the reforms to satisfy the EU. If conditionality, with the carrot and stick of membership, was the sole reason for any reforms in the area of minority rights to be made, I question Latvia's commitment to enforcing these rights. Thus, it raises concerns surrounding the minority rights situation in Latvia after the stick and carrot were removed when membership was offered. Did the Latvian government fully meet the citizenship and minority rights policy requirements for accession or did the EU lower standards in Latvia for wider political reasons? In order to answer this question, the next part of this chapter will analyse the political participation of minorities in Latvia, throughout the accession process and into membership, to determine if membership truly impacted on minority rights standards in Latvia.

### 3.2 Political Participation of Minorities in Latvia

The political participation of national minorities was a major concern in Latvia, with the lack of proportionate representation in state institutions contributing to the distrust in the functioning of these institutions.<sup>42</sup> The two major stumbling blocks preventing minority groups from fully participating in political life were the high proficiency requirements in the national language and the citizenship requirements as set out in article 101 of the Latvian Constitution. Despite the progress made on the citizenship and language laws, Latvian remains the only working language of the elected bodies, despite high numbers of Russian-speaking minorities living in the country. On joining the EU in 2004, Latvia was required to amend its constitution to extend the right to political participation to any EU citizen that permanently resides in Latvia. Whilst these amendments were made, in 2017, the Latvian constitution still makes no reference to inclusion of non-citizens or stateless persons. Currently, article 101 of the Latvian constitution provides that;

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<sup>42</sup> Van Elsuwege (2004), p.25.



Every citizen of Latvia has the right, as provided for by law, to participate in the work of the State and of local government, and to hold a position in the civil service. Local governments shall be elected by Latvian citizens and citizens of the EU who permanently reside in Latvia. Every citizen of the European Union who permanently resides in Latvia has the right, as provided by law, to participate in the work of local governments. The working language of local governments is the Latvian language.<sup>43</sup>

Therefore, minorities with citizenship in another EU member state may now benefit from some political participation rights. However, many minorities do not have citizenship in another state and are thus still widely excluded from participation in political life.

Van Elsuwege proposes that extending the right to political participation to non-citizens would not only extend the right as required by the Council directive, but it could also go some way towards eliminating the democratic deficit in Latvia.<sup>44</sup> The democratic deficit in Latvia comes as a direct result of the fact that many of the population feel alienated from the state institutions due to limited possibilities to participate. Despite support from various EU institutions to extend the right to political participation, the ruling political parties did not support this policy. This is based on a fear that allowing non-citizens to participate in political life would change the political make-up of the major cities and potentially reduce their political power. The political elite feared that minority based political parties would take political hold of major cities such as the capital Riga and the second largest city Daugavpils, where national minorities still make up a high percentage of the population. By improving political participation of minorities, this would reduce the political elite's influence, something which they seek to avoid at all costs.

The language requirements prevented most minorities from political participation, even if they had successfully gained citizenship. The 1992 Latvian language law made

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<sup>43</sup>Saeima, *Latvian Constitution* (Riga: Saeima, 2014), article 101.

<sup>44</sup> Van Elsuwege (2004), p.27.

Latvian the only official state language,<sup>45</sup> despite such a high percentage of the Latvian population speaking Russian as a first language. Furthermore, the Latvian election law provides that candidates running for parliamentary and municipal elections were subject to language proficiency requirements, something which was not required of native Latvians. This required candidates to hold the highest level of proficiency, a near native proficiency in Latvian. This was a much higher standard than the one required for naturalisation. To Latvia, the language restrictions ensured the proper functioning of the Latvian Parliament, with Latvian as the working language.<sup>46</sup> It was also a way in which Latvia sought to overcome the fact that Latvian had become a second language in some cities during the occupation; making Latvian the working language would ensure a return of its prominence in these cities. The EU on the other hand, saw these restrictions as a breach of human rights. Adrey claimed that the language laws breached human rights as it left a large group of the population under-represented in the political life of the country.<sup>47</sup>

The political participation of national minorities was first brought before the Human Rights Committee (HRC) in the case of *Antonina Ignatane v. Latvia*.<sup>48</sup> The case concerned a candidate holding a Language certificate, who was struck off the candidate list after a different language authority, held that she did not have the language proficiency to stand for election. In this instance, the HRC held that Latvia was in violation of article 25 in conjunction with article 2 of the ICCPR.<sup>49</sup> The facts of this case are similar to the first case regarding political participation of minorities to be brought before the

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<sup>45</sup> Saeima of the Republic of Latvia, *Republic of Latvia Language Law* (Riga, Saeima, 1992). article one.

<sup>46</sup> J.B. Adrey, "Minority language rights before and after the 2004 enlargement: the Copenhagen Criteria in the Baltic States", *Journal of Multilingual and Multicultural Development* 26.5 (2005), p.459.

<sup>47</sup> Adrey (2005), p.459.

<sup>48</sup> *Antonina Ignatane v. Latvia* Communication No. 884/1999 (Human Rights Committee, 25 July 2001).

<sup>49</sup> Article 25 ICCPR: Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;  
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

ECtHR in the case of *Ingrida Podkolzina v. Latvia*.<sup>50</sup> As previously outlined, Podkolzina was a candidate representing the National Harmony Party, whose aims included the promotion of the Russian-speaking communities' interests. According to the 1995 Parliamentary Election Act, political candidates who have not completed their education in Latvian were required to hold a certificate of knowledge at the highest level. Podkolzina claimed that removal of her name from the candidate list due to insufficient knowledge of Latvian language, in spite of holding a valid language certificate, violated article 3 of the protocol no. 1. Her name was stuck off following a surprise visit from a language examiner. She refused to sit the exam after having no opportunity to prepare. As a result, the candidate was held to not have the adequate command of Latvian and her candidacy was cancelled.

The ECtHR ruled that state sovereignty provides that every state can establish the qualifications for electoral eligibility, taking into account its individual circumstances and requirements. The qualifications and measures put in place which limit an individual's access to the right to participate in national elections must, however, be proportionate to the aim pursued. Podkolzina maintained that the requirement of certain linguistic skills was disproportionate to the legitimate objective of a state language and the procedure for determining language proficiency was arbitrary. The Court held that the right of an individual to stand as a candidate must not be rejected arbitrarily, and a decision must be made by an impartial institution. Whilst the Court held that the requirement to hold a language certificate was legitimate, the re-examination meant that procedural guarantees were not respected. The procedure of the additional examination to determine eligibility was deemed to be incompatible with the procedural requirements of fairness and legal certainty, and the Latvian state was ruled to have violated article 3 of protocol 1.

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<sup>50</sup> *Podkolzina v. Latvia* Application No. 46726/99 (European Court of Human Rights, 9 April 2002).

The judgment is significant for two very different reasons. It confirmed that a state has the sovereign right to establish its own official language,<sup>51</sup> confirming that Latvia was entitled to place the requirements of Latvian language knowledge as part of a candidate's eligibility. However, the case was also seen as a victory for the claimant.<sup>52</sup> The Court identified that the rule of law can be used to protect an individual when the state takes actions which are disproportionate to the legitimate aims of the policy and that the additional examination requirements were excessive and went beyond what is required to prove the necessary language proficiency for political participation in Latvia.

Following the Court decision, the Latvian Parliament showed no immediate intention of amending the election Law. The requirements for a high level knowledge of the state language to become a member of either national or local government were abolished through amendments to the Election Law in May 2002.<sup>53</sup> The timing of these amendments may again be linked to a political motive as these changes were made just prior to Latvia submitting an application for NATO membership. I suggest that the reforms were made to strengthen the NATO application, and not as a result of conditionality or any genuine commitment to the reforms. The reforms were made to show progress and development, but were very limited in their substance. For example, the requirement for citizenship still excludes a large number of the Russian-minority from political participation as naturalisation remains an area of concern. However, these concerns did not prevent EU membership, as Latvia signed the Accession Treaty on the 16<sup>th</sup> April 2003 and become a member state just over a year later on the 1<sup>st</sup> May 2004. Latvia was held to a much lesser standard of minority rights, required by other CEECs for membership, as analysed in previous sections of this chapter. The standard of minority rights required of Latvia to satisfy the EU, also falls short of the requirements of current candidate countries, as will be analysed with regards to Bosnia, in chapter five of this thesis.

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<sup>51</sup> C. Taube, "Latvia: Political Participation of Linguistic Minorities", *International Journal of Constitutional Law* 1.3 (2003), p.514.

<sup>52</sup> Taube (2003), p.514.

<sup>53</sup> Saeima of the Republic of Latvia, *The Saeima Election Law* (Riga: Saeima, 2009).

#### 4. Post-Accession Minority Rights Issues in Latvia

Despite the undeniable progress made by Latvia in all areas to become a member of the EU, it is evident that a “number of issues remain unresolved”,<sup>54</sup> to the present day, in particular, the political participation of minorities. The most recent census held in Latvia, in 2011, confirmed that only 62.1% of respondents identified themselves as native Latvian.<sup>55</sup> The Russian population has declined in recent years with many returning to Russia or moving within the EU itself, following Latvia’s accession in 2004. However, the Russian minority is still significant, as in 2011, it represented 26.9% of the population.<sup>56</sup> Therefore, ongoing concerns about the status of non-citizens, language legislation and minority language rights issues are worrying as they have continued into the post-accession period in Latvia. It has been suggested by Morris that the “minorities clause of Copenhagen seen as a requirement for EU accession rather than a necessary long-term condition of membership”.<sup>57</sup> This would suggest that long-term minority rights are not seen as a priority in Latvia and steps were only taken in Latvia to reform minority rights in order to satisfy EU accession with no longevity attached.

On the surface, Latvia appears to be the success story of conditionality with a number of substantial reforms occurring in the accession process as outlined in detail above. However, when one looks beyond the surface, I propose that the reforms were superficial and did not lead to substantive improvement to the protection of minority rights. The post-accession problems surrounding the minority issue come from two key factors. First, Latvia made the minimum reforms required for membership, without any real commitment to them. The Soviet Occupation left Latvians feeling discriminated

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<sup>54</sup> Morris (2003), p.28.

<sup>55</sup> Central Statistical Bureau of Latvia, “Population Census 2011”, 26 April 2015, <http://www.csb.gov.lv/en/statistikas-temas/population-census-30761.html>, accessed 26 May 2016.

<sup>56</sup> Central Statistical Bureau of Latvia, “Population Census 2011”, 26 April 2016 <http://www.csb.gov.lv/en/statistikas-temas/population-census-30761.html>, accessed 26 May 2016.

<sup>57</sup> Morris (2003), p.1.

against in their own country and this was still too fresh to allow Latvia to fully commit to the protection of minorities. If Latvia had fully committed to the minority rights policies, one must ask if these minority rights issues would continue to be such a substantial feature of Latvian society and culture, more than a decade after accession. Secondly, the EU accepted the reforms at face value and failed to assess the real impact that the reforms would have to the protections of the minorities. Moreover, the EU failed to take active steps in monitoring the implementation of the reforms that had been required to bring minority rights to an acceptable standard for membership. Although the monitoring power of the EU on minority rights are limited, the lack of commitment on the area of minority rights extended to the EU and not just Latvia itself, as highlighted in chapter two of this thesis.

#### 4.1 Framework Convention for the Protection of National Minorities

Despite joining the EU in May 2004, Latvia failed, or arguably refused, to ratify the Framework Convention for the Protection of National Minorities prior to membership. In order to comply with the Convention, Latvia was required to amend to the naturalisation process, improve minority language rights and ensure equal treatment for non-citizens, improving minority right standards. It must be noted that France as in EU-15 member has continually refused to ratify the Convention despite calls from the Council of Europe, to ratify as a matter of urgency. Despite the reluctance of France, ratification of the Convention became part of the accession process through the Accession Partnerships and later the Stabilisation and Association Agreement. Latvia remains the only country to have been granted membership to EU without ratifying the Convention; Latvia only ratified the Convention on the 6<sup>th</sup> June 2005. The fact that Latvia was not denied membership prior to accession shows a lack of commitment to minority rights and the Convention on both sides. Latvia delayed the process of ratification despite knowing it

should have been necessary for membership, whilst the EU did not make the failure to ratify the Convention a stumbling block to membership.<sup>58</sup>

The delay in the ratification of the Convention until after becoming a member state allowed Latvia to make declarations that were subject to less International scrutiny than had they been made prior to accession. It is unlikely that the declarations would have been received well had they been made prior to EU membership due to their restricting nature, limiting the impact of the Convention. The Latvian government limited the scope of the language protections, stating that Latvia will apply article 10, paragraph 2, recognition of the right to use minority languages and article 11, paragraph 2 on minority language signs, in line with the Latvian constitution and other laws on the use of the state language.<sup>59</sup> These laws provide that Latvian is the official language and must be used for signage and in correspondents between individuals and authorities. This effectively eliminates any real protection provided by articles 10 and 11 of the Convention to minorities in Latvia. Moreover, the declarations prevent challenges being made against Latvia, reducing the monitoring power of the Council of Europe. Whilst respecting the sovereignty and national cultural identity of every state, Latvia affirms the positive role of an integrated society, including the command of the state language and refers to the specific historical experience and traditions of Latvia.<sup>60</sup> In this statement, Latvia places a clear emphasis on the importance of the Latvian language. This declaration, further limits the powers of the Council of Europe to monitor the language laws in Latvia, having placed the use of the Latvian language, out of reach of the Convention.

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<sup>58</sup> G. Sasse, "The politics of EU conditionality: the norm of minority protection during and beyond EU accession", *Journal of European Public Policy* 15.6 (2008), p.853.

<sup>59</sup> Council of Europe Treat Office, "List of declarations made with respect to treaty No. 157, Framework Convention for the Protection of National Minorities", 2 April 2014, <http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=157&CM=1&DF=&CL=ENG&VL=1> accessed 2 April 2014.

<sup>60</sup> Council of Europe Treat Office, "List of declarations made with respect to treaty No. 157, Framework Convention for the Protection of National Minorities", 2 April 2014, <http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=157&CM=1&DF=&CL=ENG&VL=1> accessed 2 April 2104.

The declarations reinforced that Latvia has, at best, a lukewarm attitude towards minority rights. The refusal to ratify the Convention prior to accession, suggests that Latvia was not willing to be bound by these imposed obligations to minority rights. In this case, EU membership was not enough to entice Latvia to ratify the Convention prior to membership. The ability to adopt a domestic policy which reflected the Latvian position on minority rights and thus shaping the way in which it adopted Internationally binding documents was more important<sup>61</sup> than being held to the same standard in minority rights as all other member states.<sup>62</sup>

Despite the Latvian declarations, the Convention provides Europe with the only legal basis for monitoring minority issues in Latvia.<sup>63</sup> The Advisory Committee of the Framework Convention provides the principle reports for Latvia's minority rights compliance, but the effectiveness of these reports is limited as the Committee cannot comment on issues relating to articles 10 and 11 of the Convention. I propose that Latvia was aware of the geopolitical issues surrounding its membership, notably the relations between the EU and Russia and the tensions created by Latvia. This provided Latvia a degree of leverage to be selective in the terms of membership it chose to adopt. Moreover, the ongoing tensions between the ethnic Latvians and Russian speaking minority raised security concerns. I believe that it is for this reason that the EU was willing to compromise its minority rights policy standards in order to allow Latvia membership.

#### 4.2 Naturalisation

Despite the 2002 European Commission Regular Report suggesting that the progress made by Latvia towards accession in the area of minority rights had met the

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<sup>61</sup> G. Sasse, "Gone with the wind? Minority Rights in Central and European Europe before and after EU enlargement", *Ethnic Mobilization in the New Europe* 21-22 April 2006, [https://www.researchgate.net/publication/228461902\\_Gone\\_with\\_the\\_Wind\\_Minority\\_Rights\\_in\\_Central\\_and\\_Eastern\\_Europe\\_before\\_and\\_after\\_EU\\_enlargement](https://www.researchgate.net/publication/228461902_Gone_with_the_Wind_Minority_Rights_in_Central_and_Eastern_Europe_before_and_after_EU_enlargement) accessed 26 May 2015.

<sup>62</sup> With the exception of France.

<sup>63</sup> Sasse (2006), p.15.



political criteria for membership,<sup>64</sup> the non-citizens in Latvia continue to be subject to ongoing discrimination and face barriers to political and social life. Whilst reforms have been made toward increasing the naturalisation of citizens,<sup>65</sup> such as abolishing the window system, this has been counterbalanced by the constitutional reform strengthening Latvian as the only state language. The differential treatment of citizens and non-citizens in Latvia has increased following membership as the EU no longer has the leverage of membership to ensure Latvian compliance.

Latvia has developed as an “exclusive, almost restitutionist policy seeking to identify the Latvian state with the Latvian nation into a more inclusive civic definition of Latvian Citizenship”.<sup>66</sup> This has been achieved by making the naturalisation process for minorities an extremely difficult and long process, to try and dissuade minorities from applying. The naturalisation process shows a continued lack of commitment by Latvia towards the minority issue. Between 1<sup>st</sup> January 1995 and March 2016, there were 143,792 applications for naturalisation for 158,210<sup>67</sup> individuals, owing to family applications. The total number of successful applications, where naturalisation was granted, stands at 143,723 persons.<sup>68</sup> Despite these seemingly high numbers of naturalisations, according to the most recent census in 2011, approximately 14% of the population continue to lack citizenship status.<sup>69</sup> Moreover, recent trends show a decline in the number of applications from those made around the time of the accession of Latvia into the EU compared to the number of applications currently being made annually; in 2005, there were 19,169 applications made. Since 2008 this annual figure has dropped to

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<sup>64</sup> European Commission, “Regular Report On Latvia’s progress Towards Accession”, 9 October 2002, [http://Ec.Europa.Eu/Enlargement/Archives/Pdf/Key\\_Documents/2002/Lv\\_En.Pdf](http://Ec.Europa.Eu/Enlargement/Archives/Pdf/Key_Documents/2002/Lv_En.Pdf) accessed 1 April 2014.

<sup>65</sup> Taube (2003), p.515.

<sup>66</sup> Morris (2003), p.1.

<sup>67</sup> The Office of Citizenship and Migration Affairs, “Naturalization”, 1 January 2016, <http://www.pmlp.gov.lv/lv/sakums/statistika/iedzivotaju-registrs/> accessed 15 April 2016.

<sup>68</sup> The Office of Citizenship and Migration Affairs, “Naturalization”, 1 January 2016, <http://www.pmlp.gov.lv/lv/sakums/statistika/iedzivotaju-registrs/> accessed 15 April 2016.

<sup>69</sup> Central Statistic Bureau of Latvia “Population Census 2011”, 26 April 2016, <http://www.csb.gov.lv/en/statistikas-temas/population-census-30761.html> accessed 28 April 2016.

around 2000 applications made annually.<sup>70</sup> The figures suggest that there was a direct correlation between Latvia becoming an EU member state and the associated benefits that this brought to citizens, such as free movement rights, and the number of applications for naturalisation made. It would appear that the Russian-minority saw the benefit of gaining Latvian citizenship at the time Latvia joined the EU as it has an indirect impact upon their individual rights. Not only did they gain Latvian citizenship, they gained further rights through EU citizenship. However, once the limited extent of these rights had been realised after the Latvia joined the EU, the rate of naturalisation declined.

The current decline in the number of applications raises questions of the willingness of the Russian-speaking minority to naturalise. It is possible that the damage has already been done and the Russian minority may not want to identify with Latvia following the discrimination they have suffered; the amendments to the citizenship and language laws were too little too late. The implications of this refusal to engage with Latvia could be substantial. The Russian minority continue to represent a large percent of the population in Latvia, especially in the larger cities as indicated above. There are fears that the Russian minority in Latvia who remain loyal to Russia could spark conflict, influenced by the Russian activists in the Ukraine.<sup>71</sup> If Latvia wishes to avoid this, it is essential that it takes all necessary measures to better integrate the Russian minority and increase the sense of belonging of the Russian minority in Latvia.

The need for naturalisation and citizenship is arguably outdated for political participation, given the political make up of Latvia. It could be suggested that long-term residency, for example five years, would suffice to allow for political participation as it shows a genuine link to Latvia. However, to date non-citizens remain largely excluded from political life, despite being able to prove long-term residency in Latvia. This sits

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<sup>70</sup> The Office of Citizenship and Migration Affairs, "Naturalization", 1 January 2016, <http://www.pmlp.gov.lv/lv/sakums/statistika/iedzivotaju-registrs/> accessed 15 April 2016.

<sup>71</sup> C. Williams, "Latvia, with a large minority of Russians, worries about Putin's goals", 2 May 2015, <http://www.latimes.com/world/europe/la-fg-latvia-russia-next-20150502-story.html> accessed 26 October 2015.

uncomfortably with Council Directive 94/80/EC of 19 December 1994, which provides for the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a member state of which they are not nationals.<sup>72</sup> Article 101 of the Latvian constitution now reflects the requirement to provide voting rights for all EU citizens. However, at present, Latvia allows EU citizens that are resident in Latvia to vote in elections, but fails to provide minorities who are not citizens of a member state similar participation rights.<sup>73</sup> For the Russian minority, this is an obvious barrier to political participation if they are not Latvian citizens as they are also not EU citizens and thus have no formal method in which to be involved in the decision making process.

#### 4.3 Minority Language Barriers

It has been observed by Ozolins that the influx of Russian only speakers who expected to work and be served in Russian created a situation where locals were obligated to learn Russian.<sup>74</sup> Native Latvians were required to learn Russian to ensure the success of their businesses and the ability to speak to more clients. As a direct result, the Latvian language became threatened, especially in the larger cities such as Riga where the Russian minority based themselves. In the previous section of this chapter, the development of the language laws was analysed, highlighting that Latvian is the only official language. However, the language law created tensions between the Latvian and Russian population. In March 2001, the European Commission stipulated that Latvia must have respect for and implement the various principles laid down in the Convention, including those related to the use of minority languages.<sup>75</sup> However, the declarations made by Latvia in regards to articles 10 and 11 of the Framework convention, effectively

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<sup>72</sup>Council directive 94/80/EC, 19 December 1994, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELLAR:3c8e9549-86dc-418c-9fb8-dedf9674511b> accessed 1 April 2014.

<sup>73</sup> Taube (2003), p.515.

<sup>74</sup> U. Ozolins, "Between Russian and European hegemony: current language policy in the Baltic states", *Current Issues on Language and Society* 6 (1999), p.10.

<sup>75</sup>European Commission, "2001 Regular Report on Latvia's progress towards accession", 13 November 2001, [http://ec.europa.eu/enlargement/archives/pdf/key\\_documents/2001/lv\\_en.pdf](http://ec.europa.eu/enlargement/archives/pdf/key_documents/2001/lv_en.pdf) accessed 09 April 2014.

exclude the application of the language protections contained in this minority rights document. As a result, the minority language issues in Latvia continue into membership.

The second opinion of the Advisory Committee on the Framework Convention of National Minorities,<sup>76</sup> focuses on the issue of minority languages, with emphasis on article 10, despite the declarations limiting its scope. Article 10 of the Framework Convention provides every person belonging to a national minority the right to use their minority language, in private and in public.<sup>77</sup> However, the high level of Latvian language skills required for appointment into many professions<sup>78</sup> is still a cause for concern. It prevents minorities from being able to partake in many parts of public life from political participation to being employed in the public sector. Furthermore, the lack of support and tuition available for those minorities wishing to take the Latvian language examinations results in approximately 40% of those sitting the examinations to fail them.<sup>79</sup> This has led to a striking lack of minority representation in local government and within most state institutions.

The Advisory Committee states that Latvian language Laws continue to restrict the use of minority languages. It expresses disappointment that the mandatory use of Latvian in all official communications and required level of proficiency in public and a number of private posts is monitored by the state language centre. The Committee concluded that despite the declarations made by Latvia, that the current language restrictions are

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<sup>76</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, "Second Opinion on Latvia", 18 June 2013, [http://www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_2nd\\_OP\\_Latvia\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_2nd_OP_Latvia_en.pdf) accessed 13 February 2014.

<sup>77</sup> Council of Europe, *Framework Convention for the Protection of National Minorities* (Strasbourg: Council of Europe, 1995), article 10.

<sup>78</sup> Over 1000 professions require C1 (highest) level of proficiency.

<sup>79</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, "Second Opinion on Latvia", 18 June 2013, [http://www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_2nd\\_OP\\_Latvia\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_2nd_OP_Latvia_en.pdf) accessed 13 February 2014, p.5.

incompatible with the Framework Convention for the Protection of National Minorities.<sup>80</sup>

There have been limited measures to improve social cohesion in Latvia. Both the Integration guidelines and an action plan were designed to improve and promote social cohesion of minorities in Latvia. However, these programmes continue to emphasise the issue of language proficiency and fail to provide a solution to improved integration of the Russian speaking minority into public life. Overall, these barriers have led minorities to feel as though they are not represented or protected in Latvia despite their long-term residency in the country.

#### 5. Brubaker's Triadic Nexus: A Justification for Double Standards in Minority Rights?

The EU applied a double standard in the accession process of Latvia, by allowing the country to progress to membership despite failing to ratify a key piece of European legislation on minority rights. All other candidate countries have been and will be required to ratify the Framework Convention prior to membership whereas, as discussed above, this only occurred in Latvia after it had become a full member state. As a result, Latvia was able to make a list of declarations, which effectively rendered the Convention useless to protect the Russian-speaking minority. The fact that the EU allowed Latvia to gain membership despite minority rights being a serious cause for concern raises serious questions about its commitment to minority rights and the motives behind pushing Latvia's membership application. In chapter three, I highlighted the link between security and the Russian minority in Latvia. This created tensions between Latvia and Russia on the EU's doorstep which made the Union uneasy and fearing security and stability on its borders. I agree with Gordan claims that the overreaching geopolitical relationship of EU member states with Russia<sup>81</sup> are the real motivation for Latvia's acceptance into the Union. The ongoing concerns in Latvia post-accession highlight that minority rights are

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<sup>80</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, "Second Opinion on Latvia", 18 June 2013, [http://www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_2nd\\_OP\\_Latvia\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_2nd_OP_Latvia_en.pdf) accessed 13 February 2014.

<sup>81</sup> Gordan (2007), p.281.

not at a standard found across other member states, falling short of the requirements of the Framework Convention.

However, it has been suggested that the different minority rights standards between the CEECS and Latvia and Estonia may be justified by Brubaker's triadic nexus which seeks to explain the relationship between national minorities, newly nationalising states in which they live and the external 'homelands'. In 1996, Brubaker claimed that the future displayed by Europe to the world looked distressingly like the past, with the suggestion that Europe was moving back to a focus on the nation state, rather than beyond it.<sup>82</sup> What followed with the collapse of the Soviet Union, Yugoslavia and Czechoslovakia in the early 1990s was the creation of a number of successor states which were extraordinarily heterogeneous in ethnolinguistic and ethnoreligious terms, and yet many of these states claimed legitimacy as they existed as the states of and for independently existing ethnocultural nations.<sup>83</sup> In an attempt to legitimise their independence, the successor states tended to pursue nationalisation agendas, due to the existence of "large, alienated and putatively dangerous national minorities, connected to and supported by neighbouring kin or patron states".<sup>84</sup> According to Brubaker, the development of the successor states into independent states created a triadic nexus linking the national minorities, newly nationalising states in which they live and the external 'homelands' which they belong or can be construed to belonging, by ethno cultural affinity.<sup>85</sup>

The first element of the triadic nexus identified by Brubaker is the nationalising newly independent (or newly reconfigured) state. Brubaker claims that there are five key elements to a nationalising state. First, there must be claims from the state that it contains a core nation or nationality, understood in ethno-cultural terms and

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<sup>82</sup> Brubaker (1996), p.2.

<sup>83</sup> R. Brubaker, "Nationalizing States revisited: projects and processes of nationalization in post-Soviet states", *Ethnic and Racial Studies* 34:11 (2011), p.1786.

<sup>84</sup> Brubaker (2011) p.1786.

<sup>85</sup> Brubaker (1996) p.4.

distinguished from the citizenry or permanent resident population of the state as a whole. Second, there must be a claim of ownership, in the sense that the state represents itself as the state of and or the nation. Thirdly, the core nation must hold itself out to be in a weak cultural, economic or demographic position within the state. Fourth, this weakness must require state action to strengthen the core nation, to promote its language, cultural flourishing demographic robustness, economic welfare or political hegemony. Lastly, the state must claim that such action is remedial or compensatory as it is needed to redress previous discrimination or oppression suffered by the core nation.<sup>86</sup> The case study of Latvia epitomises the concept of the nationalising state, seeking to return to its position as an independent Latvian state, as it was prior to the 1940 Soviet occupation and introducing language and citizenship policies which would strengthen the Latvian core nation, following the Soviet Occupation, as outlined in this chapter.

The second element of the triadic nexus is existence of a national minority, which makes a demand for state recognition of the basis of their distinct ethno-cultural nationality, and the assertion of certain collective, nationality based cultural or political rights.<sup>87</sup> This can again be demonstrated by the Russian minority that found themselves in an independent Latvia with limited legal protection, following succession. Under the Soviet Occupation, the Russian migrants to Latvia enjoyed for citizenship rights. These rights were removed following Latvian independence in 1991, leaving the Russian minority vulnerable.

The final element to Brubaker's triadic nexus is the existence of external national homelands. States becomes an external national homeland when cultural or political elites of the homeland feel a sense of responsibility to the ethnic co-national who resides in other states. This typically occurs when state borders are changed. These external homelands feel an obligation to exercise state rights over their ethnonational kin in other states. This leads to the homelands to monitor the condition, promote the welfare,

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<sup>86</sup> Brubaker (1996) p.5.

<sup>87</sup> Brubaker (1996), p.6.

support the activities and institutions as well as take measures to protect the interests of their ethnonational kin in other states.<sup>88</sup> The actions of the external national homeland in terms of both monitoring and intervention are likely to increase when the kin or its co-nationals come under greater risk of nationalising policies and practices of the state they live in. In the Latvian example, Russia serves as a clear example of an external national homeland. The three elements of the triadic nexus cannot be regarded as fixed entities, rather they are dynamic and relational concepts which must be viewed as interlocking and interactive.<sup>89</sup> The triadic nexus highlights the clear link between the development of the political identity of the CEEC following succession and minority rights and can be used to explain the discriminatory policies adopted by a number of states towards the national minority, such as the Russian minority in Latvia and also in Estonia.

A number of scholars have been critical of Brubaker's approach to statehood, claiming that it is both confusing and potentially misleading.<sup>90</sup> Burgess highlights that the triadic nexus theory reflects a longstanding tendency to treat Central and Eastern Europe as a distinct unit, which should be treated differently to the West.<sup>91</sup> It is possible to draw comparisons to the double standards that have arisen in minority right standards between the Western European states and the implications of the triadic nexus. According to Kuzio, Brubaker's sharp distinction between 'western civic' states and 'eastern nationalizing states' is deeply questionable as it is often difficult to differentiate between the alleged nationalising practices of the CEEC and the earlier practices of 'nation-building' which occurred in the civic states of the West, such as practices of unitary nation-states such as France, Britain and the USA whereby national identity is constructed around the ethno-cultural core.<sup>92</sup> The same double standards can be seen in

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<sup>88</sup> Brubaker (1996), p.58.

<sup>89</sup> Smith (2002), p.5.

<sup>90</sup> Smith (2002), p.5.

<sup>91</sup> A. Burgess, "Critical reflections on the return of national minority rights regulation to East/West European affairs", in K. Cordell (eds), *Ethnicity and Democratisation in the New Europe* (London: Routledge, 1999), p.52.

<sup>92</sup> T. Kuzio, "Nationalising states or nation building? Critical review of the theoretical literature and empirical evidence", *Nations and Nationalism* 7:2 (2001), p.151.



the minority rights standards required of the EU member states as compared with the aspiring member states. Any attempts to promote a universal and far-reaching minority rights policy have been undermined by western states' reluctance to consent to a dilution of their own sovereignty.<sup>93</sup> Thus, the double standards between the West and the East are also exposed in the area of minority rights. The 'inequality between stable democratic West and unstable, post-socialist' East has been reinforced by the EU stipulation to CEE applications that entry will be contingent upon their demonstrating 'respect and protection of minorities', something which was not required of earlier applicants to the Union'.<sup>94</sup>

This increase in nationalism and the stereotype that the East poses a greater risk of instability and conflict resulted in the minority rights discourse reappearing on the political and legal agenda of international institutions, after an absence dating back to the end of WWII. Brubaker recognises some importance in the role of international institutions in the development of state building and minority rights, suggesting that in wake of cold war, minority right has become an international, rather than purely domestic concern.<sup>95</sup> However, Brubaker neglects the crucial role of organisations, such as the EU and the Council of Europe, in shaping post-communist identity politics of CEEC.<sup>96</sup> According to Smith, the role of international organisations should be central to any discussion of post-communist identity politics in CEEC, and it is more appropriate to talk of a quadratic nexus and the dynamics of the national question by looking at the nationalising state, national minorities, an external national homeland and the role of international institutions.<sup>97</sup> Moreover, it is obvious that the European dimension cannot be left out of the analysis of re-forging identities, since the post-communist states aspire to shed their Eastern image by integrating into European institutional structures, most

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<sup>93</sup> D. Chandler, "The OSCE and the internalisation of national minority rights" in K. Cordell (eds), *Ethnicity and Democratisation in the New Europe* (London: Routledge, 1999), p.61.

<sup>94</sup> Smith (2002), p.10.

<sup>95</sup> Brubaker (1996), p.47.

<sup>96</sup> Chandler (1999) p.70.

<sup>97</sup> Smith (2002), p.9

importantly the EU.<sup>98</sup> What is of most relevance to this thesis is the importance of the EU in influencing minority rights as part of wider state-building programmes.

In developing the concept of the quadratic nexus, Smith applied it to the case study of Estonia. When applying the quadratic nexus to Estonia, it is evident that international organisations have clearly become an integral part of the relational field linking the Estonian government, the Russian-speaking population and the Russian federation.<sup>99</sup> The interventionist role of the EU has offered minority and homeland nationalists the possibility of appealing to the international organisations in order to bring indirect pressure on the state government.<sup>100</sup> I suggest that similar conclusions can be reached about the EU involvement in Latvia, where requirements to change citizenship and language policy and improve minority rights as conditions for EU membership have not translated into significant backlash against Europeanisation,<sup>101</sup> confirming the direct link between EU membership and minority rights. Thus, it may be possible to use the triadic or quadratic nexus to explain the difference in the standards of minority rights in Latvia, compared to other CEECs both at the time of EU membership and post-accession.

## 6. The European Union as a Normative Power in the CEECs and Latvia?

In chapter two, it was concluded that the influence of the EU as a foreign policy actor, has resulted in the EU to be considered as a normative actor, with the “ability to shape conceptions of normal in international relations”,<sup>102</sup> which extend beyond the EUs ability to influence norms in the integration process. However, it was also noted that the EU acts as a normative power in some of its foreign policy decisions, but not in all. This has a direct effect upon the ability of the EU to influence norm adoption and encourage

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<sup>98</sup> K. Wolczk, “History, Europe and the ‘national idea: the ‘official narrative of national identity in Ukraine”, *Nationalities Papers* 28:4 (2000), p.676.

<sup>99</sup> Smith (2002), p.11.

<sup>100</sup> Smith (2002), p.12.

<sup>101</sup> Smith (2002), p.14.

<sup>102</sup> I. Manners, “Normative Power Europe: A contradiction in terms?”, *Journal of Common Market Studies* 20.2 (2002), p.239.

reform, beyond the limits of conditionality and the enlargement process. In this section, I examine whether the EU acted as a normative power during the CEECs accession process as a whole, before looking at Latvia and minority rights more specifically.

### 6.1 The European Union as a Normative Actor in the CEEC Enlargement

Noutcheva suggests that overall, the enlargement policy adopted by the EU towards the CEECs, is indicative of the EU acting as a normative power.<sup>103</sup> The main aim of the enlargement process involving the CEECs was to the democratisation and economic modernisation of the states from post-communist states with weak economies and flawed democracies to member states of the EU. According to Tocci's definition of a normative power, this would satisfy the element of a normative goal.<sup>104</sup> The Copenhagen criteria which embodied the enlargement process was reflective of the EU's own traditions and norms of democracy, human rights and the rule of law, as found in Article 6 of the Treaty of Maastricht (TEU). This supports Sijrsen's claims that normative foreign policy must be in line with existing universal legal norms and foreign policy actor has to bind itself to these internationally agreed legal principles.<sup>105</sup>

It is also important to highlight the voluntary nature of the enlargement process. It was a choice of the CEECs to follow the policies and norms of the EU in order to gain membership, through the principle of conditionality and some soft mechanism of policy transfer such as the Accession Partnerships initiated in the late 1990s. This satisfies the second element to the definition of a normative power as provided by Tocci, which requires an actor use normative means and methods in which to reach its goal, due to its

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<sup>103</sup> G. Noutcheva, "Enlargement Policy towards Central and Eastern Europe, 1989-2007", in N. Tocci, *Who is a normative foreign policy actor? The European Union and its global partners* (Brussels: Centre for European Policy Studies, 2008), p.31.

<sup>104</sup> N. Tocci, *Who is a normative foreign policy actor? The European Union and its global partners* (Brussels: Centre for European Policy Studies, 2008), p.5.

<sup>105</sup> H. Sijrsen, "The EU as a 'normative' power: how can this be? ", *Journal of European Public Policy* 13.2 (2006), p.249.

voluntary nature.<sup>106</sup> Moreover, this combination of conditionality and soft mechanisms for policy transfer provided a platform for institutional contacts between the EU and the candidates' public bodies, detailing reform priorities and monitoring mechanisms and the annual monitoring reports of the European Commission. This fits the definition provided by Manners on normative power which states that to be a normative actor, an international actor must undertake standard setting and there is an expectation of non-deviance.<sup>107</sup>

Overall, it is evident that the EU was successful in its enlargement project with the 2004 and 2007 enlargements being hailed the EU's biggest foreign policy success to date.<sup>108</sup> This satisfies the third element of Tocci's definition of a normative power, which requires an analysis of whether or not the actor achieves what it sets out and the overall impact of these actions.<sup>109</sup> The success of the enlargement process indicates that the EU fulfils this element, as it achieved its ultimate aim in the successful integration of the CEECs, with significant impact to the development of these states into functioning democracies. The EU was able to assess the events occurring in the CEECs externally and develop an "enlargement strategy in parallel to its internal agenda".<sup>110</sup> However, it must be noted that this process was not without its problems, with each state having different results and needing different amounts of time to reach the required standards of EU norms to gain membership. This may impact whether the EU did in fact act as a normative actor during the enlargement process. Sceptics of the EU enlargement policy were largely silenced in the early stages of the process, reducing any problems of deviance to norm adoption; any ongoing concerns about the enlargement process "related more to questions of how and when to enlarge rather than to whether and

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<sup>106</sup> Tocci (2008), p.5.

<sup>107</sup> See Manners (2002), p.253.

<sup>108</sup> F. Schimmelfennig, "EU political accession conditionality after the 2004 enlargement: consistency and effectiveness", *Journal of European Public Policy* 15.6 (2008), p 918.

<sup>109</sup> Tocci (2008), p.5.

<sup>110</sup> Noutcheva (2008), p.28.

why”.<sup>111</sup> Whilst it is undeniable that a number of factors influenced the EU’s actions in the enlargement process, such as the good geo-political and economic reasons to support the CEECs transition<sup>112</sup> from post-communist states to EU members and the fact that there was a general belief that the CEECs should return to Europe, these factors in fact helped the EU in maintaining a normative role in the enlargement process.

## 6.2 The European Union as a Normative Actor in Latvian Minority Rights Policy.

An analysis of the Europeans Union enlargement policy of the CEECs makes it quite clear, that as a general policy, the EU acted as a normative actor, as it fits with the different definitions of a normative power. However, an analysis of the minority rights standards required in Latvia at the time of accession raises questions as to whether the EU acted as a full normative power on this specific issue, as in chapter two it was highlighted that the EU may act as a normative power on some issues and not others. It is clear that the EU did rely upon existing legal principles in order to create the minority rights policies required of Latvia for membership. In support of Sijursen’s claims that normative foreign policy must be in line with existing universal legal norms, and that the foreign policy actor has to bind itself to these internationally agreed legal principles,<sup>113</sup> the minority rights standards required in Latvia were based upon a legal framework found in a number of documents including the Framework Convention for the Protection of National Minorities and the Treaties of the EU, including the TEU, all of which promote democracy and general human rights.

However, there are questions as to whether the actions of the EU with regards to minority rights in Latvia fits with Manners’ definition of a normative power. He states that to be a normative actor, it requires an international actor to undertake standard setting

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<sup>111</sup> Noutcheva (2008), p.30.

<sup>112</sup> See M. Vachudova, *Europe Undivided: Democracy, Leverage, and Integration after Communism* (Oxford: Oxford University Press, 2005).

<sup>113</sup> H. Sijursen, "The EU as a ‘normative’ power: how can this be? ", *Journal of European Public Policy* 13.2 (2006), p.249.

and entails an expectation of non-deviance,<sup>114</sup> which may not be satisfied due to the reluctance of the Latvia to make the required reforms. As outlined in this chapter, the institutions of Latvia, in particular the Saeima, were reluctant to make the required reforms to the citizenship and language laws in order to improve the position of the Russian-speaking minority. Furthermore, Latvia refused to ratify the key minority rights protection mechanism of the Framework Conventions for the Protection of National Minorities until after it had gained membership status which allowed for a number of reservations. Can this sit comfortably with Manners' definition of a normative power? This issue does raise some questions about whether the EU acted as a true normative power and it could be argued both ways. On the one hand, Latvia's reluctance and refusal to ratify the Convention prior to accession could go against Manners' requirement of non-deviance. This is further supported by the reservations made by Latvia on the Convention when it finally ratified the convention. On the other hand, despite the initial reluctance of Latvia to adopt the EU requirements for minority rights, this reluctance was overcome. On the basis that all CEECs including Latvia, did make the required changes and eventually ratify the convention, the issue of non-deviance was not an issue in the long-term and thus it could be argued that this satisfies the criteria for a normative power. On this basis, Manners' definition is satisfied and so it is possible to conclude that the EU did act as a normative power on this issue.

The final issue to consider is whether or not the actions of the EU in relation to Latvia's minority rights standards satisfy the three dimensions of foreign policy to determine whether it is acting in a normative way, proposed by Tocci.<sup>115</sup> It is first necessary to question what an actor wants, which requires an analysis of the goals of the international actor. This element is satisfied, in the same way it was for the CEEC enlargement policy more generally. The main aim of the enlargement process involving the CEECs was the democratisation and economic modernisation of the states from post-communist states with weak economies and flawed democracies to member states of the

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<sup>114</sup> Manners (2002), p.253.

<sup>115</sup> Tocci (2008), p.5.

EU. This also applies to minority rights standards as it falls within the concepts of democracy and human rights.

Second, it is necessary to consider how the actor acts in order to bring its policies into effect. Again, it is necessary to highlight the voluntary nature of the enlargement process and the minority rights reforms required as part of this process. Whilst it must be noted that the EU did place specific requirements upon Latvia for reform of minority rights, it did so as part of a voluntary process that Latvia had embarked on to gain membership, thus the means used by the EU are normative.

Third, it is necessary to consider whether or not the actor achieves what it sets out to, and the overall impact of these actions. Despite some reluctance on the part of Latvia, it did make some of the necessary reforms and ratify the Convention. Whilst, the post-accession compliance issues surrounding minority rights are undeniable, as outlined in section five of this chapter, the EU did improve the minority rights situation for the Russian-speaking minority and this satisfies this final element. Moreover, in chapter three it was highlighted that “Latvia is the strongest test case for the EU's ability to assert direct influence and encourage the adoption of an EU-promoted norm associated with democratic conditionality”,<sup>116</sup> which leads to the conclusion that the EU acted as a normative actor towards the minority rights policies it promotes in Latvia.

## 7. Minority rights Obligations in Latvia: a Double Standard?

In this chapter, I have begun to demonstrate why it is no longer sufficient to make claims of double standards of minority rights in the EU. Throughout the accession period the EU campaigned for an inclusive society in Latvia. This was advocated by supporting policies such as urging Latvia to allow non-citizens the right to vote in local elections to encourage integration. However, the EU stopped short of recommending an all-inclusive

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<sup>116</sup> Sasse (2008), p. 844.

citizenship policy; for fear that it would open itself to scrutiny. The nationality policies of the EU-15 are not as inclusive as the policies that the EU was calling for Latvia to adopt. The restrictive French nationality policies, as analysed in chapter one of this thesis, deny the existence of any minorities on French territory. This highlights the double standards of EU policy, as it required Latvia to provide an all-inclusive policy towards minorities whereas France was able to deny their very existence. The EU campaigned for an integrated and inclusive policy that avoided exposing its member states' policies to scrutiny. In the first section of this chapter I showed that in addition to EU-15, that the CEEC enlargement created a double standard in itself with two different standards of minority rights emerging, with Latvia and Estonia being held to one standard where assimilation policies were permitted, and the other CEECs to another, pointing to at least three different standards of minority rights at the time of the enlargements of 2004 and 2007. In the next chapter of this thesis, I shall conclude that the number of different minority rights standards found in the region has in fact increased further, using the case study of Bosnia to demonstrate this.

In this chapter I have analysed the minority rights standards in Latvia at the time of accession and post-accession. It is possible to conclude that the measures taken by Latvia to improve the minority rights situation such as the amendments made to the restrictive citizenship and language laws and the improvements made to the naturalisation procedures occurred merely in the context of EU membership. The European Commission Regular reports suggested that prior to accession, Latvia complied with its international obligations. However, the ongoing concerns of Latvia's post-accession compliance with minority rights are indicative of the failure of Latvia to commit to minority rights. Moreover, it highlights the weaknesses of the EU accession process to fully evaluate if the reforms made by candidate countries, in order to comply with accession requirements have any substantive impact. Latvia's journey to Europe concluded in 2004 only after the EU reduced its requirements for membership leading to the active endorsement of a double standard in minority rights. This is evidenced by the fact that Latvia failed to fully



comply with the ruling of *Podkolzina v. Latvia*,<sup>117</sup> or ratify the Framework Convention prior to accession, despite these forming part of the Accession Partnership. Whilst Brubaker's triadic nexus could explain the difference in minority rights in Latvia compared to the other CEECs, over thirteen years after gaining membership into the EU, Latvia continues to suffer from high numbers of non-citizens and stateless residents and ongoing concerns surrounding its commitment to minority rights.

In the final section of this chapter I examined the concept of the EU as a normative actor both in regards to the CEEC enlargement as a whole and more specifically, the minority rights in Latvia. It was concluded that despite some reluctance by Latvia to make the necessary reforms, that overall, the normative power of the EU towards the CEEC enlargement was a success in foreign policy. However, in chapter three it was noted that if a state feels that a policy lack normative justification, this may impact compliance.<sup>118</sup> Latvia's position towards the Russian minority to protect the Latvian language and to return to pre-occupation may in fact have resulted in the rejection of EU norms for domestic reasons. In the next chapter of this thesis, I shall analyse Bosnia's road map to Europe and shall consider is the EU consistent in the minority rights standards it requires in aspiring and member states current pool of potential member states? I will analyse whether Bosnia is being held to a different standard than Latvia, considering developments such as the Lisbon Treaty and increased Euroscepticism. Furthermore, I will consider whether the EU continues to act as a normative power in the enlargement process involving the Western Balkan states.

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<sup>117</sup> *Podkolzina v. Latvia* Application No. 46726/99 (European Court of Human Rights, 9 April 2002).

<sup>118</sup> G. Noutcheva, "Fake, partial and imposed compliance: the limit of the EU's normative power in the Western Balkans", *Journal of European Public Policy* 16.7 (2009), p.1068.

## Chapter Five: The Relationship between Minority Rights in Bosnia and Herzegovina and European Union Membership.

### 1. Introduction

The previous chapter of this thesis concluded that the double standards in minority rights standards at the time of the 5<sup>th</sup> and 6<sup>th</sup> enlargements of the EU were unquestionable. With reference to the third research question of this thesis which asks, 'is the EU consistent in the minority rights standards it requires in aspiring and member states?', chapter four demonstrated that the double standard in minority rights went beyond the difference in requirements between the EU-15 and the candidate countries but extended between the accession countries themselves. It was concluded that there existed three different standards of minority rights obligations by the 2007 enlargement with different standards applying to the following groups; the EU-15, one group consisting of states including Bulgaria, Romania, Slovakia, Hungary and the Czech Republic and the final standard applied to Latvia and Estonia. In order to answer the third research question of this thesis, it is necessary to compare the minority rights standards required in Latvia with the minority rights standards required in a current aspiring member state, Bosnia and Herzegovina (Bosnia).

The twelve years following the accession of Latvia have seen a number of changes for the EU. The global recession has damaged economies across the globe, including a number of EU member states. Moreover, the referendum on June 23<sup>rd</sup> 2016 saw the successful Brexit vote, providing evidence of increased Euroscepticism. According to Dvornik, "it is no longer clear that EU accession brings prosperity without heavy costs".<sup>1</sup> Despite the growing dissatisfaction among the existing member states and uncertainty of the benefits to membership, the EU still holds an attraction to states outside of this group. The Western Balkans remain allured by membership with the majority of states being candidate or potential candidate states.<sup>2</sup> Bosnia remains a

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<sup>1</sup> S. Dvornik, "Bottom-up approaches from the Balkans to the EU", *Perspectives* 1 (2015), p.3.

<sup>2</sup> EU, "On the road to EU membership", 4 November 2015, [http://europa.eu/about-eu/countries/on-the-road-to-eu-membership/index\\_en.htm](http://europa.eu/about-eu/countries/on-the-road-to-eu-membership/index_en.htm) accessed 4 November 2015.

potential candidate country due to the limited progress that has been made, to date. I propose that Bosnia is being held to different standard of minority rights than those analysed in chapter four. Bosnia is required to comply with both the *acquis communautaire* and additional requirements including compliance with the Sejdić and Finci v. Bosnia and Herzegovina ruling.<sup>3</sup> This creates further complications in the minority rights standards within the EU and confirms earlier expressed views, that it is essential for the EU to develop a unified standard across member states and potential member states.

It is an overly simplistic to believe that the minority rights issues in Bosnia developed purely as a direct result of the breakup of Yugoslavia. Whilst this event played a pivotal role in the modern day minority situation, the country has been subject to diverse rule since the fifteenth century leading to a uniquely diverse population and the development of Bosnia as the state of minorities. The Ottoman Era from 1463 to 1878 saw an increase in the Muslim population of the region creating the modern day group Bosniak peoples. The subsequent formation of the Kingdom of Yugoslavia saw an influx of Serbs and Croats into Bosnia. Following the collapse of Yugoslavia, these three main ethnic groups were unable to agree on the future of Bosnia. A successful referendum and declaration of Independence was supported by the Bosniak and Croat population whereas, the Bosnian Serbs objected independence favoring to remain within Yugoslavia. This resulted in the 1992-1995 Civil War, involving widespread ethnic cleansing.

The current constitutional framework of Bosnia developed following extensive negotiations and numerous failed attempts to end the internal conflict. The three main ethnic groups were only able to bring an end to war through the internationally brokered Dayton Peace Agreement (DPA). The DPA created a political framework based on power-sharing between the three ethnic groups, dividing the country into two entities of the Republika Srpska (RS) with a predominantly Serb population and the

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<sup>3</sup> *Sejdić and Finci v. Bosnia and Herzegovina* Application nos. 27996/06 and 34836/06 (European Court of Human Rights, 22<sup>nd</sup> December 2009).

Federation of Bosnia and Herzegovina, with a predominantly Bosniak and Croat population. This political set up is based upon the principle of consociational democracy and created power sharing between the three constituent groups, at the expense of 'others'. Drawing upon the works of Lijphart, this chapter questions the suitability of a constitutional framework based upon consociational democracy, proposing that this framework exacerbates the minority rights issues in Bosnia. The current minority rights issues stem from the fact that the 'others' seek both protection of their national interests and representation in the key political institutions but are unable to do so under this form of democracy.

The case of *Sejdić and Finci v. Bosnia and Herzegovina*<sup>4</sup> is essential to the political participation of minorities in Bosnia. As previously summarised in the introduction chapter of this thesis, the case involved applications by Sejdić, a member of the Roma community, prevented from standing for the Presidency and Finci, a member of the Jewish community, prevented from being a candidate for the House of Peoples of the Parliamentary Assembly as a direct result of articles V and IV of the Bosnian constitution, which reserved these positions for the constituent peoples. The Court held that these provisions are discriminatory, highlighting that the constitution failed to protect the political rights of minorities. This chapter analyses the possible reform proposals that could be made to the constitution of Bosnia in order to comply with the judgment, a requirement for membership.

In chapter four, I concluded that Latvia and the CEEC enlargement process was a success for the normative power of the EU but questioned the success of conditionality due to the ongoing post-accession minority rights issues which continue to be a cause for concern in Latvia in 2016. In this chapter, I shall use the *Sejdić and Finci* case to further question the ability of the EU to act as a normative actor in the field of minority rights. I question whether the EU can truly influence minority rights reform in Bosnia when the issue remains such a politically sensitive topic to date, as the EU seems reluctant to adopt policies which provide for best practice and

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<sup>4</sup> *Sejdić and Finci v. Bosnia and Herzegovina* Application Nos. 27996/06 and 34836/06 (European Court of Human Rights, 22<sup>nd</sup> December 2009).

consideration of context, as per the recommendations made in chapter one of this thesis. I conclude that the reforms required by the EU are too invasive on state sovereignty and require Bosnia to meet a much higher standard of minority rights.

## 2. Developments in Minority Rights Following the CEEC Accession into Europe

Since the accession of Latvia in 2004, there have been a number of developments in the protections of minority rights at the European level. The principle development can be found in the Lisbon Treaty, which has inserted the term 'minorities' into a text of primary EU law. Article 2 of the treaty provides that "the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, *including the rights of persons belonging to minorities*".<sup>5</sup> The language used in article two, favours the individual, rather than the traditional focus of minority rights as a collective right. Furthermore, the wording places the rights of persons belonging to minorities in a human rights context. Placing minority rights within the limits of prohibition of discrimination, as found in article 14 European Convention of Human Rights has been criticised throughout this thesis. It fails to provide any substantive minority rights, failing to provide minorities with the positive right to do something, such as political participation.

The Lisbon Treaty also provided legal status to the Charter of Fundamental Rights of the EU, originally drafted in 2000 by the European Parliament. The Charter maintains the tradition of non-discrimination as minority rights protection, encouraging member states to respect cultural, religious and linguistic diversity. Whilst there are no specific minority rights, article 21(1) provides for a prohibition of discrimination on basis of membership of a national minority.<sup>6</sup> The Charter is indirectly binding through the general principles of community law. Thus, through consideration of the Charter and Treaty of Lisbon, the protection of rights of persons belonging to

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<sup>5</sup> EU, *Treaty of Lisbon* (Lisbon: EU, 2007), article two.

<sup>6</sup> EU, "Charter of Fundamental Rights of the European Union", 26 October 2012, <http://www.refworld.org/docid/3ae6b3b70.html> accessed 23 June 2016, article 21(1).

minorities will no longer be restricted to the EU accession criterion; it is also now a value on which the Union is founded and that is common to the member states. This could go some ways in dealing with the inconsistent minority rights standards.

However, how far this protection will go is left open to debate, since the Lisbon Treaty does not provide the EU with an explicit competence in the area of minority rights, as it does not add any new policy area relevant to the protection of minorities. Thus, it does not oblige member states to introduce affirmative measures to protect minority rights.

### 3. Consociational Democracy

Lijphart developed the theory of consociational democracy as a form of power sharing, whilst completing a study of the Netherlands in the 1960s to answer the question of how to reconcile political stability in deep vertical cleavages. He defined it as “government by elite cartel designed to turn a democracy with a fragmented political culture into a stable democracy”.<sup>7</sup> To ensure that consociational democracy is effective in maintaining stability, it is essential that the political elites of a divided society accommodate the divergent interests and demands of the other groups and transcend cleavages to avoid political fragmentation. In essence, Lijphart argues that the political elites must be willing to compromise and pay deference to each group’s needs, in a joint effort to improving the political framework of the society. According to Wippman, consociational democracy is the “only means by which members of ethnic groups can maintain their identities and still participate meaningfully in the life of the larger societies”.<sup>8</sup> In most cases, consociational democracy works as a political framework for a functioning democracy where there is no majority group but the state manages to remain stable due to elite consultation and respect for the need of each ethnic group. This model has been used to develop constitutional frameworks for a number of divided societies, including Belgium, the Netherlands and Switzerland.

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<sup>7</sup> A. Lijphart, “Consociational democracy”, *World politics* 21 (1969), p.216.

<sup>8</sup> D. Wippman, “Practical and Legal Constraints on Internal Power Sharing”, in D. Wippman (eds), *International Law and Ethnic Conflict* (Cornell: Cornell University Press, 1998), p.211.

An analysis of the development of the constitution of Bosnia through the DPA shows that the country has used the framework of consociational democracy to allow the country to create a political status quo between the three main ethnic groups and maintain relative peace between. However, it has not allowed the country to maintain full political stability and develop into a fully functioning democracy, as will be demonstrated throughout this chapter. Moreover, consociational democracy is traditionally seen as a transitional model of democracy. It is not a long term solution, as it becomes “detrimental to democracy and social stability”.<sup>9</sup> In this section I will question whether this form of democracy is still appropriate over twenty years after the conflict and whether it has exacerbated the minority rights issues in Bosnia.

Whilst no two states adopt an identical model of consociational democracy, a basic model of four fundamental features has developed. These attributes can be defined as two primary features- a grand coalition and segmental autonomy, and two secondary features- proportionality and minority veto.<sup>10</sup> The first primary feature needed is a grand coalition, identified as the political leaders of the significant segments of a plural (deeply divided) society (ordinarily the main political parties where parties are based on national, religious or ethnic lines) govern the country jointly.<sup>11</sup> Typically, this takes the form of a coalition cabinet, with an executive that is shared between the main political parties, similar to the UK coalition government of 2010-2015, with the Conservatives and the Liberal Democrats. The constitutional framework of Bosnia, as outlined in Annex 4 of the DPA, contains a number of features which support a grand coalition. The Presidency consists of a member of each of the constituent people who represent the majority ethnic group of the entity from which he/she is elected, as per article V of the Constitution. This means that Bosniak and Croat members of the Presidency shall be selected from the Federation and the Serb member shall be elected from the RS. Moreover, the constitution requires that the

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<sup>9</sup> D. Rothchild and P. Roeder, “Dilemmas in State-Building in Divided Societies”, in D. Rothchild and P. Roeder (eds), *Sustainable Peace: Power and Democracy after Civil Wars* (New York: Cornell University Press, 2005), p.6.

<sup>10</sup> Lijphart (1969), pp.211-216.

<sup>11</sup> A. Lijphart, “Non-Majoritarian Democracy: A Comparison of Federal and Consociational Theories”, *Publius* 15.2 (1985), p.4.

House of Peoples comprise of fifteen members, with five members from each of the constituent peoples, as per article IV of the Constitution.

The protection of rights of the constituent peoples in Bosnia is to the detriment of the 'others' or those living in the wrong entity. Serbs living in the Federation and Bosniaks or Croats in the RS, are not eligible to stand for these positions. In practice, 'others' are identified for one of three reasons: an individual of mixed parenthood, an individual in a mixed-ethnicity marriage and an individual from one of the smaller minorities, such as Roma. The Constitution relies on self-identification to determine a person's ethnicity. Thus, there is nothing to prevent a person from the category of 'others' identifying with the constituent peoples for the sake of standing for election. However, most refuse to employ this tactic, on the basis that they should be entitled to these rights without discrimination on the basis of ethnicity. This position of the others was demonstrated in the Sejdić and Finci case, where both of the applicants refused to associate with one of the constituent peoples. As a result, they were unable to stand in the elections. The 'others' may only be involved in the grand coalition in the House of Representatives or the Constitutional Court, where membership is not predetermined by ethnicity or entity of origin.

The second primary feature of consociational democracy is segmental autonomy, meaning the ability of each segment of society to make decisions.<sup>12</sup> This is usually characterised by a decentralised and federal government, consisting of two Houses with one chamber based on proportional representation and one bi-cameral chamber that represents regional interests. In Bosnia, the state system is bi-cameral, consisting of the upper House of Peoples and the lower House of Representatives. The decision-making process is an extreme form of segmental autonomy in both entities and the rights of the other entity are largely ignored, with a focus on national vital interests.

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<sup>12</sup> Lijphart (1985), p.4.



The principle of proportionality has emerged as a secondary characteristic of consociational democracy. The state is able to reduce claims of bias towards one of the segments of a plural society, by distributing positions public sector and authority positions and public funding proportionately between the groups. Moreover, proportional representation within the balanced executive and legislative allows minorities to gain representation.<sup>13</sup> In Bosnia, proportionality is seen in civil service appointments, allocations of public funding and political representation, dividing these positions between the constituent peoples. Thus, it can be seen that there is proportionality for the distribution of positions and funding for the constituent peoples, at the expense of 'others', who continue to be excluded, in a system proportional representation.

The final feature of consociational democracy is a veto right, providing minorities a guarantee that they will not be outvoted by the majority when their vital interests are at stake.<sup>14</sup> The constitution of Bosnia provides for the vital national interest veto through articles V and IV in both the Presidency and the House of Peoples. However, the national interest veto power has been used numerous times in the House of Peoples, predominantly by the Serb members, to prevent the passage of key legislation. Raulston goes as far to say that the House of Peoples simply exists to "provide a veto power that each group of constituent people may invoke to strike down legislation deemed harmful to its interests".<sup>15</sup> The difficulty created by the veto in passing legislation supports Raulston's statement. Bosnia demonstrates that the veto power can be exploited and used to further national interests of the political elite to keep the status quo in their favour. The veto power has also been formulated in such a way that it excludes 'others' from the protection of the right to veto something for the purpose of national interests.

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<sup>13</sup> Lijphart (1985), p.5.

<sup>14</sup> Lijphart (1985), p.5.

<sup>15</sup> E. Raulston "(Un)Justifiable?: A Comparison of Electoral Discrimination jurisprudence at the European Court of Human Rights and the Constitutional Court of Bosnia and Herzegovina", *American University International Law Review* 12 (2012), p.677.

### 3.1 Criticisms of Consociational Democracy in Bosnia and Herzegovina

The model of consociational democracy has been subject to a number of criticisms. Lijphart himself was aware that consociational democracy could not always be successful in maintaining stability in a deeply divided society. “The Lebanese case shows that consociational devices, at best do not have a great deal of potency in building legitimacy and stability. At worst, they may actually have exacerbated divisions and hastened the collapse”.<sup>16</sup> This is supported by Barry, who argues that a system based on consociational democracy may aggravate rather than rehabilitate,<sup>17</sup> divided societies. The unequal protections that it creates for various groups of citizens are at odds with the concept of modern liberal democracy. The discrepancies in political participation, between the constituent peoples and ‘others’, creates inequalities in access to socio-political rights. According to Krasniqi, differentiated citizenship refers to tensions between both the majority and minority divide as well as tensions between non-dominant groups which lead to an uneven distribution of rights between the groups.<sup>18</sup> The application of group-differentiated rights post-conflict through the DPA has created differentiated citizenship and minority rights issues.

In the case of Bosnia, the emphasis placed on ethnicity and minority group membership for political participation in the power-sharing framework is problematic given the ethnic tensions. “The DPA provides a framework for a paradoxical state, which focuses on consociational power-sharing and mechanisms to overcome the dominance of ethnicity at the same time”.<sup>19</sup> There is a real risk that the continued focus on the three constituent, in the key political institutions, will exacerbate the tensions and differences between these groups. There is a causal relation between the consociational character of the Bosnian political system and extensive social exclusion

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<sup>16</sup> A. Lijphart, *Democracy in Plural societies: A comparative Exploration* (London: Yale University Press, 1977), p.233.

<sup>17</sup> B. Barry, “The Consociational Model and its Dangers”, *European Journal of Political Research* 3 (1975), pp.393-411

<sup>18</sup> G. Krasniqi, “Equal Citizens, Uneven Communities”, *Ethnopolitics* 14.2 (2015), p.213.

<sup>19</sup> S. Keil and A. Kudlenko, “Bosnia and Herzegovina 20 Years after Dayton: Complexity Born of Paradoxes”, *International Peacekeeping* 22.5 (2015), p.481.

rendered through ethno-political practices.<sup>20</sup> One of the principle aims of the DPA was to put an end to the brutal civil war by resolving the ethnic conflict in the area. However, by keeping ethnicity central to political participation, it risks reinforcing these tensions.

Reynolds proposes that “by freezing cleavages, consociationalism actually reinforces the kinds of conflict it was designed to resolve in the first place”.<sup>21</sup> The DPA was drafted in such a way that it freezes the importance placed on ethnicity in political participation at the end of the war and this is almost impossible to reform due to the national interest veto. Moreover, the exclusion of ‘others’ from the Presidency and the House of Peoples has created social exclusion. The constitutional framework has created a power-sharing system that is ineffective due to ongoing conflict between the constituent peoples and excludes all other minority groups from equal and effective political participation. This exacerbates the minority rights situation and complicating the journey to Europe.

Consociational democracies call for a veto power to ensure that all minority groups have the opportunity to veto any issue which is against their national interest as minority groups are often unable to compromise. The idea behind the vital national interest was to provide checks and balances to guarantee the rights of the constituent peoples,<sup>22</sup> as the veto can also prevent minority groups liaising together at the expense of one of the other groups. However, the veto power has to date slowed down the process on European integration<sup>23</sup> and member state building. It can lead to a political deadlock if groups continue to use their veto and are unwilling to compromise as there is no formal process on how to avoid this deadlock. In Bosnia, political leaders are not able to come to an agreement in how to implement the ruling

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<sup>20</sup> E. Sarajlic, "The Convenient Consociation: Bosnia and Herzegovina, Ethnopolitics and the EU", *Transitions* 51 (2011), pp.1-2

<sup>21</sup> A. Reynolds, "Majoritarian or Power-Sharing Government", in M. Crepaz, T. Koelble and D. Wilsford (eds), *Democracy and Institutions: The Life Work of Arend Lijphart* (Ann Arbor: University of Michigan Press, 2000), pp.169-70.

<sup>22</sup> B. Brljavac, "Institutional Discrimination against the (non) Constituent Communities in Bosnia and Herzegovina: Blocking the Europeanization Process", *Revista Română de Comunicare și Relații Publice* 13.3 (2011), p.68

<sup>23</sup> Brljavac (2011), p.59.

of Sejdić and Finci or many other reforms, including the police reforms analysed in chapter three, with the veto power being used to avoid an agreement that is seen to be detrimental to the national interests of the constituent peoples. Thus, whilst the veto is introduced to improve the likelihood of decisions being made, it can only work effectively when all groups with the veto power are willing to compromise for the good of the entire state.

The key concept in consociational democracy is power-sharing between the political leaders. However, in Bosnia “international intervention through HR impositions also undermined the power-sharing structure and political decision-making framework that Dayton provided”.<sup>24</sup> The drafters of DPA predicted that Bosnia would not be able to sustain a consociational arrangement without international supervision. Therefore the role of the High Representative (HR) was developed, to ensure civilian implementation of the agreement, as per article II of annex 10 of the Dayton Peace Agreement.<sup>25</sup> The powers of the HR include the ability to adopt law, appoint or remove civil posts including a member of the state Presidency from office and the amendment of entity constitutions, through the controversial Bonn powers.<sup>26</sup> These powers have been used extensively due to the continuing inability of the political elite to compromise; for example, on the 7<sup>th</sup> March 2001, the HR removed Ante Jelavic as a member of the Presidency.<sup>27</sup> The involvement of the International community in Bosnia has received divided support by the political leaders. The RS oppose the International presence, whereas, the Bosniak and Croat communities favour the International presence as it provides protection from Serb domination. The international involvement has created some difficulties to the use of the consociational model in Bosnia as it weakens the strength of segmental autonomy and has resulted in a lack of political consensus among Bosnian elites.<sup>28</sup>

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<sup>24</sup> Keil and Kudlenko (2015), p.482.

<sup>25</sup> UN, *General Framework Agreement for Peace in Bosnia and Herzegovina* (Dayton: UN, 1995).

<sup>26</sup> Introduced by the Peace Implementation Council in December 1997 to allow the HR to implement the Dayton peace agreement.

<sup>27</sup> The Office of High Representative, “Decision removing Ante Jelavic from his position as the Croat member of the BiH Presidency”, 3 July 2001, <http://www.ohr.int/?p=67244> accessed 07 July 2014.

<sup>28</sup> Keil and Kudlenko (2015), p.482.

Throughout this thesis the concepts of best practice and pragmatism have been endorsed. It has been proposed that adopting these concepts with regards to minority rights provides the correct balance between certainty and the consideration of context, which is often, required for minority rights issues. Consociational democracy is typically rigid and creates greater divisions between the groups of a divided society. Bieber proposes that consociational democracies are generally more highly regulated than regular democracies which lead to a danger of rendering a system immobile and inflexible.<sup>29</sup> It is evident that the concepts of pragmatism and best practice that are required for effective minority rights do not sit comfortably with the rigid and inflexible system of consociational democracy, thus, highlighting that consociational democracy is not conducive to effective minority rights.

### 3.2 The Future of Consociational Democracy in Bosnia And Herzegovina

In chapters one and two of this thesis, a combination of individual and group rights in the context of minority rights was advocated. This is supported by Mansfield who has proposed that the individual remains the primary subject of international human rights law whilst recognising the existence of groups.<sup>30</sup> The compromise between the two, sometimes conflicting sets of rights, is that the enjoyment of individual human rights requires certain human rights to directly apply to groups. In chapter one, I proposed that group and individual rights are interdependent as certain individual rights can only be exercised in the context of membership of a group, reinforcing the difficulties of separating the individual and group dimensions of human life. However, consociational democracy, places group rights as superior over individual rights. Thus, it should not continue to be the main political framework in Bosnia as it does not allow for the combined group and individual rights needed for effective minority rights.

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<sup>29</sup> Bieber (1999), p.90.

<sup>30</sup> A. Mansfield, "Ethnic but not equal: The quest for a new democratic order in Bosnia and Herzegovina", *Columbia Law Review* 103.8 (2003), p.2082.

The emphasis placed on ethnicity for political participation through consociational democracy has two clear disadvantages to minority rights and Bosnia's journey to EU membership. Firstly, it has frozen the three constituent peoples in their power-struggles, with political power distributed according to the 1991 census which took place prior to the war. Whilst a census took place in Bosnia in 2013, the results were only officially published in June 2016, after they were contested by the Bosnian Serbs, due to the inclusion of non-permanent Bosnian residents in the statistics. The census results show that the overall population of Bosnia has fallen by 824,000 since 1991,<sup>31</sup> mostly as a result of the civil war that took place. The results show an increase in the Bosniak population which made up 43.47% of the population in 1991 to 50.11% in 2013. The Serb population has remained comparable at 31.21% of the population in 1991 compared to 30.78% in 2013, whereas the Croat population fell from 17.38% to 15.43% and 'others' fell from 6.77% to 2.73%.<sup>32</sup> The results show that consociational democracy has frozen a system which gives the three constituent peoples equal power despite the population not being equally split between the three groups. Moreover, I suggest that the fall in the 'others' population is a direct result of the minority rights issues faced by this group, following the DPA. Secondly, the continued use of consociational democracy further exacerbates the minority rights situation, largely excluding the 'others' from political participation. If Bosnia is to develop its minority rights as required by the EU, consociational democracy is not the most appropriate framework moving forward.

#### 4. The Triadic/ Quadratic Nexus and Bosnia and Herzegovina

In chapter four, the triadic and quadratic nexuses were used as a possible justification for the different minority rights standards found in Latvia, when compared to the other CEECs. Brubaker claims that the development of successor states into

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<sup>31</sup>The Guardian, "Bosnia-Herzegovina has lost a fifth of its pre-war population, census shows", 1 July 2016, <https://www.theguardian.com/world/2016/jul/01/bosnia-herzegovina-has-lost-a-fifth-of-its-pre-war-population-census-shows> accessed 20 September 2016.

<sup>32</sup>Agency for Statistics of Bosnia and Herzegovina, "Census of Population, Households And Dwellings In Bosnia And Herzegovina, 2013 Final Results", 30 June 2016, <http://www.popis2013.ba/popis2013/doc/Popis2013prvolzdanje.pdf> accessed 20 September 2016, pp.54-78.

independent states created a triadic nexus linking the national minorities, newly nationalising states in which they live and the external 'homelands' which they belong or can be construed to belonging, by ethno cultural affinity.<sup>33</sup> Smith further developed this into the quadratic nexus, in the context of the CEEC enlargement, on the basis that the role of international organisations should be central to any discussion of post-communist identity politics. He argued that it is more appropriate to talk of a quadratic nexus and the dynamics of the national question by looking at the nationalising state, national minorities, an external national homeland and the role of international institutions.<sup>34</sup> If a state is able to satisfy these different elements of the nexus, this can be used to explain the different treatment and integration of minorities, in that state.

Whilst developed to analyse the CEECs, the triadic and quadratic nexus can be used to explain the situation in the Western Balkan states. According to Krasniqi, it is suitable

Due to the fact that state-building and reconstruction in post-1989 Europe was characterized by the nationalization of the political space and attempts to redefine political and national identities, which in many cases led to the eruption of conflict, the quadratic nexus offers a useful framework in the study of the tension between various actors, understood not as static concepts but as arenas of struggle for competing stances, as well as understandings of statehood and nationhood.<sup>35</sup>

In order to determine whether the nexuses can be used to explain the minority rights standards in Bosnia, it is necessary to consider the four elements outlined above and determine whether or not Bosnia satisfies each of these elements.

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<sup>33</sup> R. Brubaker, *Nationalism reframed: Nationhood and the national question in the new Europe* (Cambridge: Cambridge University Press, 1996), p.4.

<sup>34</sup> D. Smith, "Framing the national question in Central and Eastern Europe: A Quadratic Nexus?", *Global Review of Ethnopolitics* 2:1 (2002), p.19.

<sup>35</sup> G. Krasniqi, "Quadratic Nexus' and the Process of Democratization and State-Building in Albania and Kosovo: A Comparison", *The Journal of Nationalism and Ethnicity* 41.3 (2013), p.395.

The first element of the triadic nexus identified by Brubaker is the nationalising newly independent (or newly reconfigured) states. At first glance, it is difficult to see that Bosnia can satisfy this element as Brubaker states that a newly nationalising state has five elements: a core nation, a claim of ownership, a weak cultural, economic or demographic position within the state, weakness must require state action to strengthen the core nation which is remedial or compensatory.<sup>36</sup> In the case of Bosnia, it was established in chapter three of this thesis that it is a weak state in need of action and state building to improve its overall strength. However, the three constituent peoples, each with equal powers, makes it difficult to identify a clear core nation, with a claim of ownership over Bosnia. However, in critiquing Brubaker's triadic nexus with the case studies of Albania and Kosovo, Krasniqi states that "regardless of the fact that neither... can be classified as "ethnic" states where state ownership belongs to the core nation and where minorities are excluded from the political process and deprived of their cultural and political rights, both cases involve a quadratic relationship".<sup>37</sup> This is due to the fact that these states have strong civic and multi-ethnic underpinnings which support of the application of quadratic nexus in larger context of state building, and so it necessary to go beyond the "civic vs. ethnic" divide.<sup>38</sup> Thus, in following Krasniqi's understanding of the nationalising state, to mean the broader state building process, the ongoing state building in Bosnia, as outlined in chapter three, satisfies this element.

The second element of the triadic nexus is the existence of a national minority, which makes a demand for state recognition of the basis of their distinct ethno-cultural nationality, and the assertion of certain collective, nationality based cultural or political rights.<sup>39</sup> This can be demonstrated in Bosnia by the existence of the constituent peoples made up of the Bosniaks, Croats and Serbs who are all equally involved in the power-sharing system of Bosnia through consociational democracy, where no single group has a majority. Moreover, there is the active group of 'others',

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<sup>36</sup> Brubaker (1996) p.5.

<sup>37</sup> Krasniqi (2013), p.407.

<sup>38</sup> Krasniqi (2013), p.408.

<sup>39</sup> Brubaker (1996), p.6.



who have become increasingly active in their demands for recognition by the state, as demonstrated by the Sejdić and Finci case.

The final element to Brubaker's triadic nexus is the existence of external national homelands. States become an external national homeland when cultural or political elites of the homeland feel a sense of responsibility to the ethnic co-national who resides in other states. The homelands will usually monitor the condition, promote the welfare, support the activities and institutions as well as take measures to protect the interests of their ethnonational kin in other states.<sup>40</sup> In the case of Bosnia, there are two clear external national homelands. On the one hand, the RS is monitored by Serbia. This creates significant tensions between the RS and the Federation, with frequent claims by the RS that they will separate from Bosnia in order to re-unite with Serbia. On the other hand, there is also the less controversial homeland of Croatia, for the Bosnian Croat population in the Federation.

In addition to the three elements of Brubaker's triadic nexus, Smith highlights the need to include international institutions, such as the EU and the Council of Europe into this nexus, as they have become fundamental to influencing policy and state building in the Western Balkans. In chapter three, the extensive efforts of the EU to both integrate the Western Balkan states and to aid in the process of state building were analysed. Despite the fact that these efforts have to date<sup>41</sup>, not proven entirely successful, the attempts made by the EU and other European institutions cannot be overlooked when considering the state building process in Bosnia. The relationship between these four different elements of the nexus; the nation state, a national minority, the external homeland and the role of international institutions could be used to explain the differing levels of minority rights in Bosnia. However, the following section of this chapter shall examine whether the different treatment of the others is really permissible despite this, examining the involvement of the European Court of Human Rights (ECtHR) and minority rights standards in Bosnia.

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<sup>40</sup> Brubaker (1996), p.58.

<sup>41</sup> April 2017.

## 5. Bosnia and Herzegovina and the European Court of Human Rights

As indicated in earlier parts of this thesis, the case of *Sejdić and Finci v. Bosnia and Herzegovina*<sup>42</sup> emerged from two separate applications to the ECtHR heard together in the Grand Chamber on 22 December 2009. Both individuals were prevented from standing for candidacy as a direct result of articles V and IV of the Bosnian constitution which reserved these positions for the constituent peoples. The applicants argued that their inability to stand for these positions as a result of their ethnic background, which placed them in the category of ‘others’ was discriminatory and in violation of the European Convention on Human Rights. These provisions were held to be discriminatory as analysed in chapter three, as the constitution failed to protect the political rights of minorities. As indicated in chapter three, compliance with the judgment is now a requirement for EU membership. The addition of compliance with the judgment and the necessary constitutional reforms creates another level of minority rights that surpasses the obligations of existing member states. It is evident that the minority rights required in Bosnia for membership embodies the double standards claims that have been made throughout this thesis and will be explored throughout the remainder of this chapter.

The discriminatory nature of political participation had previously been raised in the case of *Pilav v. Bosnia and Herzegovina*.<sup>43</sup> Pilav, a Bosniak sought to run for the national President representative in the RS, but was not eligible as he did not associate with the Serb population, the majority constituent peoples in the RS. The Bosnian Constitutional Court issued an Opinion in March 2005, stating that the provision in the constitution preventing Pilav from running for the Presidency did not violate protocol no. 12 of the European Convention on Human Rights. The Court felt that the exclusion served the legitimate aim to maintain peace and reduce ethnic tensions as per the aims of the DPA and so was reasonably justifiable. This decision was upheld in appeal

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<sup>42</sup> *Sejdić and Finci v. Bosnia and Herzegovina* Application Nos. 27996/06 and 34836/06 (European Court of Human Rights, 22<sup>nd</sup> December 2009).

<sup>43</sup> *Pilav v. Bosnia and Herzegovina* Application No. 2678/06 (Constitutional Court of Bosnia and Herzegovina, 29 September 2006).

with a majority of seven votes to two. The Courts accepted that the provisions in article V of the Bosnian Constitution restricted the rights of certain citizens but held;

Given the current situation in Bosnia and Herzegovina and specific nature of its constitutional order as well as bearing in mind the current constitutional and law arrangements, the challenged decisions of the Court of Bosnia and Herzegovina and CEC did not violate the appellants' rights under Article 1 of the Protocol no. 12 to the European Convention... It means that they serve a legitimate aim, that they are reasonably justified.<sup>44</sup>

This position is not reflected in the decision of *Sejdić and Finci* in the ECtHR. The Court held by fourteen votes to three that Bosnia had violated article 14 (prohibiting discrimination) of the European Convention on Human Rights taken in conjunction with article 3 of protocol no.1 (right to free elections for a legislature) as regards the applicant's ineligibility to stand for election to House of Peoples. The court also held by sixteen votes to one that Bosnia had violated article 1 of protocol no.12 with regards to the applicant's ineligibility to stand for the Presidency. Furthermore, it was the first time the Court applied the general prohibition of discrimination under article 1 of protocol no.1.

There was little debate over the question as to whether articles V and IV of the constitution were discriminatory: The judgment confirmed academic opinion that the provisions in the constitution that prevented 'others' from standing as candidates was discrimination.<sup>45</sup> The contentious issues of the *Sejdić and Finci* case surrounded the applicability of Convention Rights. The Court was required to consider whether article 14 of the Convention on Human Rights in conjunction with article 3 of protocol no.1 were applicable to the House of Peoples. Article 14 provides "the rights and convention shall be secured without discrimination on any ground such a sex, race,

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<sup>44</sup> *Pilav v. Bosnia and Herzegovina* Application No. 2678/06 (Constitutional Court of Bosnia and Herzegovina, 29 September 2006), p.22.

<sup>45</sup> See G. Nystuen, *Achieving Peace Or Protecting Human Rights?: Conflicts Between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement* (Dordrecht : Martinus Nijhoff, 2005).

colour language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".<sup>46</sup> This right only prohibits discrimination in regards to those rights explicitly articulated in the convention; it is necessary to provide evidence that a different convention right has also been violated, which in this case was difficult to establish. However, the Belgium Linguistic Case confirmed that the prohibition of discrimination is not limited to the core convention rights, but applicable to other articles that the state has voluntarily provided.<sup>47</sup> Following this precedent, the Court held that article 14 is applicable in conjunction with article 3 of protocol 1 and that there was a violation by Bosnia and Herzegovina for the restrictions imposed upon eligibility for candidacy for the House of Peoples.

A wide margin of appreciation is provided for states to design their own electoral systems, on the assumption that they will comply with the accompanying convention rights. The EU is pragmatic in its position on electoral systems, appreciating the need to allow states to adopt a system that best fits their political needs. The case of *Ždandoka v. Latvia* confirmed that states enjoy considerable latitude in establishing constitutional rules on their own MPs, including the ability to set criteria governing eligibility of individuals to stand in elections.<sup>48</sup> In *Sejdić and Finci*, the Court was required to determine whether the electoral and constitutional framework created by the DPA, could be justified and was within this margin of appreciation. The Court had to consider the history of Bosnia and the circumstances which lead to the inclusion of the policies in the constitution, as a means of securing peace. Moreover, it was necessary to prove that the constitutional framework was required in order to serve a legitimate aim, necessary for a democratic society and proportionate to the aim it pursued.

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<sup>46</sup> EU, *European Convention on Human Rights* (Strasbourg: EU, 1950), article 14.

<sup>47</sup> Case "*Relating to Certain aspects of the laws on the use of Languages in Education in Belgium v. Belgium*" Application Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (European Court of Human Rights, 23 July 1968).

<sup>48</sup> *Ždandoka v. Latvia* Application No. 58278/00 (European Court of Human Rights, 17 June 2004).

The Court confirmed that articles IV and V of the Bosnian constitution were legitimate at the time that they were drafted, as the concept of constituent peoples and power-sharing was a precondition for the DPA through consociational democracy and the only way to put an end to the brutal civil war. It did not deal with the question of whether the provisions were still legitimate and instead focused on the issue of proportionality. It was noted that there had been a number of positive developments in Bosnia since the DPA was enforced. In particular, the NATO Partnership for Peace, Stabilisation and Association Agreement and some constitutional amendments were seen as significant steps of political progression. These developments led to the Court to find that the restrictions placed on membership of the House of Peoples were no longer proportionate and Bosnia was found to be in breach of article 14 of the European Convention on Human Rights in conjunction with article 3 of protocol no. 1.

With respect to the eligibility to stand for the Presidency, the courts referred to article 1 of protocol 12. It provides that “the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.<sup>49</sup> In *Sejdić and Finci*, the Court decided for the first time that discrimination under article 1 of protocol 12 would replicate discrimination under article 14. As there were alternative methods available to ensure power-sharing that avoided discrimination against the ‘others’, the restrictions on the Presidency were not proportionate to the aim of peace. This interpretation of proportionality suggests that the Court is now requiring a narrow relationship between the policy and aim sought,<sup>50</sup> which may have a significant impact upon future cases.

Despite a majority ruling against Bosnia, three judges provided dissenting judgments. These judges criticised the Court for failing to take into full account the historical background and extraordinary circumstances under which the constitution

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<sup>49</sup> EU, *European Convention on Human Rights* (Strasbourg: EU, 1950), article 1 of protocol 12.

<sup>50</sup> *Sejdić and Finci v. Bosnia and Herzegovina* Application Nos. 27996/06 and 34836/06 (European Court of Human Rights, 22<sup>nd</sup> December 2009), para 50.

of Bosnia was created. Whilst Judges Mijovic and Hajiyeu agreed that the provisions of the constitution on the Presidency breached article 1 of protocol 12, they observed the country had not made significant progress and that the government remains highly unstable. Both judges argued that the provisions were reasonable and proportional and that it would be ill-advised and inappropriate to strike down provisions that may be unjust from a human rights perspective, but are necessary for peace and stability.<sup>51</sup> The dissenting judges proposed that changes to the constitutional framework of Bosnia could have negative repercussions on the present day balance of power and damage the fragile status quo. There was an underlying fear amongst these judges that civil unrest remains a real possibility in Bosnia. Judges Mijovic and Hajiyeu did not find that the provisions concerning the House of Peoples violated article 14 in conjunction with article 3 of protocol 1.

Judge Bonello dissented on both issues, claiming that no state “should be placed under a legal or ethical obligation to sabotage the very system that saved its democratic existence”.<sup>52</sup> Judge Bonello could not support externally imposed reforms to a domestic constitution that could have the potential of damaging the stability and security of a fragile country, yet this is what may occur as a result of compliance with the judgment becoming a requirement for EU membership. None of the dissenting judges were willing to interpret the progress made in Bosnia as significant enough to jeopardise the power balance and instead adopted the 'peace by all means' approach, as endorsed by the Bosnian Constitutional Court.

On the basis of the fragile and complicated relationship between the ethnic groups, it is difficult to suggest that foreign jurists are able to assess Bosnia’s readiness to overcome ethnic power-sharing.<sup>53</sup> This position reflects the importance of context that has been highlighted throughout this thesis. Whilst foreign intervention, through

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<sup>51</sup> *Sejdić and Finci v. Bosnia and Herzegovina* Application Nos. 27996/06 and 34836/06 (European Court of Human Rights, 22<sup>nd</sup> December 2009), partly concurring and partly dissenting judgments.

<sup>52</sup> *Sejdić and Finci v. Bosnia and Herzegovina* Application Nos. 27996/06 and 34836/06 (European Court of Human Rights, 22<sup>nd</sup> December 2009), dissenting judgment.

<sup>53</sup> C. Tran, "Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision *Sejdić and Finci v. Bosnia and Herzegovina*", *Human Rights Brief* 18.2 (2011), p.6.

the Courts or other institutions may provide a state with the support required to overcome internal difficulties, they are not always best placed. In applying the European Convention of Human Rights, the Court tried to treat Bosnia the same as all other states that have ratified the Convention. I propose the Courts should have been more pragmatic in their approach and had more consideration for the complex historical background that is difficult for any external body to fully appreciate. The need to balance minority rights with the greater status quo seems to have been ignored. The next part of this chapter will provide an analysis of the reform proposals for the constitution, which are aimed at ensuring a higher minority rights standard. It will demonstrate that the reforms which the EU expects Bosnia to implement have created an unfair burden, and are too intrusive on domestic policy.

#### 6. The Reform Options for Bosnia And Herzegovina; A Turbulent Journey to Europe

On finding Bosnia in violation of both article 14 in conjunction with article 3 of protocol no. 1 and article 1 of protocol no.12 of the European Convention on Human Rights, the Court ordered costs and damages. In the *Sejdić and Finci* ruling, the Court advised that constitutional change was necessary in the composition and function of both the House of Peoples and the Presidency. However, the Court did not offer any guidance or suggestions as to the reforms it envisaged; it was not seen appropriate for a Court to dictate to a state how to reform its constitution, for fear that it would be interpreted as institutional interference. In September 2012, in a joint statement by Commissioner Štefan Füle and Secretary General of the Council of Europe Thorbjørn Jagland on Bosnia's EU membership application, made it evident that the implementation of the *Sejdić and Finci* case had become part of Bosnia's Road Map into Europe. In the statement, they noted;

With great disappointment that the institutional and political leaders of Bosnia and Herzegovina missed the first timeline for implementing the Road Map and did not submit their joint proposal on the basis of political agreement to the Parliamentary Assembly for making the Constitution of Bosnia

and Herzegovina compliant with the European Convention on Human Rights and Fundamental Freedoms by 31 August.<sup>54</sup>

Despite missing the deadline, Füle and Jagland made it clear that “the EU Road Map remains valid”<sup>55</sup> for Bosnia and Herzegovina but that the judgment “has to be executed”,<sup>56</sup> if Bosnia hopes to be considered for membership. The judgment thus adds another requirement to the increasing list that the EU is placing on Bosnia in order to be considered a suitable candidate.

Minority rights continue to be a priority to EU membership requirements and conditionality.<sup>57</sup> However, there has been a shift away from minority rights policy towards consensus politics in order to deal with ethnic relations. The relationship between compliance with the ruling and Europeanisation of Bosnia has been called in to question following the decision by the EU to end the deadlock in progress towards membership by activating the Stabilisation and Association Agreement of Bosnia in March 2015. “Foreign ministers of the 28-nation EU said they had agreed to proceed with the conclusion and entry into force of the SAA”,<sup>58</sup> on the basis of a written commitment by the political elite to implement the reform required by the Sejdić and Finci ruling. Thus, whilst the EU has removed the requirement of implementation of the ruling for the stabilisation and association agreement in order to allow some progress in the Europeanisation process of Bosnia, the ruling continues to form part of

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<sup>54</sup> Council of Europe, “Statement by Commissioner Štefan Füle and Secretary General of the Council of Europe Thorbjørn Jagland on the Road Map for Bosnia and Herzegovina's EU membership application and the execution of the European Court of Human Rights’ “Sejdić and Finci”- judgment”, 3 September 2012, [http://europa.eu/rapid/press-release MEMO-12-641\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-12-641_en.htm?locale=en) accessed 03 August 2013.

<sup>55</sup> Council of Europe, “Statement by Commissioner Štefan Füle and Secretary General of the Council of Europe Thorbjørn Jagland on the Road Map for Bosnia and Herzegovina's EU membership application and the execution of the European Court of Human Rights’ “Sejdić and Finci”- judgment”, 03 September 2012, [http://europa.eu/rapid/press-release MEMO-12-641\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-12-641_en.htm?locale=en) accessed 03 August 2013.

<sup>56</sup> Council of Europe, “Statement by Commissioner Štefan Füle and Secretary General of the Council of Europe Thorbjørn Jagland on the Road Map for Bosnia and Herzegovina's EU membership application and the execution of the European Court of Human Rights’ “Sejdić and Finci”- judgment”, 03 September 2012, [http://europa.eu/rapid/press-release MEMO-12-641\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-12-641_en.htm?locale=en) accessed 03 August 2013.

<sup>57</sup> G. Vasilev, “EU Conditionality and Ethnic Coexistence in the Balkans”, *Ethnopolitics* 10.1(2011), p.73.

<sup>58</sup> M. Robinson, “EU moves ahead with Bosnia pre-accession pact”, 16 March 2015, <http://uk.reuters.com/article/2015/03/16/uk-bosnia-eu-pact-idUKKBN0MC1O520150316> accessed 30 March 2015.



the conditionality required for accession. To date, no agreement on the implementation of the ruling has been reached.<sup>59</sup> The lack of guidance from either the Court or the EU on how to reform the constitution and implement the ruling has resulted in a number of proposals put forward for reforming the Presidency and House of Peoples of Bosnia by a number of different sources. The resistance of the political elite in Bosnia to previous reform proposals on the basis that they “fall short of approximating community ideals relating to the exercise of sovereign power”.<sup>60</sup> This means it has been necessary for the EU to turn to more radical constitutional reform. One thing that is clear, is that for Bosnia to have any chance of political advancement, with the end view being EU membership, reform to the constitution and a change in the minority rights standards is required. The proposed reforms must be analysed, in order to reach a conclusion on whether the EU is consistent with its minority rights standards in aspiring and member states.

### 6.1 Reform Proposals of the Presidency

A number of proposals have been put forward in how to reform the role of the Presidency in order to implement the ruling and satisfy the conditionality on the political participation rights of minorities in Bosnia. It has been proposed that changing the voting system in Bosnia could go some way to complying with the judgment. The concept of centripetalism could serve as an effective framework to ensure equal political participation rights of both the constituent peoples and ‘others’. By adopting “an integrative or incentives approach, centripetalism recommends the use of electoral rules that require political leaders to make cross-ethnic appeals in order to get elected”.<sup>61</sup> Horowitz recommends alternative voting as it allows the ranking of all candidates listed on the ballot,<sup>62</sup> though this method has not proven successful in Bosnia. In the past when alternative voting was used for presidential elections in the

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<sup>59</sup> April 2017.

<sup>60</sup> Vasilev (2011), p.60.

<sup>61</sup> A. McCulloch, “Does Moderation Pay? Centripetalism In Deeply Divided Societies”, *Ethnopolitics* 12 (2013), p.111.

<sup>62</sup> D. Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society* (Berkeley: University of California Press, 1991).

RS, it simply reinforced the tendency to reward extremism.<sup>63</sup> Thus, Reilly favours the single transferable vote for an electoral system based on centripetalism as it combines proportional and preferential rules.<sup>64</sup> This system of voting allows voters to rank the candidates in order of their preference. When a candidate reaches the specified quota of first preferences they are immediately elected, surplus votes not used by winning candidates are then redistributed for a second round of counting for any remaining seats. This system has a proven track record in deeply divided societies such as Northern Ireland.<sup>65</sup> However, there is nothing to suggest that this would implement the Court ruling. It would remain highly discriminatory towards the constituent peoples and would in practice not provide the 'others' with the desired political participation in the Presidency.

There is support for maintaining the current situation with one member of the Presidency from the RS and two from the Federation but removing the ethnic determinant in order to avoid discrimination.<sup>66</sup> It is suggested, that having members elected by the Parliamentary Assembly of Bosnia would improve inter-ethnic cooperation and compromise.<sup>67</sup> Direct elections encourage people to vote for the persons considered to be the strongest advocates of their own peoples and not the person best for the job and reduce the current position, which prevents Serbs from the Federation or Bosniaks or Croats from the RS from being able to stand or vote for a position on the Presidency. Furthermore, direct elections create greater legitimacy to the role of the Presidency and make it more difficult to reduce its powers to other bodies. However, Bosnian citizens display distrust towards politicians, as seen in the February 2014 riots across the country, making it unlikely that this framework is desirable in the Bosnian context. At present, political decisions are often made by

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<sup>63</sup> McCulloch (2013), p.127.

<sup>64</sup> B. Reilly, *Democracy in Divided Societies: Electoral Engineering for Conflict Management* (Cambridge: Cambridge University Press, 2001), p.17.

<sup>65</sup> Reilly (2001), pp.129-148.

<sup>66</sup> E. Hodžić and N. Stojanović, "New/Old Constitutional Engineering. Challenges and Implications of the European Court of Human Rights' decision in the case of Sejdić and Finci v. BiH", 20 June 2011, <http://www.analitika.ba/en/publications/%E2%80%9Cnewold-constitutional-engineering%E2%80%9D> accessed 24 June 2014, p.95.

<sup>67</sup> Venice Commission, "Opinion on the Draft Amendments to the Constitution of Bosnia and Herzegovina", 12 June 2006, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2006\)019-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)019-e) accessed 27 June 2014.

indirectly elected persons (Council of Ministers) or externally imposed (by the HR), reducing the legitimacy of an institution such as the Presidency. Shifting to direct elections may increase the Presidency's legitimacy, but may not be sufficient to shift the decision making away from indirectly elected bodies and increase citizens trust with the politicians in power<sup>68</sup>. Moreover, there is uncertainty that this reform would actually provide for representation of 'others'. Whilst this reform would eliminate the territorial discrimination found in the current constitution of Bosnia, there is no guarantee for the representation of 'others', thus, one would argue that it fails to fully deal with the minority rights issues.

The introduction of an individual President who would be elected indirectly by the parliamentary assembly of Bosnia would reduce the powers of the Presidency, shifting power to the Council of Ministers.<sup>69</sup> A rotation rule would guarantee that all constituent peoples are represented, and ensures that the President enjoys support among all peoples. To implement the ruling, it would be necessary to create a rotation system which included the constituent peoples and 'others'. Difficulties would arise in how to select the representative of 'others' as it is not an easily identified category of individuals, made up of numerous ethnic groups, including but not limited to, the Roma and Jewish communities identified in the ruling. It would be necessary to create a more rigid classification system that determined which group individuals fall under discarding the current self-identification process. However, the process of creating a rigid system of classifying people into ethnic or national groups is something which is not desirable as it has concerning implications. For example, as it may be difficult to accommodate those of mixed ethnicity. Moreover, there is an increasing trend, especially among the younger population not to identify with their ethnic group at all, but to identify themselves as Bosnian. To force an individual to be classified into rigid national and ethnic groupings could create tensions between the different ethnic groups. Furthermore, shifting the powers of the Presidency to the Council of Ministers

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<sup>68</sup> Hodžić and Stojanović (2011), p.93.

<sup>69</sup> Venice Commission, "Opinion on the Draft Amendments to the Constitution of Bosnia and Herzegovina", 12 June 2006, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2006\)019-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)019-e) accessed 27 June 2014.

would transform the Presidency into a mere figurehead but fail to deal with the issues surrounding the composition of the presidency itself.

Alternatively, Horwitz advocates a plurality voting system with a directly elected single-person Presidency with territorial distribution requirements, encouraging moderation within political parties.<sup>70</sup> Under this model, the winning candidate would need a simple majority ensuring a greater level of support, reducing the ethnic extremism currently dominating Bosnian politics. Moreover, this would improve inter-group relations and cooperation as the Presidency would not be able to only advocate for their own political party, they would also need to serve other ethnic groups to achieve a majority. This would increase trust in the political system as citizens would be able to see the impact of 'one person, one vote', as citizens would see that their vote has a direct effect on the election result. This system has the potential to reduce the ethnic dominated politics which is presently found in Presidency as under this voting system, it would in theory, allow for the election of any candidate up for election as it removes the ethnic quota. However, it is unlikely that any candidate for the Presidency would be successful in gaining plurality support in the current political climate. At present, ethnic values remain the motive of the political elite and there is no political party that is able to maintain its own political values parallel to presenting a multi-ethnic front. The theory of this system is promising for the constitutional reforms required in Bosnia; the reality makes it more of a distant dream.

According to Bochsler, the elimination of the quota for the three constituent people is not a viable solution.<sup>71</sup> Rather, Bochsler proposes a five-seat Presidency to be elected by single non-transferable vote in a single national electoral district that could be combined with a seat guarantee for each of the three constituent peoples.<sup>72</sup> The three constituent peoples guaranteed seats would leave the two remaining seats open

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<sup>70</sup> D. Horowitz, "Conciliatory institutions and constitutional processes in post-conflict States", *William and Mary Law Review* 49 (2008), p.1217.

<sup>71</sup> D. Bochsler, "Non-discriminatory Rules and Ethnic Representation: The Election of the Bosnian State Presidency", *Ethnopolitics* 11 (2012), p.79.

<sup>72</sup> Bochsler (2012), p.79.

to electoral competition. Whilst this framework provides for the possibility of 'others' to be elected, as it is open to all individuals, the real impact of this reform proposal is questionable. This form of election would most likely result in two seats for the Serb and Bosniak representatives and one seat for the Croat representative, with the continued exclusion of 'others'. To implement the ruling, it would be necessary to have the fourth seat guaranteed for 'others' and the fifth seat open to electoral competition. Furthermore, for this framework to provide equal rights for 'others', it would be necessary to create a veto power for the 'others'. Without the same veto power, a seat in the Presidency would provide the group of 'others' with less power than the constituent peoples and so would continue to be discriminatory. However, providing a veto power to the 'others' would be a very contentious position to adopt. It is unlikely the constituent peoples would approve the introduction of such a policy, for fear that it would impact upon their own interests. Moreover, it would be almost impossible to introduce a veto power on the basis of national vital interest to a group that does not represent a single ethnic group, as vital interests would vary in the group.

The most complicated framework proposed for the reform of the Presidency is the Geometric system.<sup>73</sup> This would radically change the structure of politics in Bosnia, creating a single electoral unit which would allow citizens to vote for any candidate of their choice. A single candidate would be chosen according to whether they had scored the highest rate of geometric means. The division of the Federation, creating one Croat dominated region and one Bosniak dominated region would help deal with the feeling across many Croat dominant parties that they are not proportionally represented. This would increase voter confidence with voters feeling they could influence the election, encouraging state wide campaigning, and positively influencing inter-ethnic relations.<sup>74</sup> This system would be open to 'others' in accordance with the judgment as there is no ethnic element to eligibility to stand.<sup>75</sup> However, the creation of regions through the Geometric system simply shifts the territorial issues away from

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<sup>73</sup> Hodžić and Stojanović (2011), p.98.

<sup>74</sup> Hodžić and Stojanović (2011), p.98.

<sup>75</sup> Bochsler (2012), p.82.

the entities into these regions and so fails to fully eliminate the territorial discrimination element. As an alternative, Hodžić, and Stojanović proposed a Geometric mean plus seven; the state would become a single electoral unit divided into the three regions and every citizen would have two votes instead of one, with an additional member to be elected from Brčko district.<sup>76</sup> This would lead to the Presidency evolving into a government system similar to the Swiss model, whereby each of the seven members would also be a minister with considerable competencies supported by secretaries of state. However, the geometric systems are complicated and run to risk of alienating the voting public; if citizens are unable to understand the effect of their vote, it is possible that they will not vote at all. A low voter turnout raises questions about the validity of the results and so I suggest that in an effort to preserve the democratic nature of the election process, these reform proposals are not suitable.

The Venice Commission proposed a single President to be assisted by two or three vice-Presidents, on a rotation cycle. The House of Representatives would nominate candidates on the basis that not more than one candidate can be from each of the constituent peoples or 'others'. Once each of the caucuses of the House of Peoples has elected one candidate, the final election would be in the hands of the House of Representative which would provide a guarantee of all three members enjoying legitimacy as representatives of the people of Bosnia as a whole.<sup>77</sup> This proposal has received the greatest level support from both the international community and domestic political parties; the HDZ (Croatian Democratic Union) suggest it could eliminate the existing flaws owing to the fact that the ethnic quota for the election of the Presidency could be eliminated. Furthermore, the SBiH (Party of Bosnia and Herzegovina) proposes the creation of a fourth member of the state Presidency elected by 'others', which is supported by the SBB (Union for a better future of Bosnia and Herzegovina) who advocate a single Presidency with three vice-Presidents. This proposal would successfully implement the ruling of Sejdić and Finci as

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<sup>76</sup> Hodžić and Stojanović (2011), p.104.

<sup>77</sup> Venice Commission, "Opinion On The Draft Amendments To The Constitution Of Bosnia And Herzegovina", 12 June 2006, [http://www.Venice.Coe.Int/Webforms/Documents/?Pdf=CDL-AD\(2006\)019-E](http://www.Venice.Coe.Int/Webforms/Documents/?Pdf=CDL-AD(2006)019-E) accessed 27 June 2014.

it would provide for the representation of 'others', on the assumption that one of the positions was reserved. There is, however, little evidence that this framework would effectively deal with the discrimination of those constituent people, residing in the wrong entity. In order to ensure that the Presidency is free from both ethnic and territorial discrimination, it is necessary to remove the current territorial requirements.

Each of these proposed reforms of the Presidency have been unable to gain sufficient domestic political support to progress any further than being a mere proposal. The constituent persons fear that any restructuring of the current tri-party Presidency will result in a loss of power and control for their peoples. At present, the Bosniaks, Croats and Serbs each have equal political power in the Presidency whilst the other are excluded from this group. Implementing a reform to the Presidency which included the 'others' within the Presidency would comply with the court ruling. However, these reform proposals interfere with domestic policy in the pursuit of minority rights standards. Whether this interference is justifiable will be considered in further detail in section six of this chapter which will examine whether the EU has acted as a normatively towards Bosnia.

## 6.2 House of Peoples Reform Proposals

The Sejdić and Finci judgment also requires reform to the House of Peoples to provide for the representation of 'others'. Article IV of the Constitution provides that membership of the House of Peoples is divided between the population of Bosnia, with two-thirds of the members from the Federation and one-third from the RS. Members are equally distributed between the three constituent peoples and are appointed by the entity Parliaments. The House of Peoples is the main institution where the constituent peoples exercise the vital interest veto. In the House of Peoples, the veto power may be used by the constituent peoples when legislation is against their national vital interest. If the use of the veto is approved by a two-third vote on the members 'home' Parliament within ten days of its referral, the legislation is blocked. The lack of a clear definition of the term 'vital interest' has led to an abuse of

process and political deadlock as evidenced by several failed attempts to implement the Sejdić and Finci ruling. This procedure adds to the discriminatory nature of the House of Peoples as the 'others' do not have a veto power. There is no representation of those who do not form the constituent peoples in this body.

Overall, there have been fewer proposals on how to comply with the court judgment and remove the discriminatory nature of membership of this institution. Whilst reforming the Presidency would lead to constitutional changes, the complexity of the process of reforming a large institution, such as the House of Peoples, may explain the cautious approach that has been taken to reform proposals. The proposals have generally focused on reforming the veto power, rather than the makeup of the House of Peoples itself. It is unclear if any of these proposals are sufficient to implement the Court ruling due to the limited advice provided by the Courts.

In February 2008, the Venice Commission "received a request from the Central Electoral Commission of Bosnia and Herzegovina to prepare opinions on the amendments to the Election Code".<sup>78</sup> The Commission noted that the best reform strategy would be to move the vital veto power to the House of Representatives and abolish the House of Peoples,<sup>79</sup> as a streamlining procedure, removing the discriminatory composition of the House of Peoples. In theory, this reform would deal with the discrimination problem in the current set up of the House of Peoples as there is minority representation provided for in the House of Representatives. However, from a constitutional perspective, it may not be a viable option. A bicameral system ensures a degree of checks and balances, as the two houses should monitor the actions of each other. For this reason a bicameral system is found in most democracies, including the UK, with the House of Lords and House of Commons. The removal of the House of Peoples would transform the constitutional set up of Bosnia into a single chamber system, reducing parliamentary accountability. With trust in the political system low in Bosnia under the current bicameral system, a shift to a single

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<sup>78</sup> Council of Europe, "Bosnia and Herzegovina", 18 February 2008, <http://www.venice.coe.int/webforms/events/?id=816> accessed 2 June 2014.

<sup>79</sup> Council of Europe, "Bosnia and Herzegovina", 18 February 2008, <http://www.venice.coe.int/webforms/events/?id=816> accessed 2 June 2014



chamber would lead to further political distrust in Bosnia, causing more harm than good.

In their study, Hodžić and Stojanović state that it should be possible to implement the judgment by reducing the competencies of the House of Peoples without having to incorporate the category of 'others' into its structure.<sup>80</sup> The House would continue to serve as a safeguard for the constituent peoples, as a body for the protection of vital national interest on issues involving minority rights protection, but no longer act as a legislative body. The legislative powers would be transferred to the Council of National Minorities, which would act as a separate body with similar powers, minus the veto. The absence of clear guidelines from the relevant EU bodies that monitor the execution of the judgment raises questions if this proposal is sufficient to fully implement the ruling. In the absence of any explicit inclusion of 'others' into this reformed version of the House of Peoples, there remains the risk of Bosnia violating the European Convention on Human Rights. A similar framework to this was proposed in both the April and Butmir packages,<sup>81</sup> but failed to gain the necessary support; one must question why it would be successful now. For the House of Peoples to become a body reserved for the protection of minority rights, it is essential that those citizens who do not fall under one of the constituent peoples are given a voice, above all other reforms.

An alternative reform of the House of Peoples is to replicate the setup of the entities and include delegates from the 'others' in the House of Peoples.<sup>82</sup> In the Federation, seventeen delegates from each of the constituent people and seven 'others' are nominated by the cantonal assemblies. The number of delegates per canton corresponds to its population, while the ethnic structure should also be proportional. However, the seats reserved for 'others' do not provide full representation or safeguarding of vital national interests as they have no active decision-making powers. The Council of Peoples in the RS, on the other hand, contain

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<sup>80</sup> Hodžić and Stojanović (2011), p.112.

<sup>81</sup> According to Amendment II, Item 8 of the April Package, the House of Peoples would take part in constitutional amendments and electing the presidency.

<sup>82</sup> Hodžić and Stojanović (2011), p.106.

a caucus for the 'others' with limited powers; they can help decide on vital interests of the constituent peoples but not on their own national interests. In both the Federation and RS, 'others' are included as delegates of the bodies but do not have equal membership with the constituent peoples; they are mere observers rather than active participants, without full political participation rights. Thus, reforming the House of Peoples to replicate the entity levels would fail to provide for equal rights of 'others'. This proposal does not remove the discrimination of the current constitutional framework, rendering it void in the implementation of the Court ruling.

The creation of 'others' delegates in the House of Peoples could lay foundations for a more active role in the state legislative process. Placing a veto power in the hands of delegates from the ranks of other could reduce inter-ethnic tension,<sup>83</sup> though this has been objected. The only thing uniting members of the 'others' is that they are not a member of the constituent peoples. The group itself comprises of citizens from up to seventeen different ethnic groups with diverging needs and requirements. The lack of unity and cohesion would cause difficulties on questions of vital national interest. Furthermore, the current framework with veto powers is already faced with deadlock situations creating difficulties in passing legislation. The addition of another veto could further hamper the functioning of the legislative bodies and lead to additional blockading and abuse of decision-making process.<sup>84</sup> The deadlock problem could be dealt with by increased direct representation in parliament by replacing the existing House of Peoples with an entity based upper house. However, as discussed above, 'others' are currently limited to passive roles in these institutions. Further reform of the entity constitutions would be necessary to create a fully representative entity based upper house. This is not a practical solution; the existing difficulties of reaching an agreement on reform would merely be further exacerbated by the need for further reform. This highlights one of the key criticisms of consociational democracy and the issues of the veto power as analysed in section two of this chapter, supporting the assertion that consociational democracy is no longer suitable in Bosnia.

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<sup>83</sup> Hodžić and Stojanović (2011), p.110.

<sup>84</sup> Hodžić and Stojanović (2011), p 109.

The reforms that have been proposed for the House of Peoples all raise one fundamental question; do they fulfil the case ruling? The focus on reforming the veto power, fails to take into full consideration the need to remove the discriminatory elements of the House of Peoples, including membership as well as the rights of each group within the institution. In order for any reform proposal to be successful in complying with the ruling it must reform both membership and power within the House of Peoples. By considering whether or not the EU acted as a normative actor in relation to these reforms of both the Presidency and the House of Peoples in the next section of this chapter, it will be possible to determine whether the EU is too demanding of Bosnia or whether the reforms required by the ruling are so vital to minority rights that it must be followed despite the significant costs.

## 7. The European Union as a Normative Power in Bosnia and Herzegovina

In chapter four it was concluded that overall, the EU did act as a normative actor in its foreign policy decisions regarding Latvia and minority rights. In order to draw a full comparison of the minority rights requirements of Latvia and Bosnia, it is necessary to analyse whether the EU is also acting as a normative actor towards Bosnia. Unlike the CEECs enlargement process, there is only limited literature on what drives the policies made by the EU towards the Western Balkans as a whole, and even more limited literature on how it justifies the demands it places on this group of states. Most of the literature highlights the same political reasons to explain why the EU tries to act as a foreign policy actor towards the Western Balkans, as were raised in connection to the CEEC in chapter four. Vachudova continues to place an emphasis on the economic and geopolitical interests of the EU member states in an undivided Europe<sup>85</sup> as the key motivation behind European policy in the region, whereas Sijrsen suggests that there are explicit political reasons which testify to a sense of kinship based duty.<sup>86</sup> Despite the similarities in the literature on what drives the policies made

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<sup>85</sup> See M. Vachudova, *Europe Undivided: Democracy, Leverage, and Integration after Communism* (Oxford: Oxford University Press, 2005).

<sup>86</sup> H. Sijrsen, "Why expand? The Question of legitimacy and Justification in the EU's Enlargement policy", *Journal of Common Market Studies* 40.3 (2002), p.495.

by the EU towards the CEECS and Western Balkans, it must be noted that the Western Balkans is a unique region and the SAP is a special version of the EU enlargement policy.<sup>87</sup> In the context of Bosnia, the goal of state building and state consolidation is dominant and identifiable in the foreign policy decisions made by the EU. The question is whether these foreign policy decisions are normative.

In order to reach a conclusion on the question of whether the EU is acting as a normative actor in Bosnia, it is necessary to consider the key definition of a normative actor cited in chapter two of this thesis and determine whether the actions of the EU satisfy these definitions. The foreign policy decisions made by the EU towards minority rights in Bosnia draw their basis from legal norms, such as the European Convention on Human Rights, as confirmed in the Sejdić and Finci ruling. This supports Sijursen's claims that normative foreign policy must be in line with existing universal legal norms and foreign policy actor has to bind itself to these internationally agreed legal principles.<sup>88</sup> The minority rights standard required in Bosnia are based upon a legal framework found in a number of documents including the Framework Convention for the Protection of National Minorities. However, I argue that the reforms required by the EU lack normative justification as they go beyond the requirements set out in the existing legal norms on minority rights by requiring intense and intrusive reforms on the constitutional framework of Bosnia. The reforms that have been proposed to ensure compliance with the Sejdić and Finci ruling have resulted in Bosnia being held to a minority rights standard based upon international intervention unlike that found in any other member state and are not indicative of the EU acting as a normative power.

According to the Manners definition of a normative power, an international actor must undertake standard setting and there is an expectation of non-deviance.<sup>89</sup> It must be noted that Bosnia does not satisfy the concept of non-deviance. Whilst the

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<sup>87</sup> G. Noutcheva, "Fake, partial and imposed compliance: the limits of the EU's normative power in the Western Balkans", *Journal of European Public Policy* 16.7 (2009), p.1068.

<sup>88</sup> H. Sijursen, "The EU as a 'normative' power: how can this be?", *Journal of European Public Policy* 13.2 (2006), p.249.

<sup>89</sup> I. Manners, "Normative Power Europe: A contradiction in terms?", *Journal of Common Market Studies* 20.2 (2002), p.253.

Croat and Bosniak groups in general support reforms which will accommodate progress in the accession into Europe, the Serbs have opposed many of the reforms required by the EU such as the police reforms as outlined in chapter three of this thesis. In regards to the implementation of the Sejdić and Finci case, there has been clear reluctance to the required reforms. The question is whether this opposition to the required reforms sits comfortably with Manner's definition of a normative power, which required non-deviance? Unlike in Latvia where the reluctance to implement the required reforms were short-term, the opposition to minority rights and other required reforms in Bosnia are deeply rooted in the ethnic tensions of the country and cannot easily be overcome. It is for this reason I propose that it is difficult reconcile the Manners definition of a normative power with the actions of the EU in regards to Bosnia.

The final definition of a normative power to be considered is the three dimensions of a normative power proposed by Tocci.<sup>90</sup> The first dimension to consider is what an actor wants, analysing the goals of the international actor. The motivations behind the actions of the EU in Bosnia and the Western Balkans, more generally, remain unclear. Whilst the EU has been involved in Bosnia since its involvement as Peace keepers and in the role of High Representative, the current motivations to reform are only connected to enlargement policy. It is not clear these goals are normative in nature. Moreover, the second dimension that it is necessary to consider is how the actor acts in order to bring its policies into effect. I propose that the reforms which are driven by external actors, as is the case of the EU and Bosnia, cannot satisfy this dimension. It is one thing for the EU to promote reform through the principle of conditionality as was seen in Latvia. It is another for the EU to dictate constitutional reform, as in Bosnia. Finally, it is necessary to consider whether or not the actor achieves what it sets out to, and the overall impact of the actor's actions. Noutcheva claims that to date, Bosnia is only partially compliant with the required

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<sup>90</sup> N. Tocci, *Who is a normative foreign policy actor? The European Union and its global partners* (Brussels: Centre for European Policy Studies, 2008), p. 5.

reforms.<sup>91</sup> Thus, the EU has not been successful in achieving its goals in Bosnia and so it is not possible to satisfy this definition of a normative power.

The EU has never expected a potential member state to significantly alter its constitutional framework in pursuit of membership, to the extent required in Bosnia. The case study of Latvia in chapter four demonstrated the leniency the EU has previously displayed in its requirements for minority rights. With regards to the Western Balkans and Bosnia in particular, the “EU did not act on the basis of its normative basis and means based on its power of attraction. In fact, the EU, by reproducing the asymmetrical and unbalanced relationship between the candidate and potential candidate states and itself, failed to acknowledge and respond to the unique conditions and legacies of the states”.<sup>92</sup> Thus, it is necessary that the EU becomes aware of the limits of its normative power on minority rights issues and considers best practice for each individual state.

## 8. Developments in Bosnia and Herzegovina

Following on from the Sejdić and Finci ruling the ECtHR has dealt with two applications made against Bosnia raising the same issues. First, on the 15<sup>th</sup> July 2014, the court confirmed the judgment in the case of Zornić v. Bosnia and Herzegovina.<sup>93</sup> The case involved Ms Zornić, an individual who, on refusal to identify with one of the three constituent peoples but as a Bosnian Citizen was ineligible to stand for either the House of Peoples or the Presidency. The ruling reaffirmed the violation of article 14 of the convention in conjunction with article 3 of protocol no.1 and article 1 of protocol no.12. In the judgment, the Court advised that:

the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for election....without discrimination based on ethnic affiliation

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<sup>91</sup> Noutcheva (2009), pp. 1065-1084.

<sup>92</sup> S. Keil and Z. Arkan, “*The limits of normative power? EU member state-building in the western Balkans*”, in S. Keil, S. and Z. Arkan (eds), *The EU and Member State Building: European Foreign Policy in the Western Balkans. Intervention and Statebuilding*. (London: Routledge, 2014), p.27.

<sup>93</sup> *Zornić v. Bosnia and Herzegovina* Application No. 3681/06 (European Court of Human Rights, 15 July 2014).

and without granting special rights for constituent people to the exclusion of minorities.<sup>94</sup>

Second, the Pilav case as highlighted in section three of this chapter, was appealed to the ECtHR. This case involved a politician who declared himself as a Bosniak whilst residing in the RS who was legally not permitted to stand for election to the Presidency as he did not identify as a Serb. On the 9<sup>th</sup> June 2016, the court held in the case of *Pilav v. Bosnia and Herzegovina*<sup>95</sup> that this territorial ethnic discrimination violated article 1 of protocol no. 12 (general prohibition of discrimination). These two cases have highlighted the urgency in the need for reform in minority rights.

While the EU has been vocal in its demands for constitutional change, it has not been clear enough about the specific requirements expected. The SAA has failed to create a clear and comprehensive guideline to aid Bosnia and Herzegovina in the process of membership. Without a clear road map, it is difficult for the country to be confident about the goal posts for membership; the addition of the requirement to comply with the *Sejdić and Finci* case illustrates that these goal posts are a moving target. Govedarica suggests that “for a long time, the EU officials have believed that the mere process of European integration will solve the country's problems. However, when it was clear that it was not the case then the EU could not find adequate alternative instrument”.<sup>96</sup> On 12 March 2014, the EU foreign policy Commissioner Catherine Ashton announced a shift in EU attentions, away from the implementation of the *Sejdić and Finci* ruling towards other state building efforts through economic, welfare and judicial reform.<sup>97</sup> This shift shows that the EU is at a loss on how to progress with Bosnia.

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<sup>94</sup> *Zornić v. Bosnia and Herzegovina* Application No. 3681/06 (European Court of Human Rights, 15 July 2014), p. 12.

<sup>95</sup> *Pilav v. Bosnia and Herzegovina* Application No. 41939/07 (European Court of Human Rights, 9 June 2016).

<sup>96</sup> Personal interview with D. Govedarica, Executive Director, Open Society Fund, Bosnia and Herzegovina, as in B. Brljavac, “Assessing the European Criteria in Bosnia and Herzegovina: a Litmus test for the European Union”, *Journal of Comparative Politics* 5.1 (2012), p.17

<sup>97</sup> Balkan Insight, “Ashton Switches EU Focus on Bosnia to Economy”, 13 March 2014, <http://www.balkaninsight.com/en/article/eu-s-ashton-presents-new-focus-on-bosnia> accessed 15 March 2014.

All the reform proposals discussed in this chapter are more intense and intrusive on the constitutional framework of a country than the reforms that were required by Latvia in order to secure membership. Latvia was able to comply with requirements in minority rights by implementing new legislation and electoral laws that continued to be discriminatory towards the Russian minority population and without signing the Framework Convention for the Protection of National Minorities. The changes that were made to Latvian laws to provide for equal rights of native Latvians and the predominantly Russian minority population were minimal at best and had limited impact on the ground. On the other hand, Bosnia ratified the Framework Convention on the 24 February 2000 over five years before Latvia, who ratified the Convention on the 6 June 2005.<sup>98</sup> Bosnia is required to redevelop and reform its main institutional bodies. In the key findings of the 2013 Progress Report on Bosnia, the European Commission concluded that Bosnia has made very limited progress in addressing the political criteria.<sup>99</sup>

In chapter four, it was argued that double standards in minority rights obligations is not sustainable as the EU looks to continue to expand to include countries with more hostile minority rights issues. I propose that the required modifications to the constitution in Bosnia are a step too far for membership. By holding the country to such a high standard of minority rights, not seen in any existing or potential member states, the EU risks alienating Bosnia and damaging the delicate power-sharing framework. A balance must be sought between the reforms that are required by the EU and acceptance by Bosnia that there is a pressing need to develop the constitution to create an accepted political framework and understanding of the needs of the minority groups who do not form one of the constituent peoples. This includes an acknowledgement that it may not be in the best interests of Bosnia to join the EU at present.

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<sup>98</sup> Council of Europe, "Geographical Reach of the FCNM", 24 October 2008, [http://www.coe.int/t/dghl/monitoring/minorities/1\\_AtGlance/PDF\\_MapMinorities\\_bil.pdf](http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_MapMinorities_bil.pdf) accessed 7 July 2014.

<sup>99</sup> European Commission, "Key findings of the 2013 Progress Report on Bosnia and Herzegovina", 22 October 2015, [http://europa.eu/rapid/press-release\\_MEMO-13-889\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-13-889_en.htm?locale=en) accessed 3 June 2016.



It is evident that the discriminatory nature of the constitution is no longer suitable for the political framework currently found in Bosnia. This chapter has sought to demonstrate that the reforms that are needed for the compliance with the Sejdić and Finci ruling have resulted in Bosnia being held to a minority rights standard based upon international intervention and is not consistent with the requirements of other states. I strongly disagree with Guzina who states that “the more the international community opens itself to 'pragmatic' considerations in the region, the more it legitimises the exclusivist nation-building projects against which it has fought”.<sup>100</sup> In order for constitutional reforms to be successful in implementing the Sejdić and Finci case ruling, it is essential that the EU is pragmatic in its approach to minority rights. The EU must allow Bosnia the opportunity to develop their own framework and understanding of the term minority, allowing for considering of context and best practice, as endorsed throughout this thesis. This is necessary in order to avoid a repeat of the problems with enforcement and minority rights standards that have occurred with the DPA. An externally drafted reform is not able to fully appreciate the complexities of the minority rights situation and the EU runs the risk of not only excluding Bosnia with its minority rights obligations but also weakening the fragile status quo. Moreover, it is necessary that the EU becomes aware of the limits of its normative power on minority rights issues and considers best practice for each individual state; the EU must work together with the existing member states and potential member states to create a unified minority rights standard that is universal across Europe.

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<sup>100</sup>D. Guzina, “Dilemmas of nation-building and citizenship in Dayton Bosnia”, *National Identities* 9.3 (2007), p.231.

## Chapter Six: Minority Rights Protections in Contemporary Europe: The Double Standards between the obligations of Member States and Candidate Countries

This thesis has examined the extent to which the EU has created double standards in its minority rights standards between its member states and candidate countries aspiring for membership. To date, literature has focused upon the double standards in minority rights at the time of the CEECs enlargement or post-accession compliance of these states.<sup>1</sup> The literature has for the most part, failed to look forward to the issue of double standards in minority rights in the states with current membership aspirations. This thesis makes an original contribution to the area of minority rights and the EU as it fills a gap in the existing literature on this issue, by offering a critical analysis of the minority rights standards required in Latvia at the time of membership in 2004 as compared with the minority rights standards required in Bosnia and Herzegovina (Bosnia) as a state currently going through the accession process. This thesis posed three main research questions to frame this analysis. Each of these research questions shall be considered in turn to highlight the key findings.

### 1. Do any Effective Mechanisms for the Protection of Minority Rights in Contemporary Europe Exist?

In order to fully answer the first research question of this thesis, which asks if there exist effective minority rights at a European level, it was necessary to determine the meaning of the term minority. In chapter one, the various proposals were analysed, such as the work of Capotorti<sup>2</sup> and Deschênes<sup>3</sup> at an International level and

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<sup>1</sup> For a selection of literature see F. Schimmelfennig, "EU political accession conditionality after the 2004 enlargement: consistency and effectiveness", *Journal of European Public Policy* 15.6 (2008), pp.918-937, F. Schimmelfennig and U. Sedelmeier "Governance by Conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe", *Journal of European Public Policy* 11.4 (2004), pp.669-687, H. Grabbe, "European Union Conditionality and the "Acquis Communautaire", *International Political Science Review* 23.3 (2002), pp.249-268.

<sup>2</sup> F. Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (New York: UN, 1979).

<sup>3</sup> J. Deschênes, *Proposal concerning a definition of the term Minority* (New York: UN, 1985).

the OSCE at a European regional level, highlighting a number of key subjective and objective elements. The common features of these definitions included numerical inferiority, a desire to preserve a minority culture and a long-standing tie to the state. Despite the various proposals at both an international and regional level being similar in content, none have received sufficient support. I conclude that this is due to the fact that states are not willing to be bound by rigid definitions of the contentious term of a minority. This thesis has endorsed a pragmatic approach to minority rights, with a definition that has both objective and subjective elements, providing the state with a definition that provides a degree of flexibility considering local context. Moreover, an analysis of the relationship between minority rights and individual and group rights demonstrated the need for a definition to be conscious of the dual element of minority life.

This thesis contributes to the ongoing debate on how to define a minority by proposing a definition which incorporates subjective and objective elements of previous proposals. The definition builds upon previous definitions by striking the balance between group and individual rights. The definition proposed in this thesis is:

1. A minority is a group comprised of voluntary members that is numerically inferior though significantly represented in a state or region where the individuals can display longstanding and firm ties to the state. The group must seek to preserve their distinct cultural identity to the benefit of both the individual member and wider group.
2. The state must adopt 'best practice' in applying this definition, taking the local political situation into consideration to ensure that all those in need of specific minority rights are protected.

This definition served as a tool for critique of the minority rights mechanisms that currently exist at both an international and regional level. An in-depth analysis of different mechanisms such as article 27 ICCPR, United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities and the Framework Covenant for the Protection of National Minorities, showed that

the existing mechanisms provide some minority rights. The emphasis on the tradition of placing minority rights under the umbrella of general human rights and non-discrimination has been criticised throughout this thesis. According to Ahmed “basic non-discrimination provisions do not accommodate plurality and access to rights other than those available under equal citizenship”.<sup>4</sup> The effectiveness of non-discrimination in protecting minorities is limited, as it simply provides that states will not interfere or discriminate against minorities, but it does not take into account the need for special protections of minorities.

The main implication of relying upon non-discrimination is evident in the fact that these principles are usually written in negative language, meaning that there are limited positive obligations placed upon the state to actively protect minorities. For example, article 27 ICCPR provides that “in those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities *shall not be denied the right*, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”.<sup>5</sup> Article 27 provides that the state shall not deny minority groups the right to enjoy their minority culture through things such as practising their religion. In chapter two of this thesis, it was concluded that it is not enough to protect minority rights through non-discrimination as this simply requires the state to ensure that minorities do not suffer from discrimination as a result of their situation. It is necessary that states take positive actions to ensure the protection of minority groups’ culture and ensure equal treatment for there to be effective minority rights. This is something which cannot be achieved by non-discrimination principles.

The various minority rights frameworks analysed in chapter two suggest that there exist some minority rights frameworks at both an International and European level. However, the key finding of this research question is that the existence of these frameworks does not mean that there are effective minority rights in contemporary Europe. Without an agreed definition of what a minority is, these protections are not

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<sup>4</sup>T. Ahmed, *The Impact of EU law on Minority Rights* (Oxford: Hart Publishing, 2011), p.17.

<sup>5</sup> UN, *International Covenant on Civil and Political Rights* (New York: UN, 1966).

effective. The vague and broad terms used in these frameworks leave too much discretion to the state to interpret to whom these minority rights apply, leaving certain minority groups outside the scope of these rights. There is a fine balance to be reached between a pragmatic approach to minority rights that provides states with a degree of discretion and ensuring a minimum standard for minorities. At present, this balance is not being struck and it is simply not possible to say that there are effective minority rights in the contemporary Europe. Due to the sensitive nature of minority rights and the need for appreciation of local context and being pragmatic, this thesis endorses a regional approach to minority rights, to achieve more effective minority rights. The EU must take greater responsibility to provide a more effective framework for the protection of minorities, starting with the endorsement of a definition which is widely supported by both states and institutions.

## 2. What Influence does EU Conditionality have upon Norm Adoption in States with European Union Aspirations? Has that Influence Diminished since 2008?

In order to answer the second research question of this thesis it was necessary to draw upon existing literature on EU conditionality, such as the work by Schimmelfennig and Sedelmeier<sup>6</sup> and Grabbe,<sup>7</sup> in order to establish the impact of EU conditionality on the ability of the EU to influence norm adoption, both generally and in regards to minority rights. It was established that the external incentives model, as advocated by Schimmelfennig and Sedelmeier,<sup>8</sup> is the most suitable to explain the success of conditionality in the EU enlargement of the CEECs. An analysis of both the Accession Partnerships in the CEECs and Latvia accession process and the Stabilisation and Association Partnerships in the Western Balkans and Bosnia accession process, as the principle tool for EU conditionality has highlighted three key weaknesses. These weaknesses have wider implications on the ability of the EU to influence aspiring member states to adopt EU norms and policies, beyond simply minority rights policies. The vague language of the Accession Partnership and the Stabilisation and Association

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<sup>6</sup> Schimmelfennig (2008), 918-937 and Schimmelfennig and Sedelmeier (2004), pp.669-687.

<sup>7</sup> Grabbe (2002), 249-268 and Grabbe (2014), pp.40-56.

<sup>8</sup> Schimmelfennig and Sedelmeier (2004), pp.669-687.

Partnership, the lack of consistency in requirements placed on states for membership and the failure of the EU to appreciate the need for social recognition or public support, all have implications on the success of EU conditionality.

Firstly, whilst the Stabilisation and Association Partnerships were developed in response to the weakness of the Accession Partnerships, neither mechanism has proven entirely effective in ensuring compliance with general EU requirements either pre or post-accession. Both mechanisms have suffered from a lack of clarity and vague definitions making it difficult to determine what reforms are actually required of the state prior to accession. Throughout this thesis, a pragmatic approach to minority rights and EU enlargement has been endorsed. However, the lack of clarity and vague definitions of terms in the accession documents, whilst providing flexibility and allowing for the appreciation of the unique position of each state, provides the states and arguably the EU with too much discretion to the meaning of these terms. This is evidenced in the lack of a definition of the term minority at either a European or International level. Both the state and the EU can choose to interpret certain policy requirements either too widely or too narrowly, to benefit their own needs, creating further issues of double standards. This concern is not limited to minority rights and has wider implications for the enlargement process as extends to any policy area in the EU. As highlighted in chapter three, the accession process requires states to have a functioning market economy. However, states are not provided with an explanation of what a functioning market economy is by the EU.

Secondly, Schimmelfennig and Sedelmeier highlight the need for consistency for EU conditionality to be successful. The implications for failure to do this can be seen in the limited success of EU conditionality in the Western Balkans. The EU is inconsistent in its pursuit of compliance between the different states in the region, adopting rigorous assessment of compliance in some states, whilst being adaptable and pragmatic in other instances.<sup>9</sup> A key finding of this thesis is that the EU has placed additional requirements upon Bosnia and other Western Balkan states through the

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<sup>9</sup> O. Anastasakis, "The EU's political conditionality in the Western Balkans: towards a more pragmatic approach", *Southeast European and Black Sea Studies* 8.4 (2008), p.366.

dual EU integration and state building process, which are not shared by other member states. States are not willing to adopt policies and norms that are not consistently applied in other member states or aspiring member states. For EU conditionality to be successful, it is necessary that all states are held accountable to the same standard; this thesis has proven that for minority rights, this is not the case. As a result, the EU's influence on states is declining. If the EU wants to continue to act as a policy driver, in both aspiring and member states, it is essential that a unified approach is adopted. Throughout this thesis, the need for a pragmatic approach to minority rights has been endorsed, with the need to strike the delicate balance between equality in rights and context-sensitivity. A pragmatic approach must be taken as to how each state reaches a minority rights standard. Whilst the end result in minority rights that the states are working towards should be consistent so as to avoid the increasing issue of double standards, the path in which states take to reach the end result cannot be a single road. Again, this has wider implications for EU conditionality and the enlargement process beyond just minority rights policies. If the EU continues to be inconsistent in the policies it requires aspiring states to adopt prior to accession, states will be less willing to sacrifice their sovereignty and adopt these norms, reducing the EU's overall normative power.

Thirdly, the use of EU conditionality fails to take into account the impact of social recognition and the general population viewpoint on norm adoption. The example of Croatia and the requirement to cooperate with the ICTY demonstrates that if the adoption of a norm or policy goes against the public view, the state may be reluctant to adopt them. This is also the case for the issue of increased Euroscepticism among both politicians and the population of states. The impact of the increase in Euroscepticism on EU conditionality is beyond the scope of this thesis. However, it can be noted that since the CEECs enlargements in 2004 and 2007, which were for the most part supported by the EU-15 and the candidate countries, "politics within the EU have affected enlargement policy much more, changing it from an elite-led and largely consensus-based project before 2004 to a much more contested one".<sup>10</sup> There has

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<sup>10</sup> Grabbe (2014), p.41.

been increased opposition or ‘enlargement fatigue’ towards further enlargement by the current member states. One of the key reasons for this fatigue, is claims that some member states were not prepared for membership at the time of accession. The suitability of Romania and Bulgaria to become members in 2007 has been widely debated in the literature.<sup>11</sup> This enlargement fatigue led to debate over the scope for further enlargement. Moreover, the global economic crisis and the Brexit vote of June 2016, has created political and financial instability in the Union which has reduced “the consistency and credibility of the accession process for would-be joiners”.<sup>12</sup> As a result, the influence and power of the EU to transform the Western Balkans region is significantly reduced compared to the power it had among the CEECs. The full impact of Euroscepticism on EU conditionality is an area of research that should be further explored. The Brexit vote could also be used as a case study to further analyse the impact of social recognition upon EU norm adoption. As Theresa May has only recently invoked article 50,<sup>13</sup> only time will show what impact the vote has on both the UK and the EU as a whole.

### 3. Is the European Union Consistent in the Minority Right Standards it Requires in Aspiring and Member States?

In 2009, Belloni stated that the Europeanisation of the countries should focus on “the coherence of [European] policy towards the region, focus less on a Europeanized political elite and more on citizens and civil society organizations, and carefully deploy incentives and rewards to sustain the reform process that is already under way”.<sup>14</sup> However, in chapters four and five it was clearly demonstrated that the EU has placed very different minority rights standards across the region, in answering the third research question of this thesis. Using the case studies of Latvia and Bosnia to frame the analysis, it can be concluded that there is no consistency in the minority rights standards required by the European Union. I concluded that the term ‘double

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<sup>11</sup> See R. Carp, “The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism”, *Utrecht Law Review* 10.1(2014), pp.1-16.

<sup>12</sup> Grabbe (2014), p.41

<sup>13</sup> 29 March 2017.

<sup>14</sup> R. Belloni, “European Integration and the Western Balkans: Lessons, Prospects and Obstacles”, *Journal of Balkan and Near Eastern Studies* 11 (2009), p.314.



standards' is no longer sufficient when describing minority rights in the region, proposing that there exist at least four different standards and obligations of minority rights. These different standards can be found in four different groups of member states and aspiring member states: EU-15, Latvia and Estonia, all other CEECs and the Western Balkans, as demonstrated by Bosnia. The scope of this thesis has not allowed for an in-depth analysis of each of these groups, or of individual states beyond the case studies of Latvia and Bosnia. This is further research which could be completed to build upon the findings of this thesis. However, the existing literature supports my assertions of these different minority rights standards.

In 2001, the European Commission claimed that "the EU is well placed to promote democracy and human rights",<sup>15</sup> relying on the fact that all member states apply the same principles to their internal and external policies. This claim suggests that the EU is a strong normative actor due to the strength of its external promotion of human rights. Through an analysis of minority rights at an EU level and the ability of the EU to influence states adoption of minority rights policies, it is possible to make conclusions on the wider implications of the issue of the EU as a normative power. The concept of the EU as a normative power was analysed in chapter two of this thesis. It was concluded that according to the different definitions that have been provided of a normative power, including definitions by Manners<sup>16</sup> and Sijrsen,<sup>17</sup> that the EU is a normative power. However, it was highlighted that this does not mean that the EU always acts as a normative power. In chapter four, it was concluded that the EU acted as a normative power with minority rights in Latvia as the policy was heavily intertwined with the principle of EU conditionality and broader foreign policy issues, whereas in chapter five, it was concluded that the EU is not acting as a normative actor with regards to the minority rights obligations in Bosnia. I propose that at present the EU cannot act as a true normative power on minority rights policies.

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<sup>15</sup> European Commission, *Communication from the Commission to the Council and the European Parliament- The European Union's role in promoting human rights and democratisation in third countries* (Brussels: European Commission 2001), p.3.

<sup>16</sup> I. Manners, "Normative Power Europe: A contradiction in terms?", *Journal of Common Market Studies* 20.2(2002), pp.235-258.

<sup>17</sup> H. Sijrsen, "The EU as a 'normative' power: how can this be? ", *Journal of European Public Policy* 13.2 (2006), pp.235-251.

Minority rights are contentious issues and thus it is unlikely that the EU would easily be able to justify policy decisions on the issue when there is no clear EU standard or norm on minority rights. Whilst the EU was successful in the external promotion of minority rights through actions such as the inclusion of minority protections in the Copenhagen Criteria for membership it was not successful in the development of internal minority rights. The failure to provide for minority rights in the *acquis communautaire* along with the fact that no single, internal standard was adopted by the EU-15 is the principle cause of the apparent double standards in minority rights. During the accession process of the CEEC's the EU failed to fully acknowledge the discrepancies which existed between the minority rights obligations it placed on the different candidate countries and the obligations of the EU-15. Furthermore, the accession process of Bosnia demonstrated the lack of normative justification for the institutional reforms required to reach the minority rights standard required to be considered for membership of the EU. This thesis has endorsed the need for pragmatism in regards to minority rights. However, the fact that there are a number of different minority standards has serious implications for the ability of the EU to act as a normative power on this policy issue. In order to act as truly normative power on the policy issue of minority rights, it is necessary that the EU develop a clear single standard in minority rights.

The key issue raised by the discrepancies in minority rights in the EU, as outlined in this thesis, is one of coherence. According to Dworkin, coherence is a political ideal or guiding principle that helps in the construction of norms so that they can be interpreted and applied equally to all.<sup>18</sup> Thus, Franck draws a distinction between coherence and mere consistency suggesting that inconsistency itself may not undermine the legitimacy of a policy.<sup>19</sup> However, the underlying question raised by the different standards found in minority rights is whether the EU can reasonably justify the double standards of minority rights? If it is possible to present any justified explanations for the distinction and differences of minority rights across the EU, it may

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<sup>18</sup> R. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), p.176.

<sup>19</sup> T. Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990), p.163.

be possible to argue that there is inconsistency but still coherence in minority rights. Drawing upon the work of Brubaker and Smith, it may be possible to use the concept of the triadic or quadratic nexus to explain the different minority rights standards found in the nationalising states.<sup>20</sup> However, the nexus can only be used to justify different minority rights standards whilst the state is in the process of state building and developing a functioning democracy- it cannot be used to justify the different minority rights obligations placed on states by the EU at the time of membership and certainly cannot justify the different standards found in full EU member states.

If the double standards remain unjustified and the EU bodies and member state all support different policies on minority rights, this undermines the role of the EU as a normative actor. Lerch and Schwellnus “take an argumentation theoretical approach... to assessing the EU’s justification of its external human rights policies”,<sup>21</sup> in order to try and justify the distinction between internal and external minority policy which has resulted in different minority rights standards being applied in EU. According to argumentation theory, there are three arguments that can be presented to justify the different approaches; utility, value and rights based, which must be each considered to determine if it is possible to justify the double standards in minority rights that this thesis has demonstrated.

### 3.1 Utility-Based Arguments

The first possible justification for the development of multiple standards of minority rights considered by Lerch and Schwellnus are utility-based. The “EU applied differentiated pressure across applicants, dependent on whether minority protection was regarded as problematic and security relevant in the particular case”.<sup>22</sup> According to utility-based justifications, “a policy decision if presented as legitimate on the basis of its efficiency in reaching a given goal, or by referring to interests such as economic

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<sup>20</sup> See R. Brubaker, *Nationalism reframed: Nationhood and the national question in the new Europe* (Cambridge: Cambridge University Press, 1996) and D. Smith, “Framing the national question in Central and Eastern Europe: A Quadratic Nexus?”, *Global Review of Ethnopolitics* 2:1 (2002) 3-16.

<sup>21</sup> M. Lerch and G. Schwellnus, “Normative by nature? The role of coherence in justifying the EU’s external human rights policy”, *Journal of European Public Policy* 13.2 (2006), p.306.

<sup>22</sup> Lerch and Schwellnus (2006), p.314.

gains or security and stability”.<sup>23</sup> The need for effective EU conditionality to ensure minority rights and a minimum level of protection for minority groups intensifies when one considers the security and stability element associated with minority rights. The experiences of the EU’s neighbours, Yugoslavia, and the ethnic-based civil war in Bosnia prompted the need for the EU to provide a voice for minorities on the basis of conflict prevention. On this basis, Lerch and Schwellnus propose that utility based arguments for the differentiation in minority obligations could be predominant in the EU’s discourse. They base this argument on the fact that security concerns were assumed to be the primary motivation behind the EU’s external minority protection, around the time of the CEEC enlargement and into the current enlargement process in the Western Balkans.<sup>24</sup>

The CEEC’s were deemed to be much higher risk members than the EU-15; the turbulent relationship between Latvia and Russia is an example of the risk to security and stability that the region presented to the EU. Moreover, the security and stability concerns raised by the Western Balkans and Bosnia are undeniable, given the ethnic tensions and civil wars that first sparked EU involvement in the region, originally as peacekeepers during the conflict in the early 1990s. The increased security threats posed by ethnic conflict, according to the utility based arguments, are the primary motivation behind an increase in attention to minority rights issues following 1992, based on the presumption that minority rights and ethnic tensions create conflict.

According to Kymlicka, the security focus provides principled justification for the differential treatment of East and West, as well as the increased attention to minority rights after 1992.<sup>25</sup> There is a direct link between the CEEC countries moving towards EU Membership with more diverse populations and ethnic tensions, which increased security threats and the EU embracing minority rights. This is evidenced in the inclusion of minority rights in the Copenhagen Criteria for membership, at the time the CEECs began the accession process. According to the utility-based arguments, the

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<sup>23</sup> Lerch and Schwellnus (2006), p.306.

<sup>24</sup> Lerch and Schwellnus (2006), p.314.

<sup>25</sup> W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford: Oxford University Press, 2001), p.374.

different level of intrusiveness into the affairs of the states can be justified on the grounds of security. This supports pragmatic minority rights obligations, judging each country on a case-by-case basis, having due regard for the security threat of each individual state. There is no doubt that a fear of ethnic conflict is a contributing factor to the double standards of minority rights, as evidenced by the difficulties in Bosnia mentioned above. However, the different levels of minority protections cannot be justified by a fear of conflict. The purpose of minority rights should be to protect the minority in need of protection, with the prevention of conflict being a secondary aim. Thus, whilst a pragmatic approach to minority rights has been advocated throughout this thesis, the utility-based arguments are not suitable to justify the difference in rights required by EU as they underestimate the importance of the minority rights.

### 3.2 Universal Rights-Based Arguments

The second possible justification of the different minority rights standards in the EU can be found in rights-based arguments. This argument suggests that states adhere to overriding principles of justice which are deemed to be universally valid and accepted by all parties. These are usually made with reference to universal human rights, such as United Nations standards.<sup>26</sup> The shift of the EU away from a Union based on a common market towards a supranational body has resulted in the development of strong human rights, found in the *acquis communautaire*. We are frequently reminded that the “EU is committed to respecting the rights of persons belonging to minorities as part of universally recognised human rights”,<sup>27</sup> through non-discrimination principles pronounced in the Treaties of the EU and express support for regional human rights documents such as the European Convention on Human Rights.

However, whilst all EU member states have ratified the various global human rights instruments, this does not extend to minority protections. The wide ranging

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<sup>26</sup> H. Sijursen, “Why expand? The Question of Legitimacy and justification in the EU’s Enlargement policy”, *Journal of Common Market Studies* 40.3 (2002), pp.494-495.

<sup>27</sup> Council of the European Union, *EU Annual Report on Human Rights 2002* (Luxembourg: Office for Official Publications of the European Communities, 2002), p.116.

reservations and declarations that have been made in regard to article 27 of the ICCPR, as discussed in chapter two, demonstrate the lack of coherence in minority rights among the member states. Furthermore, to date, France has failed to ratify the Framework Convention for the Protection of Minority Rights, despite the fact that it is used as the leading authority of minority rights in Europe. The rights based argument risks exposing the discrepancies between the internal and external application of the minority norm, while leaving little room for a principled and coherent justification of double standards.<sup>28</sup> As highlighted in chapter two, the current position of minority rights provides states with a wide margin of discretion on both definition and development of minority specific rights, supporting the notion that there is no universal norm of minority rights. If minority rights were universal or at the very least if there existed a specific European norm for minority rights, then there would be no need to deflect its application in current member states.<sup>29</sup> For this reason, rights-based arguments cannot justify the difference in minority rights standards across Europe as a standalone argument.

### 3.3 Value-Based Arguments

The final argument that could be used to justify the discrepancies in minority rights standards in the EU is value-based arguments. "A policy decision is considered to be legitimate because it is appropriate in the given cultural context and in relation to the identity of the members of a community".<sup>30</sup> The EU has drawn upon the idea of minority rights as a shared value to explain its position on minority rights. Commission President, Romano Prodi, referred to the EU as a union of diversity and minorities. He stated that "tolerance and mutual respect...are deeply rooted in Europe's humanistic heritage...we need these attitudes more than ever in today's Europe where we're all members of minorities".<sup>31</sup> This would suggest that the promotion of minority rights is presented as an externalisation of internally shared values. The value-based

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<sup>28</sup> Lerch and Schwellnus (2006), p.314.

<sup>29</sup> Lerch and Schwellnus (2006), p.314.

<sup>30</sup> Lerch and Schwellnus (2006), p.306.

<sup>31</sup> R. Prodi, "The past and future of European integration", 7 February 2002, [http://europa.eu.int/futurum/documents/speech/sp070202\\_en.htm](http://europa.eu.int/futurum/documents/speech/sp070202_en.htm) accessed 1 April 2014.

arguments for justification of different standards of minority rights are based on the principle that all member states of the EU share a single value of minority rights.

It could be argued that the difference in minority rights standards is justified, as it is appropriate given the cultural context. The fact is that there are a number of different minority groups across Europe that all have different cultural needs, especially as the EU expands. Thus, it may be justifiable to apply different minority rights for different minorities. Furthermore, some minority groups are a greater cause concern for stability, which may also explain the different standards. However, the lack of coherence in the human rights framework which has been adopted by the EU member states raises serious doubts as to the ability of the EU to rely upon the value-based argument to justify the external promotion of minority rights. Any attempt to rely on this argument merely exposes the incoherent application of minority rights within the EU, as demonstrated by the example of France. The EU's argument therefore exacerbates rather than diminishes the problematic character of the EU's external minority policy.<sup>32</sup>

#### 4. Is it Possible to Justify Different Minority rights Standards found in European Member States and Candidate Countries?

The need for a unified policy on minority rights is essential and I argue that the normative arguments presented do not provide sufficient justification for the double standards in the minority rights obligations. Lerch and Schwellnus suggest it is necessary to combine the rights and utility based arguments<sup>33</sup> to justify the different application of minority rights in the EU. The combination of these two arguments could potentially justify the EU's requiring different minority rights standards of states for two reasons. On the one hand, according to EU institutions, human rights policies are central to the functioning of the EU, thus supporting a rights-based argument. On the other hand, a key function of human rights (and the protection of minorities) is "in

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<sup>32</sup>Lerch and Schwellnus (2006), p.315.

<sup>33</sup>Lerch and Schwellnus (2006), p.315.

general, to achieve and sustain internal and external stability”,<sup>34</sup> supporting the utility-based argument. However, as these arguments fail to justify the different standards as the EU has failed to incorporate minority rights within its wider human rights policies and thus cannot rely upon the rights based arguments.

The EU only took steps to acknowledge minority rights when the CEECs posed a threat to stability in the region. Any attempt to rely upon these arguments simply highlights the problematic character of the EU’s external minority policy. The case studies of Latvia and Bosnia have demonstrated that whilst there is a need for a degree of pragmatism in regards to minority rights standards, none of the normative justifications proposed by Lerch and Schwellnus are strong enough to overcome the negative consequences of the different standards which are endorsed by the EU, as outlined throughout this thesis. Thus, it is essential that the EU develop a clear single standard in minority rights.

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<sup>34</sup>Lerch and Schwellnus (2006), p.315.



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