

Minority Protection and the
Enlarged European Union:
The Way Forward



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MINORITY PROTECTION AND THE ENLARGED EUROPEAN UNION: THE WAY FORWARD

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ACKNOWLEDGEMENTS

Today, the heads of state and ministers of foreign affairs of the 25 member states signed the Treaty Establishing a Constitution for Europe. For the first time, Europe equips itself with a formal constitution, and, at last, EU law enshrines the “rights of persons belonging to minorities” at the constitutional level.*

I am happy that we are able to present our book now, only six months after Europe’s ‘E-Day’ and immediately after the new Constitution has been signed.

This timely delivery has, of course, only been possible due to the help of many. I would like to thank Tom Bass and Brad Fox for providing their professionalism in copyediting the texts in this volume. Regarding the Bolzano/Bozen Declaration on the Protection of Minorities in the Enlarged European Union, I am especially grateful for the engagement of the signatories of the Declaration and the input provided by the many participants at the PECEDE conference, which took place in Bolzano/Bozen/Bulsan at the end of January 2004. Special thanks go also to the respective project-teams at EURAC and LGI who provided me with countless and valuable help during this project. Finally, it has to be underlined that the PECEDE project (Platform for an Enriching Culturally and Ethnically Diverse Europe, see <http://www.eurac.edu/pecede>) and this book could never have been realized without the financial help of the Open Society Institute and the European Commission. The sole responsibility for the content lies with the authors and neither the Commission nor OSI are responsible for the information contained in this book that will hopefully provide the reader with useful insight and ideas.

The editor

Bolzano/Bozen/Bulsan

October 29, 2004

* The Constitution for Europe, as agreed upon by the European Convention in July 2003, has been subject to changes by the Intergovernmental Conference 2003/2004. Moreover, after the IGC, the proposal underwent a process of consolidation. As a result of this, the numbering of the respective four parts of the Constitution has been integrated into one corpus. Consequently, the articles of the Constitution, as signed by the member states, run from Art. I-1 to Art. IV-448 (see document CIG 87/2/04 REV 2, October 29, 2004). This implies that most of the articles—including those of the well known and here highly relevant Charter of Fundamental Rights—have been changed. However, since this new Constitution will hardly enter into force before 2007, we continue to use the ‘old’ numeration of articles as far as the Charter is concerned.

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ABBREVIATIONS AND ACRONYMS

AC	Advisory Committee
CAHMIN	Ad Hoc Committee for the Protection of National Minorities
CEE	Central and Eastern Europe
CEEC	Central and Eastern European Countries
Ch.F.R.	Charter of Fundamental Rights of the European Union
CIG	<i>Conférence intergouvernementale</i>
CLRAE	Congress of Local and Regional Authorities of Europe
CoE	Council of Europe
CoM	Committee of Ministers (Council of Europe)
COM	European Commission Document
CONEM	Committee of National and Ethnic Minorities (proposed)
CoR	Committee of Regions (European Union)
CSCE	Conference for Security and Cooperation in Europe
CSPs	Country Strategy Papers
Dec.	Decision
DG	Directorate General
Dir.	Directive
EBLUL	European Bureau for Lesser-used Languages, Brussels
EC	European Community
ECHR	European Convention of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice, Luxembourg
ECMI	European Center for Minority Issues, Flensburg
ECR	European Court Reports
ECRI	European Commission against Racism and Intolerance
ECRML	European Charter for Regional or Minority Languages
ECtHR	European Court of Human Rights
EC Treaty	European Community Treaty
E-Day	Enlargement Day of May 1, 2004
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Area
EP	European Parliament
EU	European Union

EU+25	Enlarged EU of May 1, 2004
EUMAP	EU Accession Monitoring Program, OSI–Budapest
EUMC	EU Center for Monitoring Racism and Xenophobia, Vienna
EURAC	European Academy Bolzano/Bozen
FCNM	Framework Convention for the Protection of National Minorities
HCNM	OSCE High Commissioner on National Minorities, The Hague
HZDS	Movement for a Democratic Slovakia
ICCPR	International Covenant on Civil and Political Rights
IGC	Intergovernmental Conference
JHA	Justice and Home Affairs
LGI	Local Government and Public Service Reform Initiative, Budapest
LINGUA	A financial aid scheme of the EU dedicated to encouraging proficiency in languages
MEP	Member of European Parliament
NCEDI	Bulgarian National Council on Ethnic and Demographic Issues
NGO	Nongovernmental Organization
OJ	Official Journal (of the EU)
OMC	Open Methods of Coordination
OSCE	Organization for Security and Cooperation in Europe
OSI	Open Society Institute
PECEDE	Platform for an Enriching Culturally and Ethnically Diverse Europe
PHARE	Poland–Hungary Aid for Reconstruction of the Economy
PJCC	Police and Judicial Cooperation in Criminal Matters
RDP	Roma Development Program (Spain)
Reg.	Regulation
Summit	European Council Meeting
TEC	Treaty establishing the European Community
TEU	Treaty on European Union (Maastricht Treaty)
Venice Commission	European Commission for Democracy through Law (Council of Europe)

PREFACE

Michl Ebner

The entry of eight Central and Eastern European countries together with Cyprus and Malta into the European Union on May 1, 2004 is a historic achievement, ending centuries of division. Europe reunited means a stronger, democratic, and more stable continent, with a single market providing economic benefits for all of its 450 million citizens. Enlargement is widely perceived as one of the most important opportunities for the European Union at the beginning of the 21st century, not only regarding the enlargement of the market, but also in terms of promoting common values and standards for human rights, the protection of minorities, and the promotion of regional and minority languages.

The European Parliament has demonstrated its commitment to the protection of Europe's linguistic heritage, including lesser-used languages, in a series of resolutions going back to the early 1980s—in particular the two resolutions on the Arfé reports of 1981 and 1983, the resolution on the Kuijpers report of 1987, the resolution on the Reding report of 1991, the resolution on the Killilea report of 1994, the Morgan resolution of 2001, and the resolution on the Ebner report of 2003—the last adopted by an absolute majority, with clear recommendations for the European Commission to pave the way for the promotion of linguistic diversity after EU enlargement.

It was due to the commitment and efforts of the European Parliament that the European Bureau for Lesser-used Languages (EBLUL) was set up in 1982, and a separate budget line for the “promotion and safeguard of minority and regional languages and cultures” was introduced in the 1983 budget. Although minority protection is one of the key EU accession criteria, the European Commission itself has so far failed to create a legal basis for the promotion of European regional and lesser-used languages.

2001 was deemed the European Year of Languages, and since then important developments have taken place. With the council resolution of February 14, 2002 on the promotion of linguistic diversity and language learning, the Council declared itself in favor of linguistic diversity and instructed the European Commission to draw up an action plan on linguistic diversity and language learning.

The action plan takes an inclusive approach, seeking to promote language diversity, including lesser-used European regional and minority languages. The latter were also explicitly discussed in the EC's discussion paper on the action plan. Projects promoting regional or minority languages will have to seek funding under the large EU mainstreaming

programs rather than under a specific budget line. Although this development can be interpreted as a 'language policy' on regional and minority languages, it is certainly very far from what we would call positive discrimination or affirmative action in the field of minority protection. Nevertheless, it is still an important development—a sound basis on which we can build. According to the European Community (EC), 40 million Europeans speak a minority language. EU enlargement in 2004 will increase that number by another six million. Against that background, initiatives to encourage linguistic diversity could help create a climate of trust, defuse certain existing controversial issues, and create heightened public awareness of the common linguistic and cultural heritage of an enlarged Europe. However, the historical date May 1, 2004 necessitates that the European Union approach the issue of minorities from a more encompassing perspective. Special emphasis will have to be given not only to the minorities living in current and future candidate states but also to the living conditions and culture of minorities living within EU territory—in all member states alike. Thereby, the Union should not limit its minority consciousness to the field of languages but should look at the overall picture of minority protection. In May 2004 the Union should enter a process of brainstorming options for efficient diversity management.

The European Academy, with the support of the Local Government Initiative in Budapest and financial contributions from the European Commission, has already launched a process in this direction by convening the conference "The European Union and the Protection of Minorities: the Way Forward," at the end of January 2004. This conference resulted in the presentation of an elaborated document at the beginning of May 2004 titled the Bolzano/Bozen Declaration on the Protection of Minorities in the Enlarged European Union, which could mark the way forward for the Union and its countless minorities. In this volume, Gabriel N. Toggenburg presents a set of analyses which underlie the Bolzano Declaration.

In attempting to lay out the general supranational framework for minority protection, the editor himself locates the minority agenda within the EU system of multilevel governance and points to possibilities and limitations within this new "third legal layer," as he calls it. Rachel Guglielmo then proceeds to describe concretely the positive and negative experiences in the area of minority protection as they played out during the enlargement process. Due to the practical importance of this issue, a second contribution written by Gwendolyn Sasse complements the analyses of this very recent European experience and the role the European Commission has played therein. Then the volume provides a thorough legal analyses by Frank Hoffmeister on how this monitoring experience could be applied to the future framework within the enlarged European Union.

After discussing rights monitoring and public performance regarding minorities, the book goes on to describe the constitutional resources the Union could make use of when addressing minority issues in the future. In his piece, Bruno de Witte outlines what a European Union 'minority policy' might look like in the future and shows its legal shape and contour. After this important assessment, the book switches to another topic of crucial relevance—the question of how the Union can and should enhance its cooperation with the Council of Europe. Rainer Hofmann and Erik Friberg provide a perspective on future interplay that offers synergies and

avoids duplication. Last but not least, Steve Peers considers the millions of people who do not hold EU-citizenship, most of whom fall into the group often referred to as ‘new minorities.’ These articles, contributed by a wide range of distinguished experts in the field of EU law, minority protection and human rights, form a timely academic evaluation of the status quo and prospects for minority protection in the enlarged European Union—an issue of utmost importance to everyone interested in the ‘European enterprise,’ particularly those concerned with the future of Europe’s minorities.

MINORITY PROTECTION IN A SUPRANATIONAL CONTEXT: LIMITS AND OPPORTUNITIES

Gabriel N. Toggenburg

Abstract

Over the course of the last decade “respect for and protection of minorities” has become part of regular EU-speak. Therefore, the occasion of May 1, 2004 raises the question whether the Union should not only strengthen its commitment to minorities but even embark upon a new strand of law—not national or international but *supranational*—aiming at protecting minorities living *inside* member states, new and old alike.

The implementation of a proper supranational system of minority protection could offer new instruments of highest relevance to minorities, and allow for a so far unforeseen degree of minority involvement by an international player. However, its opponents could argue that—not only could such a regime endanger the balance between the federal level and the level of member states—the Union cannot possibly define ‘EU minorities,’ due to the simple fact that it knows no ‘EU majority’ and no full-fledged citizenship law.

However, *minority language* in the draft EU Constitution, as well as increasingly important Europe-wide phenomena such as the rights of Roma or the presence of tens of millions of third-country nationals, means that there will be cases that cannot be expected to fall within the policy preferences of a single member state. European integration does and will ever more so provide protection against discrimination, mobility, financial programming, and new forms of participation.

The way forward for the Union is to build a situation where minority concerns are dealt with at the various European levels of government to a diverging degree in full accordance with the spirit of subsidiarity. This should lead to a situation where minorities in Europe can efficiently use the new opportunities the EU system offers, where major frictions between national minority regimes and the Common Market are avoided, and where the Union develops a soft, multifaceted engagement with its minorities.

MINORITY PROTECTION IN A SUPRANATIONAL CONTEXT: LIMITS AND OPPORTUNITIES

Gabriel N. Toggenburg

1. Introduction: Is a New Level of Law Coming to Bear on Minority Protection in Europe?

Protecting small social groups and their cultures calls for complex legal mechanisms and the establishment of a delicate judicial balance. The sum of the norms and the respective case law in this area traditionally finds its home and its source either in *international* or in *national* (constitutional) law. In the era of the League of Nations international sources prevailed, while the beginning of the United Nations marked a redelegation of the issue of minorities to national legal sources.¹ However, at the end of the last century we witnessed an astonishingly fast resurrection of international activities in Europe. Both of the two important Council of Europe instruments (the Framework Convention for the Protection of National Minorities and the European Charter for the Protection of Regional or Minority Languages) entered into force in 1998, and the OSCE's various contributions to the elaboration of a European standard² fall within that period as well. Besides this process of internationalization, Europe has undergone another specific dynamic: the EU enlargement process that brought a third player onto the scene of international minority policies—the European Union. This raises the question whether the recent international *impetus* in the area of minority protection will eventually create a third legal layer—beyond national and international law—namely a *supra-national* minority law, thereby opening a new chapter in the history of minority protection.

In fact Europe is very much 'on the move' in this respect. Where the European Union and the European Communities before it hardly took notice of the countless minorities living within EU/EC territory, now we have seen keen political interest in the status of minorities who live outside the Union's borders, namely on the territory of the former and current candidate states. Despite this new and very visible political engagement on the part of the EU,

* Special thanks go to Gwendolyn Sasse and Bruno de Witte for commenting on an earlier version of this article.

¹ See Arnold (1995: 1165).

² Such as the Hague Recommendations on the Education Rights of National Minorities (1996), the Oslo Recommendations on the Linguistic Rights of National Minorities (1998), or the Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999).

the current Union lacks a sound legal mandate to allow the full transposition of this external engagement into its internal legal system—necessary to bring the benefits of this fresh EU interest to the minorities living *inside* the EU as well. When it comes to minorities, internal EU law and external EU politics seem to diverge. Now that eastern enlargement is a *fait accompli*, the question arises whether after May 1, 2004 the law should be boosted up to the level of politics or whether politics should retreat from this area and fall back in line with the rather agnostic stance of the law we have seen so far.

Politics would follow law in the scenario of “phasing out and status quo” as De Witte labeled it.³ In this case a new—to use Gwendolyn Sasse’s words⁴—“tacit policy of consensus on inaction” in the field of minority protection would prevent any major adaptation of the current legal system. Conversely, the law would follow politics in a sort of ‘full minority scenario,’ where new alliances of new and old members would press for the ‘incorporation’ or ‘internalization’ of the protection of minorities into the *acquis* of the newly enlarged Union.⁵

What stands in the way of this second scenario? Apart from the EU’s *currently* very limited legal competences, many will *in principle* argue that the Union should never become a full-fledged legal system of minority protection.⁶ However, what often seems to stand at the core of such critical stances *vis-à-vis* full-fledged EU involvement in the area of minority protection is less a *constitutional* argument *against the future EU* as a player in the field of minority protection but more a *political* argument *in favor of the current Council of Europe* as the well established main player in the field—to be protected against a sort of *delirium omnipotentiae* of the Union as it gets more and more engaged in new areas. Indeed, a functioning system of minority protection should not be weakened by artificially establishing a new player in the field that merely provides ‘more of the same.’ But can we imagine a European Union that does not duplicate the Council of Europe but rather outperforms it in the degree of minority protection offered?

In the following we will first trace the emergence of the EU’s political interest in the protection of minorities (part 2.1) before exploring the scenario of a true supranational and full-fledged EU minority protection system (part 2.2). Having considered the Union a potential provider of proper minority policy, we will look at the current Union as a mere legal and institutional background for minorities and their home states by trying to identify respective opportunities (part 3.1) and limitations (part 3.2) for minorities and national minority policies within the EU system. Finally, we will try to sketch the ‘way forward’ for the

³ See De Witte in this volume.

⁴ See Sasse in this volume.

⁵ Such a possible scenario bases itself on a simple policy-calculation: If the number increases of EU member states which do more for their minorities than simply protect them from discrimination, the likelihood that the Union will develop standards in the area of minority protection is also to increase. See Hilpold (2001: 453).

⁶ For a list of frequently used arguments for and against minority involvement by the EU see Van den Berghe (2003: 196–198).

enlarged Union in a policy area which will remain of considerable importance for Europe in the course of the 21st century.

2. The Union as Provider of ‘EU Minority Policy’?

2.1 *Where Does EU Involvement Come From?*

When explaining how the question of minorities entered the EU arena one can distinguish between two processes. The first one dates from the beginning of the 1980s and was endogenous in nature, meaning that it was caused by factors within the European Union itself. The second one dates from the fall of the Iron Curtain, is connected to the process of eastern enlargement, and therefore driven by forces mainly outside the EU system—hence exogenous in nature.

The first, endogenous process was motivated by the initial desire to create an EC charter of rights for the traditional minorities living within the then nine EC member states. This approach is most evident in the proposals tabled within the European Parliament by Alber and Count Stauffenberg.⁷ However, the aim of the small group of parliamentarians sustaining this project soon switched from a ‘charter of rights’ approach to a ‘political claim’ approach that did not so much propose EU measures (and definitively no EU catalogue of rights) but used the European Community as a forum to call on *member states* to protect minorities and their languages. This approach can be seen in various parliamentary resolutions. More recently a sort of EC-centered ‘integration’ or ‘mainstreaming’ approach prevails: Parliament has called upon the Union itself to streamline its measures in a minority-friendly way. The most current examples in this respect are the proposals in the parliament report drafted by Michl Ebner in 2003.⁸ The Ebner report also gives evidence of a rising consciousness of the necessity to coordinate and share tasks among the international players—the EU, the Council of Europe, and the OSCE.⁹

⁷ These proposals—which raised academic interest despite their political failure—offered a full-fledged EU charter of minority rights. They were both doomed to fail as they did not take into consideration the constitutional asset of the European Communities and were obviously not suited to gain major political support. They both took a clear group rights approach—the Count Stauffenberg proposal even distinguishes between group and individual rights. Moreover, they provided for a broad definition of the term ‘minorities’ and called for affirmative actions such as proportional representation in public service. In the breadth of these provisions, the drafts went well beyond the consensus under international law at that time. For details, see Peter Hilpold (2001: 456–462).

⁸ See also the preface to this volume by Michl Ebner.

⁹ An issue that is also treated in this book with due intensity by Hofmann and Friberg.

What most of the various initiatives in the framework of the ‘endogenous’ process have in common is, first, that they originated within the Union (namely around pressure groups interested in the destiny of minority-cultures within member states); second, that they focused mainly on the area of language policy; third, that they were not exclusively directed at (member) states but also addressed EU institutions; fourth, that they provoked no political effects at the (member) state level and only few at the EU level (the three most important in the 1980s being the creation and funding of the European Bureau for Lesser Used Languages, EBLUL,¹⁰ the creation of an EC budget line for minority languages,¹¹ and the establishment of the EP intergroup on minorities¹²); and fifth, that they have been promoted nearly exclusively by the European Parliament, which thereby gained a reputation as the most minority-minded EU institution.¹³

¹⁰ EBLUL is not an EU institution or agency; neither can it be “considered a semi-official Community organization” (Biscoe 2001:60). It is an association established under Belgian (*Bureau européen pour les langues moins répondues*) and Irish law (European Bureau for Lesser Used Languages). The Parliament and Council decision of April 21, 2004 recognizes, however, that EBLUL and the Mercator network are “bodies pursuing a general European interest” and grants them a special status. The decision 792/2004/EC establishing a Community action program to promote bodies active at European level in the field of culture (OJ 2004 L 138/40–49) provides for the first time in the history of EBLUL a financial scheme running more than a year. Most recently, however, the political future of EBLUL has been questioned. Supposedly, the future role of EBLUL will also depend on the outcome of the current discussion on the possible creation of an EU agency on language learning and linguistic diversity. For information on EBLUL’s current activities see <http://www.eblul.org/>.

¹¹ Budget line B3-1006 had to be suspended as a consequence of a judgment by the European Court of Justice in 1998 that narrowed the understanding of “insignificant actions,” which—contrary to the general rule—do not need, in addition to entry into the budget, an act of secondary legislation authorizing the expenditure in question.

¹² Intergroups are unofficial groupings within Parliament consisting of members from at least three different political groups with a common interest in a particular theme. They are not organs of Parliament and must refrain from any activity that might lend them an official appearance (see PE 282.037/BUR/DEF). The most recent president of the intergroup on minority languages was Sanders-ten Holte (the presidency rotates every two and a half years). Every new legislative period requires that the various intergroups be newly constituted.

¹³ It is interesting to see that the new procedural rules of the enlarged European Parliament declare *expressis verbis* that the Committee on Foreign Affairs is responsible for “issues concerning... the protection of minorities... in third countries” and that the Committee on Civil Liberties, Justice, and Home Affairs is responsible for “the protection within the territory of the Union citizens rights, human rights and fundamental rights, including the protection of minorities.” See Rules of Procedure (16th edition) as of July 2004, 101 and 108. However, one should recognize the important role of the Commission’s DG Culture (not to mention the prominent role the Commission’s DG Enlargement played during the enlargement process).

Beside the incremental endogenous process, the newer and complementary process that developed over the last 10 years is strictly attached to the perspective of eastern enlargement.¹⁴ This exogenous process differs significantly from the first. First, it had its motivating sources outside the Union of then 15 states. Rather than focusing on the preservation of minority cultures and rights *within* the EU territory, concern centered on a political 'risk import' caused by ethnic and social tensions *outside* the EU15 that could undermine the security and stability of the European Union after enlargement. Second, this motivation ensured not only that cultural issues were of importance but also, if not mainly, issues crucial for stability and security such as the political participation of traditional minorities, social integration of groups such as Roma, even questions of citizenship such as with the Russian minority in the Baltic states. Third, the exogenous process neither confronted EU member states nor EU institutions with political claims, but focused entirely on candidate states giving birth to the celebrated 'double standard.'¹⁵ Fourth, this process produced considerable effects in the legal and political systems of the candidate states as a result, without showing any major spillover into the EU. Fifth, the external dimension of this second process led to the fact that it was promoted by all the three EU institutions, including the center of states' interest—the Council. Indeed, it is no coincidence that the 'Copenhagen criteria' were formulated by the European Council.¹⁶ Last but not least, one has to note that while the first, endogenous process remained somewhere in a silent corner of EU politics, the exogenous process brought considerable feedback: over the course of the last decade 'respect for and protection of minorities' has become part of regular EU-speak.

It is true that the enlargement process accelerated the 'minority momentum' of the European Union and produced considerable effects in candidate states.¹⁷ But it is also true that even after long years of monitoring there remain obvious shortcomings when it comes to the implementation of minority norms within the new member states.¹⁸ And seeing that many of

¹⁴ For a detailed description of this aspect of the EU's policy *vis-à-vis* candidate states, see e.g., Pentassuglia (2001).

¹⁵ Many have noted this phenomenon. See, e.g., Amato et al. (1998).

¹⁶ Even so, the Commission, through its monitoring exercise *vis-à-vis* candidate states, can be identified as the most active player. For an assessment of this prominent exercise see the contributions by Guglielmo, Sasse, and Hoffmeister in this volume.

¹⁷ See Guglielmo, Sasse, and Hoffmeister in this volume. The (non)effects of EU conditionality have inspired a considerable amount of scholarship (mostly in political science). See, e.g., Schweltnus (2002), Papagianni (2002), Ram (2003), Smith (2003), Topidi (2003), Vermeersch (2004).

¹⁸ This was also spelled out by Günther Verheugen in his speech before Parliament on October 9, 2003 when proposing to conclude negotiations: "However, in spite of general progress with regard to the political criteria, there are still some problem areas, which we identify clearly and unambiguously. These include shortcomings in administration, corruption, minority rights and equality issues" (speech 02/462). And the large rallies of the Roma population in Slovakia, three months before that

the EC-imposed obligations in this area are not based on the *Acquis Communautaire*, there is not even an EC law-based safeguard against further decrease in the ‘minority performance’ of new member states now that the political carrot of membership has been consumed. Nor does the accession treaty provide any sort of ‘special safeguard clause’ in the area of minority rights (as in other areas).¹⁹

The situations in the old member states and at the EU level itself are sobering as well. Despite the fact that in recent years EU law offered obvious and crucial developments in the area of anti-discrimination and social policy,²⁰ it is hard to qualify this as a congruent incorporation of the *foreign* EU minority policy as developed in these last years.²¹ At the end of the enlargement process there is no obvious sign that would dilute the initial impression that the Union sees minority protection as an export which is not designed for “domestic consumption” (De Witte 2002: 139). Therefore the big ‘E-day’ of May 1, 2004 raises the urgent policy question whether the Union should not only strengthen its commitment to minorities but even embark upon a new strand of law aiming at protecting minorities living *inside* member states, new and old alike.²²

country became an EU member state, confirmed that a pragmatic approach postulating a fade out of EU interest in minority issues back to the traditional ‘agnosticism’—relying on the presumption that the remaining sensitive minority issues will solve themselves—is far too optimistic. Compare De Witte (2002: 155).

¹⁹ Such clauses have been inserted in the area of economy (Art. 27), internal market (Art. 38), and the obligation of mutual recognition in the context of criminal law and civil matters (Art. 39). Until May 1, 2007 these transitory provisions offer emergency mechanisms in the respective fields. See Act concerning the condition of accession in OJ 2003 L 236.

²⁰ For an overview see, e.g., the Commission’s recent green paper on “Equality and Non-discrimination in an Enlarged European Union,” COM (2004)379 final as May 28, 2004.

²¹ Many might see in this “extension of anti-discrimination legislation” within the EU a clear internal result of the external minority protection criterion from Copenhagen (Heidbreder 2004: 21). Comparing, however, the contents of the two policy areas, it is submitted here that this qualifies as an evolutionary development of the EU’s internal anti-discrimination and anti-racism policy rather than as an (r)evolutionary incorporation of the EU’s external minority policy. Of course, eastern enlargement has played a role in this development, but not an exclusive one. The astonishingly quick adoption of the two directives based on Art. 13 was also inspired by an internal interest in anti-racism (the directives passed in 2000, during the ‘Austrian crisis,’ an especially fruitful political climate for this policy area).

²² Compare also Hillion who identifies and describes further effects of enlargement such as the ‘cutting off’ of some minorities from their motherland (Hungary will have to apply stricter border controls *vis-à-vis* Croatia, Romania, Serbia, and Ukraine; see Hillion [2004: 728]).

2.2 *How Far Could and Should the EU's Minority Engagement Go?*

The various degrees of involvement of a public entity in the area of minority protection include three categories—the provision of minority rights, the definition of the legal term ‘minority,’ and the concrete application of this definition to minorities on the ground (identification of minorities). So far international organizations have not gone beyond providing various sets of minority principles and prescribing respective duties, while leaving ample space for pick-and-choose approaches for each state.²³ The definition of what a minority is and the identification of the groups that fall under this definition remain to a great degree within the competence of the states themselves.²⁴ If we imagine, however, a European Union—an entity that undoubtedly oscillates between a state and an international organization—that does prescribe an EU definition of ‘minorities’ applicable on EU territory and that does provide these groups directly with a set of special EU rights, it would hardly duplicate the work of the Council of Europe but rather open a new chapter in the history of minority protection.²⁵ However, there are, if not constitutional arguments, at least constitutional concerns that must be raised against such a vision of a full-fledged EU system of minority protection. The most obvious argument frequently mentioned in this context is the lack of

²³ This is true also for the two prominent Council of Europe instruments, the Language Charter and, to a much lesser degree, the Framework Convention.

²⁴ It is interesting to note, however, that the Human Rights Committee interpreted Art. 27 as referring to minorities who are present *de facto*, and whose existence “is not dependent” upon a decision by a state authority party, but must be “established by objective criteria.” By looking at minorities as a factual matter the Committee obviously wants to prevent states from restricting the protective shield of Art. 27 to a certain few legally recognized groups (see general comment no. 23, par. 5.2, in Joseh et al. [2000: 577]). However, it can hardly be overlooked that any application of a norm entails a definition and identification of those entitled to benefit from that norm. Withdrawing the creative filter of definition and application from member states, the Human Rights Committee will have to fill this gap and thereby assume a sort of quasi-supranational character. Also in the context of the CoE this seems to be a somewhat open issue. Under the FCNM the advisory board applies a Solomonian and indeed ‘pragmatic’ approach in this matter. See Hofmann (2003: 447–449).

²⁵ Hofmann and Friberg conclude that the Union “should not have a role in detailed standard-setting as regards minority rights” by pointing to the insufficiencies of the “light” minority scenario described by De Witte, where the EU’s existing constitutional resources are used as a sort of “backdoor entrance” for elements of minority protection. They identify “[t]he clear risk ... that the minority dimension becomes increasingly diluted, and minority protection a mere fiction” (see Hofmann and Friberg, in this volume: 140). However, one can hardly argue against a full-fledged ‘minority scenario’ by referring to a mere ‘mainstreaming scenario,’ as the latter is by definition a compromise. Therefore, there is room to raise again the question of where the limits of EU involvement in this area are.

EU competence in the area of minority protection.²⁶ One should not forget, however, that the lack of a legislative competence at the EU level is not an eternal disease *per se* but just the legal result of a political lacuna—namely the lack of political consensus amongst EU member states to transfer such a competence to the EU level. Neither offers the subsidiarity principle (often invoked in this context) a *legal* argument against EU involvement in diversity matters as it just regulates the *execution* of competencies and therefore leaves the *location* of such competencies to the respective treaty provisions and, thereby, to the discretion of politicians.

In any event, when discussing the transfer of a general ‘minority-competence’ to the EU level, allowing a full-fledged EU policy in this field, it is actually more up to those who are in favor of such a step to put forward their arguments than for the opponents of such a move to argue against this transfer of competence. After all, every established political environment is characterized by inertia, and this is even more relevant in the context of the EU, where any change to primary law has to be agreed upon by *all* member states and their parliaments—an event that is becoming more and more difficult to imagine.

Advocates of a proper supranational system of minority protection can point to the fact that an EU minority system could by far outclass the mechanisms of protection we find in traditional international law in terms of efficiency. Detailed European laws in the respective area would guarantee the direct effect and strict implementation of the enshrined rights and duties. Moreover, advocates could present such full EU involvement as the only way to put an end to the existing double standard in the treatment of minorities in candidate states and other third states, on the one hand, and those living in EU member states, on the other. They could sketch such an active EU engagement as a means to put an end to the variety of approaches to the ‘minority question’ existing among member states—a variety that has so far hindered the development of a true ‘European standard’ in the field of minority protection in international law.

On the other hand, the opponents of such an EU competence could argue that the Union cannot possibly define its own ‘EU minorities’ due to the simple fact that it knows no ‘EU majority.’²⁷ In contrast to the construction of the early ‘common markets’ in the

²⁶ As is well known, according to the principle of conferral the Union can only act *de jure* “within the limits of the competences conferred upon it by the member states” in primary law. See Art I-9 par. 1 of the proposed Constitution. On the competence question see, e.g., Van den Berghe (2004: 198).

²⁷ See De Witte (2002: 149) and Hilpold (2001: 434). Those who label the European Union as a “union of minorities,” as President Romano Prodi frequently does (see, e.g., speech IP/00/41 delivered to Parliament on February 15, 2000), refer in most cases not to cultural or ethnic identities but to the constitutional standing of all member states. Even in this sense the wording is misleading as the term ‘minority’ calls in its traditional reading for a structurally disadvantaged position—a requirement not realized in current EU constitutional law that still builds on two-tier legitimation (European and national) and where the so-called ‘masters of the treaties’ (i.e., the member states) all remain co-dominant. Consequently, the Maltese cannot be considered to be an EU minority despite the fact that they account for only 0.15 percent of the overall EU population.

respective nation states of the 19th century,²⁸ the European Community succeeded in creating a full-fledged Common Market without making use of any ethnic, cultural, and linguistic homogenization. Nevertheless, it is here submitted that this hardly constitutes a stringent argument. Rather it seems that the Union could very well, theoretically, establish an EU law notion of ‘minorities’ which uses the *national* (and according to more recent developments probably also the *regional*)²⁹ level as a parameter of reference. And in a second step, the Union could identify minorities at the national (and regional) level according to that definition and thereby qualify them as addressees for the rights enlisted in an EU Charter of Minority Rights.

However, there are *constitutional concerns* against a full EU competence in the area of minority protection deriving from the current constitutional nature of the Union, which as it is far from being a proper state, is characterized by a delicate balance of power between the federal level and the level of member states, and draws from the latter a considerable degree of its legitimacy. It seems difficult to imagine these characteristics untouched within a federal unit which exerts a full-fledged minority policy within the territory of its member ‘states.’

When comparing the Union to a proper state one has to note that in the EU context cultural and ethnic affiliation traditionally did not play a legally relevant role. The existence of a ‘European people’—especially in the context of the question whether the Union is a (democratic) state—either has been entirely denied³⁰ or interpreted as a non-ethnic and non-national abstract agglomeration of peoples (Marko 1998: 381–382). Hence the term ‘people’ (implying majority and minority notions) has been reserved for the national level. The treaty itself when mentioning ‘peoples’ merely referred to the collective of people living in a member states without attempting to “insert in the preamble a disguised recognition of ‘minority’ peoples as distinct from national populations.”³¹ To equip the Union as it currently stands with a full-fledged minority competence would raise at least two ‘constitutional concerns.’ First, it seems at odds to think of a European Union that develops its own ‘minority law’ without equipping itself with its own ‘nationality and citizenship law.’ One could argue

²⁸ For a profound discussion of this, see Gellner (1985).

²⁹ Note that the Venice Commission in its opinion on Belgium declared quite clearly that “in situations of decentralization of powers, the existence of a ‘minority’ within the meaning of the Framework Convention and in particular the question of whether a group is dominant or co-dominant must be assessed both at the state and at the sub-state levels” (CDL-AD 2002 1, March 12, 2002, point 41). Contrary to this is the case of Ballantyne et al. (Communication Nos. 359/1989 and 385/1989, UN Doc. CCPR/C/47-D/359/1989 and 385/1989/1989/Rev.1), where the UN Human Rights Committee firmly held that minorities referred to in Art. 27 CCPR are only minorities within a state and not minorities within a province.

³⁰ See, e.g., Grimm (1995).

³¹ See Bruno de Witte (1993: 167) referring to the beginning of the EC treaty where one finds the famous aim of the establishment of an “ever closer union among the peoples of Europe.”

that such a law would form the self-evident basis for drawing the concepts of a proper 'EU minority law'.³² However, the Union has remained highly cautious so far in its definition of the links between the Union and its citizens.³³ Whereas states often refer in this context to ethnic or cultural affiliation, the Union keeps escaping to a derivative, indirect 'concept' of citizenship by delegating all the responsibility for the establishment of this identity-nexus between the EU and (potential) EU citizens to its member states. It seems highly improbably that the European Union as we currently know it is going to give up this cautious approach in such a highly politically sensitive matter.

A second constitutional concern against a full-fledged EU competence in the area of minority protection draws on the delicate unity-diversity balance within the EU and points to the fact that a full-fledged minority competence of the EU might seriously impinge on the latter. An intrusive Union establishing its own perception of diversity *within* member states and attempting to (re)design existing (or not existing) national policies could be seen as a negation of European diversity itself, namely the diversity *between* member states' attitudes *vis-à-vis* diversity. In this sense 'diversity' can be described as a 'self-restricting' value. The Union as it stands has to maintain a relative balance between divergent diversity perceptions within the framework of a *Staatenverbund* which guarantees "the national identities of its member states" and a "full mutual respect" between the Union and the states.³⁴ This state-centered perception of 'diversity' is most obvious in the new 'motto' of the Union as proposed in the new Constitution where "united in diversity" seems—quite in contrast to the American *E pluribus unum*—to put the general process of integration (among states) under the condition of the preservation of sufficient national distinctiveness.³⁵ Diversity management in the Union as we know it must therefore remain double-headed by serving possibly two

³² A true and original (in contrast to the current derivative) concept of European citizenship could be located on the large scale between *ius sanguinis* and *ius domicilii*. See in this context Gamberale (1995: 658) who distinguishes three main scenarios (a "Volk approach," a "fortress Europe" approach, and a "new republican" approach).

³³ Despite the fact that there was hardly any doubt about the strict subsidiarity of the Union's approach, member states found it worthwhile to stress this once more *expressis verbis* in the Treaty of Amsterdam, which says "citizenship of the Union shall complement and not replace national citizenship" (Art. 17 par.1, second sentence, TEC).

³⁴ See the principle of loyalty as now formulated in Art. 5 of the proposed Constitution. Note also that a too active involvement in diversity matters within member states does not only reduce diversity among states, and thereby affect the national identities of the states, but can also be seen as undermining the legitimacy of the Union itself. This again would explain the seemingly paradoxical belief that "cultural diversity *sustains* European unity" (emphasis added; see, e.g., Com [2004] 101 final of February 10, 2004, 5)!

³⁵ See Art. I-8, par. 3 of the proposed EU Constitution (CIG 87/2/04 REV 2, October 29, 2004). Compare Toggenburg (2004a).

forms of diversity, one *between* states and one *within* states. A full-fledged competence of the Union in the area of minority protection risks reducing the importance of the former reading of diversity and thereby altering the constitutional psychography of the Union, a move that not all advocates of a full-fledged EU minority policy might feel comfortable with.

That EU law does not offer a general, clear-cut principle of diversity³⁶ is confirmed by the proposed constitutional treaty, which treats diversity as an important ‘non-value’ in a rather ambiguous way.³⁷ This approach is also reflected at the political level, where “Europe preaches diversity and respect for cultures, but among member states the goal sometimes appears to be to assimilate immigrants, rather than to cultivate, maintain and respect diversity.”³⁸ It has been said that upholding the discrepancy between a prominent EU diversity discussion and a lack of proper diversity policy might easily lead to frustrations that reveal ‘diversity’ as an empty catch word and leave ethnic, cultural, and linguistic diversity solely to the influence of the forces of negative EU integration (Kraus 2004: 731). However, it is submitted here that even if one excludes the scenario of a full-fledged EU minority policy, there is no reason to take such a pessimistic view.

Not to transfer a full-fledged competence in the field of minority protection does not reduce the future Union to a mere mainstreaming scenario—which does nothing more than keep its policies open to members of minorities and dedicate special attention to avoid overlooking special minority needs in its various funding schemes.³⁹ Believing ‘only’ in a *light minority scenario* (where no major additional competences are transferred to the EU level) does not mean pushing the protection of minorities—now that enlargement is completed—from a rights discourse to a mere policy discourse and from rather clear-cut government to fuzzy forms of governance. As is shown in detail in the contribution by De Witte, current EU law offers a considerable amount of “constitutional resources,” which can be used for a

³⁶ Compare also von Bogdandy (2002: 196–197).

³⁷ The Constitution does not formally list “diversity” as a value the Union is founded on (Art.I-2) but as an EU objective (Art. I-3 par. 3). And even there the language remains vague. Whereas the other objectives clearly point to an active EU engagement in the field at stake (“promote,” “offer,” “work for,” “combat,” “contribute and uphold”), “cultural and linguistic diversity” is the odd one out as the Union’s “objective” is merely that it “shall respect” such diversity. See more in the detail on the “value” of diversity in De Witte (forthcoming).

³⁸ Speech 03/517 by Romano Prodi in New York, November 4, 2003.

³⁹ Of course, from a *de facto* perspective this *de jure* limited approach is of utmost importance. In this context, see, e.g., Bauer and Rainer (2004) or Labrie et al. (1994). On languages, see especially the report on *Support for Minority Languages in Europe* commissioned by the Commission, available online at <http://europa.eu.int/comm/education/policies/lang/langmin/support.pdf>, or the report *The European Union and Lesser-used Languages* (Parliament working paper EDUC 108 EN, 2002) commissioned by Parliament.

certain involvement by the Union in the area of minority protection.⁴⁰ Moreover, the EU's 'diversity *acquis*' does provide a useful protective shield against the harmonizing forces of the Common Market, also in the area of minority protection as is shown further below.⁴¹ One should not undervalue the fact that, if the new EU Constitution enters into force, the term 'minorities' will for the first time in the history of European integration appear in primary law, in two prominent provisions. Art. 21 of the Charter, which has been incorporated in part II of the Constitution (Art. II-81), forbids all discrimination based on "membership to a national minority" and Art. 2 in the first part of the Constitution establishes "human rights, including the rights of persons belonging to minorities" as values which "the Union is founded on."⁴² Moreover, the Union is held, according to Art. 22 of the Charter to "respect cultural, religious and linguistic diversity."⁴³ These values are, according to the new Constitution, "common to the member states in a society of pluralism." These are new—admittedly, still very vague—constitutional notions that might be read as the germination of an EU law on minority protection.⁴⁴ It is therefore prudent not to exclude the possibility that the Union will at some point establish a catalogue of minority rights—most probably not in the form of an EU Charter of Minority Rights, but rather resulting from a slow and rather incremental process of standard setting as part of the legislative discourse between Parliament and the Council and the case law of the Court of Justice. It will be up to these EU institutions to flesh out the now formally recognized EU value of respect for the rights of persons belonging to minorities.

⁴⁰ With the Treaty of Amsterdam a new anti-discrimination *acquis* in primary and secondary law has been developing that *combats* discrimination based on "racial or ethnic origin, religion or belief" (Art. 13 TEC). For more detail, see De Witte in this volume.

⁴¹ Different might the situation be within the EFTA. See Toggenburg (2002).

⁴² See CIG 85/04, June 18, 2004 which expresses head-of-state or government agreements to CIG 81/04, June 16, where one finds on page 7, Annex 2, a passage on the Union's values taking up a proposal delivered by the Italian Presidency. In this sense, one of the major aims of the Bolzano Declaration has already been fulfilled (compare the Declaration in this volume on page 163).

⁴³ The genesis of this provision shows that it was essentially inspired by 'minority deliberations' (however, the explanatory memorandum of the Charter remains silent in this respect). The fact that Art. 22, which is formulated quite in terms of 'soft policy,' has been placed in the rather 'hard' title III of the Charter ("Equality") might indicate that it bears also a minority notion (Callies [2001: 263] sees in this position the result of a bargaining process on whether to introduce a minority provision). This, however, cannot erase the fact that Art. 22 is hopelessly vague in wording. See subsequent note and comparison in a wider context in Toggenburg (2004c).

⁴⁴ Prominent voices have already identified Article 22 of the Charter as a nucleus for an evolving EU-imposed duty to protect minorities living within member states. See European Union Network of Independent Experts on Fundamental Rights (2000: 175). Critical in this respect is De Witte in this volume.

However, the view described here of a *light minority scenario* brings us again back to the initial argument of possible duplications with standard setting as it occurs within the Council of Europe. It seems foreseeable that a similar situation as the one within the context of human rights is going to arise. As in the case of human rights and the discussion surrounding the EU's accession to the ECHR, the question arises whether the Union should rather accede to the respective instrument of the Council of Europe, namely the Framework Convention, in order to avoid frictions between the EU and the Council of Europe system—a proposal which seems to be gaining popularity.⁴⁵ However, it is submitted here that an accession to the Framework Convention is likely to raise more questions than it resolves. Apart from institutional problems, the *current* lack of competence (which we also ignored in the above context) and the obvious fact that the Court of Justice might see in the accession to the FCNM a violation of the Union's autonomy (as the Council of Europe's Committee of Ministers monitors the implementation of the Convention by contracting parties),⁴⁶ one has to recognize that various FCNM provisions are not applicable at all in the EU context. Others raise tricky questions. A telling example in this respect is the duty of the (FCNM) parties to "take measures in the field of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority."⁴⁷ Apart from the fact that member states express—e.g., with the non-transposition of the contested directive concerning the education of migrants' children⁴⁸—that they are not very keen on an EU involvement in their educational systems, the term "their national minorities" would give the impression that the Union has 'its own' minorities, an idea we have opposed above. Also questionable is the duty to ensure as far as possible "in areas inhabited by persons belonging to national minorities... the conditions which would make it possible to use the minority language in relations with those persons and the administrative authorities." What are these EU authorities? An EU system that offers minority language communication only with those specific EU bodies which are situated in a minority area merely by chance (such as the EU agency for safety and health in Bilbao) would hardly make any sense. Therefore, all EU authorities should be open to communication with persons belonging to national minorities. Moreover, to restrict correspondence in minority languages between all EU institutions (wherever based) and "persons belonging to national minorities" to only those individuals who can prove that they live in an area which "traditionally or in substantial numbers" is inhabited by minorities seems—in the context of an institution responsible for the entire EU territory—to infringe on the principle of equality. Last but not least, the last IGC showed quite clearly that politically speaking, there is not much room for the provision of

⁴⁵ See, e.g., Friberg and Hofmann in this volume, or Van den Berghe (2004: 202).

⁴⁶ Art. 24 par. 1 FCNM.

⁴⁷ Art. 12 par. 1 FCNM.

⁴⁸ Council Directive 77/486/EEC of July 25, 1977 on the education of the children of migrant workers, in OJ 1977 L 199: 32–33.

EU communication with citizens in any non-official EU language.⁴⁹ Moreover, the Framework Convention focuses on areas such as culture, media, research, and education where the Union has only weak competencies and where new obligations of the Union in a transversal area such as the protection of minorities might easily lead to tensions between the European and the national level⁵⁰—most probably even if one were to introduce a clause similar to the one in Art. 51, par. 2 of the Charter of Fundamental Rights.⁵¹ In general, it seems highly implausible that the member states would ever sign a mixed agreement on the accession of the EU to the FCNM without making crucial reservations to the scope of the FCNM. However, in such a scenario, it might be more transparent and more capable for judicial enforcement to anchor those FCNM provisions which meet political consensus for such an “extension to the EU” in an internal EU legal source, rather than adhering to an international agreement which was not intended for the participation of a supranational organization. The risk of overlaps and duplications with the Council of Europe should rather be limited by an overarching strategy of cooperation between the Union and the Council, as outlined by Hoffmann and Friberg in this volume, than by getting involved in a half-hearted “contractual adventure.”

3. The Union as Legal Framework for National Minorities and National Policies

3.1. *What Are the Supposed and Real Opportunities for Minorities?*

When speculating about the positive aspects of the relationship between the integration process between EU member states and the protection of minorities within these states, scholarship usually dedicates considerable space to the regional dimension of the European Union.⁵²

⁴⁹ Note that during the IGC the proposal was tabled to provide Catalan, Basque, and Galician the same status currently held by Gaelic (see Art. 21 TEU in conjunction with Art. 314 TEC). This would have meant that the EU Constitution would not only be translated into these languages but that citizens would have the right to address EU institutions and receive information from them in these languages. However, Art. IV-448, par. 2 of the proposed Constitution provides only the possibility to translate the constitutional treaty into ‘any’ other languages (besides official EU languages) “among those which ... enjoy official status in all or part” of member states’ territories.

⁵⁰ See, e.g., Art. 15 FCNM.

⁵¹ “This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task of the Union, or modify powers and tasks defined in other parts of the Constitution.”

⁵² Note, however, that the regional dimension has also been mentioned as an example for the negative influence of the EU system on minorities by pointing to the fact that European integration tends to reinforce the central states to the detriment of subnational authorities. See, e.g., Verhoeven (1998: 233).

This is astonishing since only a minority of European minorities constitute the majority in a regional entity within a member state and can therefore profit from the regional dimension of the EU. Moreover, the integration process hardly provides these few minorities any relevant net victory in legal standing *vis-à-vis* 'their' majorities at the national level, i.e., the member states. Admittedly, some minorities are offered possibilities—e.g., through representation offices in Brussels or through participation in the Council—to influence the integration process in a direct way.⁵³ But these forms of participation are strongly dependent on national law and the divergent political cultures of the member states in this respect. It is undoubtedly true that the Union does offer an additional identity anchor, which allows regions and minorities to 'bypass,' at least partly, the national identity layer. But this soft factor finds no corresponding hard constitutional guarantee for regions within the EU system. The vision that the power of European integration—which has significantly eroded state sovereignty—would in the end bring power to the 'second degree nations' proved to be unrealistic.⁵⁴ "Independence in Europe"—to use the slogan of the Scottish National Party⁵⁵—has to remain a fiction.⁵⁶ And there are also no signs for any sort of "internal enlargement"—the granting of full EU membership to nations such as Catalonia, Galicia, the Basque Country, Flanders, Wales, or Scotland—a vision currently propagated by the European Free Alliance in the European Parliament.⁵⁷

What the EU does offer is not independence but *interdependence*: EU member states depend on the Union just as they depend on their regions. And the Union, in turn, is not only in need of member states' policy-consensus but also of the efficient transposition of EU law at the regional level and legitimizing approval by powerful regions. Therefore, the regional dimension is increasingly heard in a "Europe with regions."⁵⁸ This is confirmed by recent developments such as the idea of tripartite contracts between the Commission, the member state, and its regions.⁵⁹ The proposed European Constitution further strengthens the regional dimension of the EU by expanding—for the first time since its introduction by

⁵³ Compare in this context Nagel (2004) or Lynch (1996).

⁵⁴ Compare, e.g., Törnquist Plewa (2001: 27) who asks whether Europe will become a "Europe of nations and minorities."

⁵⁵ Compare the SNP website: <http://www.snp.org.uk/>.

⁵⁶ On the legal questions involved, see Schieren (2000).

⁵⁷ See the video clip *United in Diversity* or the EFA manifesto for the EP elections 2004 available online at <http://www.efa-dppe.org/>.

⁵⁸ As opposed to the outdated model of a Europe of regions. See in this respect the analysis of Borrás-Alomar, Christiansen, and Rodríguez-Pose (1994).

⁵⁹ Commission Communication of December 11, 2002: a framework for target-based tripartite contracts and agreements between the Community, the states, and regional and local authorities (COM[2002]709 final).

the Maastricht Treaty—the principle of subsidiarity to the regional level and by providing it with procedural teeth.⁶⁰ Regions form part of the national identities of member states as far as “their fundamental... political and constitutional... structures” have to be respected by reason of EU law.⁶¹ However, all this does not alter the general picture that in constitutional terms the regions remain primarily regions of member states and the latter act as the ‘governesses’ of their regions on the European scene.

What holds true for regions is even truer in the case of minorities. The Union’s structure offers no constitutional space reserved for European minority groups. Proposals in this direction never gained any sort of relevant political support.⁶² Nevertheless it is here submitted that the supranational character of the Union is *per se* already reason enough for minorities to consider the integration process a useful phenomenon.⁶³ One can argue that many of the rights and tools granted to all EU citizens are of special relevance to minorities. The fact that all linguistic minorities who speak a language which happens to be also an official language of the EU may use the latter when corresponding with the EU independent from their country of residence is just one example. Compared to international and national law, EU law offers new instruments that are of highest relevance for minorities: mobility, financial programming, and new forms of participation.

Via the EC law principles of direct effect and supremacy, the Union (law) comes into direct contact with individuals by influencing and shaping their concrete realities in a rather immediate way and by granting rights that can be invoked against national law, which for centuries used to be the only palpable legal environment for citizens, minorities included.

⁶⁰ A new “early warning mechanism” entrusts the national parliaments with the task of ensuring compliance of proposed European legislation with the principle of subsidiarity by providing a suspending veto if one third of national parliaments oppose a Commission proposal. Admittedly, the question of the level at which an “intended action” can be “sufficiently achieved” (see Art. I-11, par. 3 of the constitutional treaty) will supposedly depend on member states’ *political* self-definition. However this *ex ante* control is complemented by an eventual *judicial ex post* examination before the European Court of Justice. In the future it will be possible for the Committee of Regions to initiate such a proceeding before the court. For more on this, see the protocol on the application of the principles of subsidiarity and proportionality as attached to the proposed European Constitution.

⁶¹ See Art. 5, par. 1 of the Constitution on “Relations between the Union and Member States.”

⁶² The most recent was discussed in the European Convention and aimed at the establishment of a “Committee of National and Ethnic Minorities.” The idea of CONEM was to guarantee to every minority with at least 15,000 members in a respective state a voice in the consultative body similar to the Committee of Regions. See Convention Document CONV 580/03 of February 26, 2003, presented by József Szájer, delegate of the Hungarian National Assembly.

⁶³ More in terms of possibility than results. It has rightly said that the ability to fully access additional rights can be limited, as is the case with the Roma population. See Wilkens (2004: esp. 32–35). Wilkens is also right when saying that economic integration does not necessarily increase the standing of minorities (economic integration can even generate contrary effects, see Wilkens [2004: 20]).

Economic rights are of special importance in this context as mobility—the underlying spirit of the Common Market—is crucial for minorities who settle on two sides of a border or who have strong identity links to the majority population of a neighboring state, be it their kin state or merely an important trading partner. In these cases long-standing and painful divisions such as the “Brenner” border between Italy and Austria have been rendered politically permeable in a silent but highly efficient process of economic integration.

Second, the Union provides financial resources to a vast variety of policy fields such as cultural policy, regional policy,⁶⁴ language policy, social policy,⁶⁵ etc. Here, the Union can mainstream its activities according to minority needs or even dedicate special funds to minorities. As the field of language policy and the discussion surrounding the establishment of a proper program dedicated to minority languages shows, the hurdles against taking measures of affirmative action reserving funds especially to minorities are less of a legal and primarily of a political nature. Art. 21 of the Charter as well as the proposed Constitution newly introduced the transversal duty of the Union to “combat” discriminations based on ethnic origin or belief “in defining and implementing” *all* EU policies and activities (Art. III-118 of the proposed constitutional treaty); these should be sufficient in the future to prevent financial schemes from ignoring minority interests. Moreover, the Commission supposedly will insert more and more anti-discrimination clauses in secondary legislation in order to translate this duty into concrete norms in the various policy fields.⁶⁶ Through

⁶⁴ In its third report on social cohesion (February 2004) the Commission mentions “increasing the employment potential of people who face greater difficulties in accessing the labor market and retaining their jobs, such as people with disabilities, ethnic minorities and migrants” as a priority of future funding under the European Structural Fund. See report available at http://europa.eu.int/comm/regional_policy.

⁶⁵ See, e.g., number 7 of the European Employment Guidelines, which highlights the need to integrate disadvantaged groups (ethnic minorities included) into the labor market. See Council Decision 2003/578/EC of July 22, 2003 on guidelines for the employment policies of member states.

⁶⁶ See, e.g., the proposal of the Commission to amend regulation 1612/68 on the free movement of workers, COM (98) final of October 1998. The clause used there draws on the wording of Art. 13 TEC and not the wording of Art. 21 of the Charter. This is of relevance as Art. 13 does not cover discriminations on the basis of, e.g., language and membership to a national minority, whereas Art. 21 Ch.F.R. does. Consequently, the Union forbids certain forms of discrimination (Art 21 Ch.F.R.) without formally holding a respective competence to combat them (Art. 13 TEC). Unfortunately, the proposed Constitution does not resolve this contradiction (compare Art. III-118 of the proposed Constitution). In the area of language discrimination the Commission holds that “the concept of discrimination on the basis of language is not covered by the concept of discrimination based on ethnic origin in either Article 13 of the EC Treaty or Directive 2000/43/EC(1)” (Commission reply to written question E-3479/01 by Michl Ebner, see OJ 2002 C 147E, 186, and 187). Nevertheless, omissions such as the exclusion of minority languages from the LINGUA program can hardly be justified by this argument.

the means of programming and financial mainstreaming, a minority-friendly climate at the political level could render the EU a very proactive player in the field of minority protection.

Third, the Union increasingly offers direct contacts from the bottom up. This not only guarantees a certain control by citizens *vis-à-vis* EU administration and the implementation of EU law (especially through the Parliament ombudsman, who is empowered to “receive complaints from any... person residing... in a member state”)⁶⁷ but also enables citizens to directly participate in the decision-making process of the Union. Minorities frequently express their wishes via NGOs and thereby find new, additional channels at the EU level for inserting their political will into the decision-making process.⁶⁸ Not only new policy-making models such as the ‘open method of coordination’ are of relevance here.⁶⁹ The proposed Constitution provides an entirely new title in primary law, namely “the democratic life of the Union,” which establishes an EU principle of “participatory democracy” and introduces a new instrument of “citizens’ initiative.”⁷⁰ No less than one million citizens coming from “a significant number of member states”⁷¹ may invite the Commission to submit any appropriate proposal on matters where citizens “consider that a legal act of the Union is required.” This is of practical relevance for minorities who are not rooted in a single member state but in a number of member states or who are dispersed all over Europe, such as Europe’s eight million Roma.⁷² The poverty and segregation of the Roma are a European phenomenon that requires an EU-born reply. The EU Network of Experts on Fundamental Rights recently proposed that the EU should adopt a

⁶⁷ Art. 195, par. 1 TEC. Note, however, that EU law’s classical judicial remedies offer only limited access to individual persons—a fact often criticized.

⁶⁸ An example of a rather successful usage of such informal fora by an NGO such as EBLUL is the consultation process that led to the Commission’s action plan on linguistic diversity and language learning. Despite the breadth of the topic and the vast amount of people involved in the area of language learning, the action plan dedicates considerable emphasis to the highly specific topic of minority languages (even if it does clearly signal that the Commission does not intend to treat them separately by, e.g., calling only for a minority language program of its own).

⁶⁹ Possible OMC mechanisms have also been mentioned in the context of monitoring the respect for and the protection of minorities in the Union. See Hillion (2004: 739).

⁷⁰ Art. 47, par. 4 of the proposed Constitution.

⁷¹ A future European law will have to determine “the provisions for the procedures and conditions required for such a citizens’ initiative, including the minimum number of member states from which they must come” (Art. I-47, par. 4). It is here submitted that one fifth of the member states (i.e., currently five states) should in any event suffice.

⁷² Figure taken from enlargement briefing on EU support for Roma communities in Central and Eastern Europe (DG Enlargement, May 2002, available online at http://europa.eu.int/comm/enlargement/docs/pdf/brochure_roma_may2002.pdf).

directive “specifically aimed at encouraging the integration of Roma” since the Race Directive is mainly aimed at preventing discrimination and not producing desegregation.⁷³

Last but not least, in talking about ‘opportunities’ within the EU system it seems appropriate to mention the tens of millions of third-country nationals living all over the territory of the European Union. Seeing that they represent a Europe-wide phenomenon and seeing that their destiny, for political reasons, cannot be expected to fall within the policy preferences of a single member state, they should be of major interest to the EU. The European Union has neglected its special, political responsibility for this group consisting mostly of vulnerable sub-groups that can be subsumed under the heading of ‘new’ minorities. In most areas relating to the rights of immigrant minorities, the EU remained “a creature of its member states” who determine the status of this disadvantaged group.⁷⁴ This seems problematic insofar as EU citizenship has been criticized as “operating most effectively as an internal divider”—i.e., separating out non-EU citizens⁷⁵ from EU citizens (Bhaba 1999: 21). By providing an additional set of rights to nationals of member states, the Union augmented the difference in legal standing between nationals and non-nationals within the EU. Recent developments such as those outlined by Steve Peers in this volume show that the EU increasingly recognizes an EU responsibility for this group which is of transnational and non-territorial character. These new activities as well as a possible enhanced EU integration strategy for the Roma might be the nucleus of a special involvement in minority policy by the Union.

3.2 *What Are the Supposed and Real Threats to National Minority Policies?*

The protection of minorities often goes beyond mere anti-discrimination policy and provides ‘affirmative action’ in order to compensate for disadvantages linked to the circumstances of specific minorities and establish factual equality between a majority and a minority. It is interesting to note that with respect to affirmative action, the approaches of international and European Community law so far differed substantially. Whereas in the context of the former it was usual to discuss states’ (controversial) duty to *take* affirmative action in favor of certain vulnerable groups, EC law poses rather the opposite question, namely, whether there is a

⁷³ According to the Network this could be the “most important contribution” that the Union could take “within the framework of its existing powers.” See European Network of Independent Experts on Fundamental Rights (2004: 103).

⁷⁴ See Geddes (1995: 214) who called the group of third-country nationals the “sixteenth member state.”

⁷⁵ *Extracomunitari*, as they are tellingly called in Italian.

(controversial) duty for states to *omit* affirmative action.⁷⁶ The earlier experiences before the Court of Justice regarding gender quotas raised numerous concerns and questions in this respect. Especially in minority subregimes such as South Tyrol, the impending effects of European integration were noted with an obvious sense of dismay, as national norms could be challenged in the future “not by the aggressive nationalism of the past, but by that very European internationalism” that has been “for so long and so unswervingly supported” (Alcock 1992: 29).⁷⁷ In the meantime, the constitutional landscape has changed considerably. Eastern enlargement established minority protection as an obvious EU concern, primary law developed a ‘diversity *acquis*,’ the court smoothed its stance *vis-à-vis* gender quotas, and Art. 5 of the recent Race Directive allows member states to maintain or adopt “specific measures” in order to ensure “full equality in practice” and in order to “prevent or compensate for disadvantages linked to racial or ethnic origin.”⁷⁸ In the following we cannot offer more than an overview of case law with respect to minorities and a resulting sketch of the general mechanisms standing behind the relationship between the Common Market and the protection of minorities. This could be considered to be the ‘negative’ approach to our topic.⁷⁹

⁷⁶ Another question is, whether the Union itself has the competence to take measures of positive discrimination on the basis of Art. 13 TEC. A dominant part of the scholarship seems to accept this possibility (see, e.g., Arnold. 2001: 254). An *e contrario* argument against this might be the wording of Art. 141 par. 4 TEC in the area of gender discrimination which *expressis verbis* foresees such a possibility (see Toggenburg 2000: 21). An amendment to current Art. 13 TEC allowing affirmative action as a means to combat all the forms of discriminations covered by that article could enhance the legal security here (in this respect compare also the Bolzano/Bozen Declaration in this volume on page 163). However, some argue that the difference in wording (persisting in the proposed constitution) between Art. 21 Ch.F.R. and Art. 13 TEC indicates that Article 13 TEC cannot be used to adopt specific measures to combat discrimination based on membership of a national minority. See Hillion (2004: 724).

⁷⁷ Also Hofmann (2002: 164) identifies “at least in principle, an anti-national minority tendency.” Brunner identifies in EC law a tendency to “push back” the protection of minorities as developed within national systems. As sources of this he refers to the prohibition to discriminate on the basis of nationality (Art. 12 TEC) but—in my eyes remarkably—also to the new Art. 13 TEC and the race directive itself (Brunner 2002: 222). For further references and an analysis of the legal situation in South Tyrol in this respect, see Toggenburg (2001).

⁷⁸ See Council Directive 2000/43/EC of June 29, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, in OJ 2000 L 180: 22, 26. Some may find this formulation “disappointing in the way that it fails to *encourage* positive action” at the member state level, as did Brown (2002: 216). In any case, one should not forget that the Race Directive is just a piece of secondary law which (apart from its vagueness in this respect) can hardly offer an impeccable message of how far positive action can go under the Common Market regime (established by primary law).

⁷⁹ Scholarship tends to focus on the positive side of the story, i.e., the question what the Union did (or did not) undertake for minorities. Note, however, that Verhoeven wrote in 1998 that “the impact of

The possible tension between the Common Market and the protection of minorities derives from the differences in these two areas of laws' *raisons d'être*. Whereas certain mechanisms of minority protection aim at providing privileged access to rare, public goods such as social housing, workplaces in public administrations, or public funds such as scholarships to certain, vulnerable groups, the Common Market aims—quite to the contrary—at distributing all 'social advantages' equally to all citizens of other EU member states. The Common Market is hence opposed to any sort of biotopes in legal and political systems and pushes to expand all advantages granted to nationals of one specific state (irrespective of whether such an advantage is granted to all or just a small subgroup, as is the case in our context) to all EU citizens.⁸⁰ The influence of Common Market mechanisms stands, therefore, as an extension of the personal scope of the respective systems of protection at the national or regional level. At the same time, the Common Market avoids—as a general tendency—any seemingly unjustified extension of special duties⁸¹ to EU citizens. Whether an extension or reduction of the personal scope of a national provision is necessary, and whether it would lead to a distortion of that very mechanism, has to be seen on a case-by-case basis.

Systems of minority protection have to respect the principle of proportionality at the national level; and they eventually will infringe on the principle of equality according to national constitutional law, and have to be brought into balance with other national interests. Hence, one could argue that such systems are used to respect external factors. But, first, this is part of the domestic agenda of each member state and does not raise problems under 'alien' EU law, and secondly, member states are free to provide such systems with a special constitutional basis. Regarding potential interaction with the EU level, there is no such protective shield providing legal certainty: hardly any national system of minority protection is mentioned in EU primary law. Not even a full-fledged entity such as the Autonomous Province of Bolzano/Bozen in Italy, which is equipped with a 'special statute' guaranteed by national constitutional law, finds any sort of exemption from the Common Market

European integration on national minorities might, on balance, still be more negative than positive" (1998: 233)—an assessment which is not shared here.

⁸⁰ Do note that the legal essence of the Common Market to reduce limitations (to mobility) is not *in principle* opposed to the interests of persons belonging to minorities such as, e.g., the preservation of their identity. Sticking to language issues, one can quote the Konstantinides case, where the freedom to provide services was invoked in order to remove application of national German provisions obliging the name of a member of a minority—a Greek citizen—to be spelt in a way which disrespected the proper pronunciation of that name. See case C-168/91, *Konstantinidis*, [1993] ECR I191. Do also note that the Common Market does not alter the territorial or material scope of minority protective systems.

⁸¹ Rights mostly necessitate corresponding duties (providing the right to use a particular language before the courts means prescribing that a sufficient amount of people working at the courts are fluent in that language).

provisions in EU constitutional law. Only those entities that happened to raise sufficient political interest during the accession negotiations between the EC and the respective state are equipped with a ‘special statute’ at the EU level.⁸² When Finland, Norway, and Sweden⁸³ decided to accede to the Union they called for an explicit recognition of their special duties *vis-à-vis* persons belonging to the Saami population.⁸⁴ The accession of Finland, moreover, offers an example of how a system of *territorial* autonomy—namely the regime of the Aaland Islands—was granted EU constitutional ranking and saved from unwanted effects of the Common Market.⁸⁵ Interestingly, the newest accession treaty to the European Union contains no such protective reference to national systems for minority protection. This can be explained by the fact that the respective mechanisms in the Central European states are considerably weaker than the mentioned cases and therefore hardly raise comparable doubts.

⁸² In fact, accession negotiations are the most efficient moments to anchor specific national interests in EU primary law. Italy is a founding member of the European Community and in the fifties could not be expected to think of possible implications for the future of South Tyrol (which was then not equipped with the strong system of autonomy it now is). Later, in 1995, when the ‘Schutzmacht’ of the South Tyroleans acceded to the Union, it was hardly possible for Austria to argue legally for a ‘South Tyrol clause’ in the treaties—an amendment to primary law—which would not have been necessitated by the accession of Austria but by Italy.

⁸³ In the end, Norway did not accede due to the negative outcome of the national referendum. It has been said that the Norwegian government “was the only one of the Nordic negotiators who expressed its worry about the future standing of the... Saami” and that the Finnish negotiators “failed to ask any special rights for the Saami minority.” Note also that in Finland, in opposition to Sweden and Norway, reindeer husbandry is not solely a privilege of the Saami population. See Toivanen (2004: 316).

⁸⁴ The Saami protocol has been annexed to the accession treaty and forms, therefore, part of primary law. It says that “notwithstanding the provisions of the EC Treaty, exclusive rights to reindeer husbandry within traditional Saami areas may be granted to the Saami people” (Art. 1). Article 2 says, moreover, that the protocol “may be extended to take account of any further development of exclusive Saami rights linked to their traditional means of livelihood.” However, such an amendment to the protocol has to be unanimously approved by the Council. See OJ 1994 C 241.

⁸⁵ Article 1 of the ‘Aaland protocol’ reads as follows: “The provisions of the EC treaty shall not preclude the application of the existing provisions in force on January 1, 1994 on the Aaland islands on:—restrictions, on a non-discriminatory basis, on the right of natural persons who do not enjoy *hembygdsraett/kotiseutuoikeus* (regional citizenship) in Aaland, and for legal persons, to acquire and hold real property on the Aaland islands without permission by the competent authorities of the Aaland islands;—restrictions, on a non-discriminatory basis, on the right of establishment and the right to provide services by natural persons who do not enjoy *hembygdsraett/kotiseutuoikeus* (regional citizenship) in Aaland, or by legal persons without permission by the competent authorities of the Aaland islands.” See OJ 1994 C 241: 352.

Moreover, these norms are not deeply rooted in the respective political systems and national identities but rather are recent results of the enlargement process.⁸⁶

Hence we can say that the Common Market has possibly direct and distorting effects on certain national mechanisms of minority protection. EU law—as can be seen in the area of gender discrimination—only partly accepts the idea of ‘positive discrimination,’ and primary law offers no explicit protective shield against unwanted effects (from the perspective of national law) of ‘negative integration.’ Before trying to describe in abstract terms what the interaction between national protective systems and liberalizing European market forces might look like it seems useful to have a look at some concrete cases brought to the European Court of Justice.

Already two decades ago, in 1985, the court handed down an important judgment in the *Groener* case. Anita Groener, a Dutch national, was an art teacher who applied for a post in Ireland but was refused as she did not know Gaelic—a precondition for that job according to Irish law despite the fact that the specific course was taught in English.⁸⁷ In order to bypass this restriction, Groener invoked EC law, arguing that such language requirements limit the free movement of workers. The court explained that:

... [t]he EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a member state which is both the national language and the first official language. However, the implementation of such a policy must not encroach upon a fundamental freedom such as that of the free movement of workers. Therefore, the requirements deriving from measures intended to implement such a policy must not in any circumstance be disproportionate in relation to the aim pursued, and the manner in which they are applied must not bring about discrimination against nationals of other member states.⁸⁸

Language policies—and therefore also certain minority policies—of and within a member state can, therefore, very well violate the principles of the Common Market, especially if language competence is used as a limiting sluice to access to work.⁸⁹ In Art. 3 of the regulation

⁸⁶ Another way to look at this *lacuna* would be to take recourse to the so-called *estoppel* principle. In this perspective protective clauses are not necessary in the accession treaty due to the active involvement of the EU in framing these minority mechanisms before accession. This engagement could be seen as preventing the EU system from distorting certain minority mechanisms (after accession) through the invocation of Common Market principles.

⁸⁷ See Case 379/87, *Groener*, [1989] ECR 3967.

⁸⁸ *Groener*, par. 19.

⁸⁹ Actually all minority-relevant cases which have so far been tabled before the Court of Justice had a clear language dimension. For further references and a discussion at the broader background of the relationship between linguistic diversity and economic unity, see Toggenburg (2004b). Compare also Palermo (2001).

on the free movement of workers, the Council states that all those “provisions laid down by law, regulation, administrative action, or administrative practices of a member state shall not apply” which “limit application for and offers of employment or the right of foreign nationals to take up and pursue employment.” The drafters of Regulation 1612/68 obviously recognize that such a severe prohibition would also reduce the margin left for measures of language policy in member states and added that it does “not apply to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled.”⁹⁰ In the specific case, it was clear to all parties that knowledge of Gaelic was not required for the specific job Ms. Groener had applied for, as the course was to be held in English. The Court found however—maybe somewhat forcefully—a way to argue that the Irish language requirement for teachers is justified “by reason of the nature of the post,” referring to the “essential role” that teachers play in the framework of a national language policy. Teachers play an essential role not only through teaching, but “by their participation in the daily life of the school and the privileged relationship which they have with their pupils.”⁹¹ Therefore, the Court found it “not unreasonable” that Ireland asks them to have an “adequate knowledge” of Gaelic and recognizes this duty as being required by reason of the nature of the post to be filled within the meaning of the last subparagraph of Article 3(1) of Regulation 1612/68—provided that “the level of knowledge required is not disproportionate in relation to the objective pursued.”⁹² This is an astonishing assessment because a piece of secondary law is interpreted here in a very broad way that, moreover, goes against the spirit of the fundamental freedom of mobility of workers and is not based on any justifying source in primary law. The *Groener* case appears as a judicial milestone in the cultural unity/economic diversity conundrum, as it evidences a memorable discrepancy between political will and legal means within the EU system.

The Court refuses, as one could have expected, to provide the area of national language policy with a general exemption from the process of European integration. Therefore, it has to confront the difficult task of—as Advocate General Darmon put it—“drawing a line between the powers of the Community and those of member states and considering whether or not a policy of preserving and fostering a language may be pursued.” Darmon asks himself whether

⁹⁰ See Art. 3, Regulation (EEC) No. 1612/68 of the Council of October 15, 1968 on freedom of movement for workers within the Community (OJ 1968 L 257: 2).

⁹¹ *Groener*, par. 20.

⁹² *Groener*, par. 20. Further clear conditions set out by the Court are that the principle of non-discrimination precludes the imposition of any requirement that the linguistic knowledge in question must have been acquired within the national territory and that exceptions to such language requirements as the one at stake have to apply in a non-discriminatory way both to nationals and EU citizens. See *Groener*, par. 23 and 22. This fact surfaced again in the *Angonese* case (see below).

it is “for the Community to decide whether or not a particular language should survive? Is the Community to set Europe’s linguistic heritage in its present state for all time?”⁹³ The Advocate General obviously wanted to reserve as much space as possible for member-state language policies when he says that “[i]t seems to me that every state has the right to try to ensure the diversity of its cultural heritage and, consequently, to establish the means to carry out such a policy.”⁹⁴ It seems as if the Court was very well aware of these very politically sensitive issues and therefore escaped to a very ‘sovereignty friendly’ reading of the mentioned provision of secondary law. It seems as if the Court wanted to protect cultural diversity in Ireland as an expression of Ireland’s national identity. In legal terms though, the ice on which the Court had to operate was rather thin. One can argue that in a post-Maastricht scenario the Court could and would have made recourse to the ‘diversity *acquis*’ in primary law such as Art. 6 EU (respect for the national identities of member states) and Art. 151, par. 4 (respect for and promotion of the diversity of cultures) in order to better substantiate his wide reading of Art. 3 of regulation 1612/68.

The *Groener* case has been seen as diluting the fear that the protective systems at the national level are damned to erode when exposed to the forces of the Common Market. However, it remained unclear to what degree this applies not only for language policies which do not refer to a “national language” but also for languages that have a weaker official status at the national level. These doubts proved unfounded eleven years later when the Court ruled on the *Angonese* case in 2000.⁹⁵ The factual background of the case took place in South Tyrol, where Mr. Angonese was denied a position in a bank due to the fact that he could not provide proof of his language proficiency by means of a specific local certificate for language proficiency. The language policy at stake differs from the *Groener* case mainly in its regional dimension: here, access to a working place is made conditional upon the knowledge of a minority language which is not considered a national language and which has official status only in a single region. However, in the *Angonese* case the very duty of German proficiency was not at stake. The applicant only invoked EC law in order to contest the highly limited possibility of proving the language proficiency (namely through the mentioned particular document issued only in that region)—not in order to contest the language duty itself. Nevertheless, the fact that the Court stuck to this limited radius of examination can be read as a silent approval of policies which foster a regional minority language at the cost of the Common Market.⁹⁶ It seems acceptable from the perspective of EU law that language duties can be imposed on EU citizens even when it is clear that such duties may limit the free

⁹³ Opinion delivered on May 16, 1989, ECR 1989, 3967, par. 16 and 19.

⁹⁴ *Ibid.* Par. 20.

⁹⁵ Case 281/98, *Angonese*, [2000] ECR 4139.

⁹⁶ Regarding the limited range of means to prove language proficiency, the Court followed the applicant and called for a more flexible system in the assessment of language proficiency.

movement of EU workers, independent of the fact, whether such a language duty concerns a national or regional language.

The *Groener* and *Angonese* cases show that EU law accepts that language *duties*—if conforming to the principle of proportionality—be imposed on EU citizens.⁹⁷ What the Common Market *accepts* in the context of duties, it *enforces* in the context of rights: the extension of the norm at stake to all EU citizens. In the *Mutsch* case of 1985, the Court construed special language rights as a “social advantage,”⁹⁸ which consequently had to be granted to all EU citizens who are in the same circumstances as the respective nationals. Robert Maria Mutsch, a citizen of Luxembourg, wanted to make use of the privilege granted to Belgian nationals residing in a German-speaking municipality in Verviers to use German language before the local courts.⁹⁹ However, the Italian government intervened and argued *inter alia* that national provisions adopted for the benefit of an officially recognized minority can only concern persons who are members of that minority and reside in the area where that minority is established. It seems that this strategy aimed to absolve the regional legal authority in question from the supervisory jurisdiction of the ECJ by stressing that the aim of the norm at stake is the protection of minorities (as opposed to other policy aims falling within a core competence of the EU) and that its method is personal autonomy (as opposed to territorial autonomy including all persons living in a specific EU territory). Advocate General Lenz, however, provided a clear reply, saying that: “it cannot be assumed that advantages... are inapplicable [to EU citizens] merely because they are granted in order to protect minority rights... The requirement of equal treatment... applies [also] in areas which are not primarily governed by Community law.”¹⁰⁰ Thirteen years later, in 1998, a similar case, that of *Bickel/Franz*, touched on the area of freedom to provide services.¹⁰¹ Both Franz and Bickel, a German and an Austrian national, respectively, came into conflict with Italian law. They both wanted to exercise the right of persons resident in the province of Bolzano/Bozen to use German before the Court by arguing that a limitation to this right to persons resident in the province equates to indirect discrimination on the basis of nationality. In this context the Court also checked under which condition EU citizens could be legally excluded from the system at

⁹⁷ What hardly can be followed is the assessment that the *Groener* case would be “a clear demonstration of economic group rights winning out over individual economic rights” (Biscoe 2001: 61). Neither does Irish language policy here establish proper “group rights” nor did the Court look at this case from an individual versus group rights perspective.

⁹⁸ For that term, see Article 7 par. 2 of Regulation 1612/68.

⁹⁹ Case 137/84, *Mutsch*, [1985] ECR 2681.

¹⁰⁰ Opinion of the Advocate General, 2685 and 2686. This laid the basis for ECJ jurisdiction in future related cases. However, it is submitted that this stance corresponds quite closely with the ECJ’s general habit of looking more at the effects and less at the aims of national provisions.

¹⁰¹ Case 274/96, *Bickel and Franz*, [1998] ECR 7637.

stake, and under which circumstances certain advantages could be made conditional on a residence clause. In accordance with previous case law, the Court held that the residence requirement can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of national provisions.¹⁰² The Italian government repeated its contention made in the *Mutsch* case, but was—again—unable to convince the Court in this respect. The court responded, stating “it does not appear... that that aim would be undermined if the rules at issue were extended to cover German-speaking nationals from other member states exercising their right to freedom of movement.”¹⁰³ From the cases of *Mutsch* and *Bickel/Franz* we can therefore conclude that national norms providing residents of certain regions with special language rights have to be extended to all EU citizens who find themselves “in the same circumstances,”¹⁰⁴ i.e., whose “language is the same.”^{105,106}

However, the Court went so far as to admit that “of course, the protection of such a minority may constitute a legitimate aim.” This clearly indicates—and herein stands the importance of the *Bickel/Franz* case when compared to the *Mutsch* case—that an exclusion of EU citizens from local benefits can in certain cases be justified by reference to the scope of minority protection.

When trying to identify the general nature of the interactions between national mechanisms of minority protection and the Common Market one might conclude that the concrete turnout of a supposed ‘clash’ of interests depends very much on the nature of the national mechanisms at stake. Those mechanisms that distribute rare goods might be at risk when checked against market freedoms. Changing the personal scope of such ‘quantity-sensitive rules’ means, first, that the financial cost for the public authorities involved rises significantly (e.g., more persons entitled to privileged social housing means more costs for the respective authority); second, that political costs might be involved (e.g., opening the labor market to new groups of persons can alter the social structure and political outlook of a region); and, third, that the rule at stake might sooner or later, through an expansion of its

¹⁰² See, e.g., Case C-152/73, *Sotgiu* [1974], ECR I-153.

¹⁰³ The Court added here that Italy did not contradict the point that the courts concerned are in a position to conduct proceedings in German without additional complications or costs. This argument was used already by the Advocate General who, furthermore, saw in the provision of bilingual proceedings in South Tyrol for all German-speaking EU citizens, a strengthening rather than a weakening element for the German minority.

¹⁰⁴ *Mutsch*, par. 18.

¹⁰⁵ *Bickel and Franz*, par. 31.

¹⁰⁶ Note that the attempt by some (in literature and political discourse) to reduce this obligatory expansion of language privileges only to those EU citizens who speak the additional language as a mother tongue has to be rejected as it would result in new indirect discrimination on the basis of nationality. See Toggenburg (1999: 14). *Contra*, see, e.g., Gattini (1999).

personal scope, be led *ad absurdum* and lose its *raison d'être* (e.g., the reservation of quotas in the public administration for a certain linguistic minority group resident in a specific region might lose its meaning if these quotas were opened to all EU citizens). Other mechanisms again are not (or not to the same immediate degree) put at risk when their personal scope is expanded to all EU citizens. Such measures could be called 'non-quantity-sensitive rules' as they aim at the establishment of substantial equality by other means than the privileged access to rare goods. An example of such a rule is the right to use one's language before the courts. Providing a bilingual court system is costly, but the augmentation in the number of 'users' of such a system raises significantly neither the political nor financial costs of such a 'privilege.' Rather one could argue that the rather stable costs are invested more efficiently when the 'privilege' is expanded to a major group of beneficiaries.

All this shows that the regime of the Common Market indeed poses certain threats to strong mechanisms protecting minorities. The case of quantity-sensitive measures is especially problematic in this respect. However, the *Groener* case evidences that the Union accepts restrictions *vis-à-vis* EU citizens, and the *Bickel/Franz* case indicates that the Court is ready to accept minority protection as a legitimate aim which can justify such restrictions as long as they conform to the principle of proportionality. Recent developments in EU primary law might point to a future where the Court could make more extensive usage of the increased 'diversity *acquis*.' The entry into force of the new Constitution will avoid a situation which would leave the Court without constitutional 'anchors' for justification of measures of minority protection within member states.¹⁰⁷ Seeing in the end that the legality of national mechanisms depends on the observance of the principle of proportionality, there will always remain a certain degree of discretion that moves a considerable responsibility onto the shoulders of the Court.¹⁰⁸ The question of whether a system of, e.g., proportional representation in the public administration conforms to EC law depends very much on the concrete case at hand, but also on the question of the degree to which the Court applies judicial subsidiarity and refers the examination of the principle of proportionality back to the national level. In any case it does not seem appropriate to describe the relationship between Common Market principles and national mechanisms for minority protection as an unconditional confrontation. Minority rights systems will open to EU citizens to the degree that this is digestible for their primary task, namely to protect the substantial needs of the minorities at stake. Moreover, they will have to give up unnecessary limitations of a secondary nature. The mentioned examples of EU

¹⁰⁷ Different in this respect is the situation within the European economic area where the EFTA-Court saw itself unable to 'defend' a language policy fostering the Icelandic language against Common Market principles. See Toggenburg (2002).

¹⁰⁸ As regards South Tyrol, this question raised major questions (see in detail Toggenburg [2001: esp. 179–192]) some of which are still open. In any case it cannot be argued that, in the *Bickel/Franz* and *Angonese* cases, the Court 'sustained' the proportional system in public administration by affirming that the latter "does not infringe on Art. 39 TEC" (see the opinion of Horn [2001: 23]).

influence leading to the destruction of a regional monopoly for issuing certificates of language proficiency and the extension of the right to use a particular language before Courts are good examples of this. EC law can here be seen as a helpful means to rebalance systems of minority protection where they impose legal restrictions that are not (or no more) proportional in view of the factual and political situation at hand.¹⁰⁹ However, the Common Market will experience limitations to European mobility by accepting national measures protecting minorities (such as has been shown regarding language requirements applied 'against' EU citizens). This latter aspect—an expression of minority protection as a common EU value—will render the Common Market more diversity-sensible. In this sense it seems as if the relationship between minority protection and the Common Market is less one of confrontation, mostly one of cohabitation, and in some cases even one of symbiotic cross-fertilization.

4. Conclusion: The Way Forward for the Enlarged Union

Recently the evolution of minority rights in general has been sketched as a process leading from “minority protection” to a “law of diversity” characterized by a legislature that ceases to intervene on details and rather provides a “center of control of the basic framework rules” (Palermo and Woelk 2004). Asymmetry in application and instruments, pluralism of sources and subjects, and negotiation are identified as the main elements of such a scenario. “Sovereignty over minorities” ceases to be concentrated in one sphere of central government and this, so the authors continue, leads “inevitably” to the fact that minority protection ceases to be a question of competence and becomes a “transversal and shared objective to be realized by different actors and instruments in a combined approach” (Palermo and Woelk 2004).

This rather plausible general assessment confirms our view that the European Union—one of the many layers of governance minorities are confronted with—will have to play a specific role in the area at stake here. At the very same time, looking at minority protection as a transversal policy objective of relevance to all public entities at all levels of governance excludes a monolithic EU supranational regime of minority protection. ‘Internalizing’ the Copenhagen criteria of minority protection after the E-Day of May 1, 2004 can hardly mean embarking on a supranational minority protection regime. Even if the protection of minorities is seen less and less as a proper ‘competence matter,’ the question of competence still matters. Especially

¹⁰⁹ This dynamic function of “re-adaptation” and “re-balancing” (Hilpold speaks of a *“heilsamer Korrekturmechanismus”* which helps to overcome inelastic constitutional traditions [2001: 469]) exerted by EC law seems to fit well in a broader development of international law. Hofmann (2002: 174), on the basis of the attitude of the CoE’s Advisory Committee, points to a “current trend in minority rights law which no longer focuses on the preservation of a certain status quo, but would allow for necessary developments in order to adapt the relevant legal framework to changed circumstances.”

in the context of European integration, the need for clear delimitation of competences seems rather to gain in political importance than to fade away. The way forward for the Union is to build a situation where minority concerns are dealt with at the various European levels of government to a diverging degree in full accordance with the spirit of subsidiarity. The task for the Union herein is not to reinvent the wheel but to make it roll, not codification of the impossible but coordination of the possible. This revamped coordination should include the international as well as the horizontal and vertical intra-European dimension.

International coordination requires the enlarged Union to substantially improve its cooperation with the Council of Europe and the OSCE. The Union should establish a regular and institutionalized dialogue with these international players, thereby transporting permanently the dynamic know-how within these two forums directly to the Union in order to be taken account of and applied in all relevant fields of EU internal policing. Moreover, the establishment of a functioning triangle between these three players is important in order to improve the monitoring process *vis-à-vis* current and future applicant states, some of them characterized by considerable ethnic tension. However, international cooperation will not only improve policy performance of the Union but also that of the other two sides of the triangle. Through the Union, the Council of Europe could make use of the leverage of a political heavyweight *vis-à-vis* single states in the framework of its various monitoring procedures. The OSCE, on the other hand, could adopt a closely knit cooperation with the Union as means to get more convincingly involved in Western Europe.

Horizontal intra-European coordination means that the Union has to learn to read its obligation to respect all forms of diversity and take the cultural aspects of all its activities into account as a duty to take minority issues seriously. This means, in the first place, that it has to be aware of minorities and their special situations in all its activities and that the impact of these activities must be coordinated at the EU level. This goes not only for the legislative output in the process of 'positive integration' but also for the prohibitive effects of 'negative integration' within the Common Market policy.

Vertical intra-European coordination finally refers to cooperation between the EU and the national level. The Union should focus on actively complementing state policies in a vast variety of policy areas such as culture or regional and social cohesion by taking a clear minority-friendly approach. The Union should ensure that it plugs the gaps it can most efficiently fill. It is here where the Union can offer a new conscience for those weak groups of persons who risk being overlooked at the national, regional, and local levels. The Union's approach will therefore be characterized by a certain degree of flexibility. In fact, the continued efforts of the Union for Roma have already been identified as one area the Union might concentrate on (Heidbreder 2004: 17). The policy *vis-à-vis* third-country nationals might be another example for increased responsibility and activity on the part of the European Union.

This scenario of 'full coordination' should lead to a situation where the minorities in Europe can efficiently use the new opportunities the EU system offers, where major frictions between national minority regimes and the Common Market are avoided and where the Union develops a soft, multifaceted engagement with its minorities. In this solid political

background an EU internal legal discourse will bring the still opaque EU value to respect the rights of persons belonging to minorities to legal life.

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HUMAN RIGHTS IN THE ACCESSION PROCESS: ROMA AND MUSLIMS IN AN ENLARGING EU

Rachel Guglielmo

Abstract

When considering enlargement, the EU and other European organizations saw minority issues as a source of tension in Central and Eastern Europe and felt that their focused attention was justified in the interest of conflict prevention. To this end, minority protection was included among the Copenhagen criteria for accession. However, at the time these criteria were outlined, the EU itself lacked minority protection standards, creating an immediate double standard.

Still, the accession experience suggests that external pressure can be a powerful force for change. New anti-discrimination and minority rights legislation and minority protection policies throughout Central and Eastern Europe provide civil society advocates with important tools for holding their governments accountable.

At the same time, in the absence of the external pressures of the accession process, few EU member states have adopted specific policies to ensure comprehensive minority protection. Few met the EU's deadline for full compliance with the Race and Employment Directives.

Yet minority protection issues do exist in member states. Practices with regard to Roma populations that have been criticized severely by international observers in candidate states have been documented in Spain and Germany as well.

The emergence of large Muslim communities with traditions and values different from those of the majority populations in several member states poses challenges to the underlying assumptions of the European system for minority protection, which identifies minority communities primarily in terms of race and ethnic background rather than religion.

To build on the momentum built up through the accession process, the EU should support both domestic civil society monitoring as well as EU-level monitoring of minority protection issues across the EU. And the EU's minority rights protection standards should be subject to continuous review and revision to retain their relevance to changing realities in Europe.

HUMAN RIGHTS IN THE ACCESSION PROCESS: ROMA AND MUSLIMS IN AN ENLARGING EU

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1. Introduction

It is widely perceived that the European Union made a major contribution to the development of standards and practices in the area of minority rights protection in the 1990s. And the European Council's 1993 decision to identify "respect for and protection of minorities" explicitly among the political criteria for accession indisputably led to a flurry of legislative and policy activity, particularly in the EU candidate states of Central and Eastern Europe (CEE).

But what has been the practical impact of all the activity generated by this decision? Do vulnerable minority groups across Europe find themselves in a better position today as a result? What can an external actor such as the EU reasonably expect to achieve through human rights conditionality, and how can it maximize its returns on the effort? To be sure, it is difficult if not impossible to accumulate quantitative evidence to support a definitive answer to these questions. Nonetheless, qualitative examination and assessment of the accession experience can offer important lessons for the EU (and for other powerful external actors) as it seeks to promote and encourage meaningful compliance with human and minority rights standards, among its current and future members as well as farther afield.¹

This paper assesses the extent to which the accession process has generated positive change across the EU by examining: its effect on the situation of Roma (the minority group most consistently identified as vulnerable in EU reports) in candidate states; its effect on the

¹ In the 1990s the EU also began to include minority rights within the human rights conditionality clauses that have become a standard element of its bilateral trade association agreements with non-EU states (see Toggenburg 2000). Though discussion of these agreements and their impact falls beyond the scope of this paper, our examination of the EU's success in using conditionality to encourage improvements in the situation of minorities in Central and Eastern European (CEE) candidate states may be useful when considering the potential effect of similar efforts *vis-à-vis* non-candidate countries.

situation of Roma and Muslims within five EU member states;² and the long-term implications for minority protection in the EU and beyond.

It will seek to demonstrate that in order to have a sustainable and positive impact, external interventions to promote human and minority rights must give attention not only to formal compliance with legal standards, but to the *process* by which compliance is monitored and evaluated. It will assert that multi-level monitoring not only provides information crucial to effective conflict prevention, it also generates critical democratic input on public policies and deeper societal engagement in the ongoing process of articulating and implementing the values and principles underlying human rights norms. And it will suggest that perhaps the most dramatic long-term effect of the EU's progressive human rights policy during the accession process will be felt not in the candidate states, but within the EU itself.

2. EU Standards on Minority Protection

When the Copenhagen criteria were adopted by the European Council in 1993 the EU lacked minority protection standards; there were no directives articulating member states' obligations to protect against discrimination or promote minority rights. Thus, the decision to include minority protection among the criteria to be fulfilled by new candidates as a condition of membership was unprecedented and somewhat curious, as it expanded the boundary of EU human rights policy beyond apparent internal consensus.

The European Commission (EC) was assigned the task of monitoring compliance with the accession criteria, including the requirement that candidate states demonstrate "stability of institutions guaranteeing... respect for and protection of minority rights." Monitoring without the benefit of clear standards posed an immediate challenge, further complicated by widely differing traditions and approaches to traditional minority rights issues among member states; there was a lack of accepted benchmarks against which candidate states could be measured.³

Nonetheless, the EU and other European organizations saw minority issues as a source of tension in Central and Eastern Europe, and felt that their focused attention was justified in the

² The situation of Roma in candidate states and of vulnerable minorities in the five largest EU member states (Roma in Germany and Spain; Muslims in France, Italy, and the UK) was the subject of a series of analytical reports published by the European Union Accession Monitoring Program (EUMAP) of the Open Society Institute (OSI) in 2001 and 2002. This paper makes extensive reference to information contained in these reports, which are available in full at <http://www.eumap.org>.

³ For detailed commentary on the *ad hoc* nature of EU monitoring with regard to minority protection, see Sasse and Hughes (2003). See also the chapter by Sasse in this volume.

interest of conflict prevention.⁴ Thus, beginning in 1997 the European Commission offered detailed annual assessments of candidates' treatment of minority groups in its *Regular Reports on Progress towards Accession*. Though all ten CEE candidates were judged to have fulfilled the Copenhagen political criteria by 1999, the Commission continued to make serious critiques of the situation of candidate state minority populations, and to offer recommendations for improvement, with the implication that backsliding could have negative consequences with respect to a candidate's chances of achieving membership.

The increased attention to minority issues in candidate states may have contributed to rising interest in such issues within the EU as well. During the course of the accession process, the EU adopted the Race and Employment Directives,⁵ which provide important legislative guidelines in the area of anti-discrimination. And in 2002 the European Commission, acting on a recommendation from the European Parliament, strengthened its capacity for monitoring human rights performance in EU member states by establishing a network of human rights experts (known as the Network of Independent Experts in Fundamental Rights). The network's principal task is to prepare an annual report on the fundamental rights situation within the EU. The operation of the network is expected to enhance the EU's conflict prevention capabilities as outlined in Article 7 of the EU Treaty (TEU).⁶

However, the TEU still does not formally incorporate the Copenhagen minority protection criterion;⁷ thus, with the accession of eight of the ten CEE candidates in May

⁴ For example, in 1993 the Organization for Security and Cooperation in Europe (OSCE) established the Office of the High Commissioner on National Minorities (HCNM) with a conflict prevention mandate. The HCNM has been active almost exclusively in Central and Eastern Europe and Central Asia.

⁵ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180/22); Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303/16).

⁶ Article 7 TEU makes it possible for the Council, on the basis of a proposal from the Commission and Parliament, to determine "that there is a serious and persistent breach by a member state of principles mentioned in Article 6(1)," and to address "appropriate recommendations to this state." See EU Network of Independent Experts in Fundamental Rights (2002).

⁷ Though Commission representatives have stated in written communications to the European Parliament that minority protection is *implicitly* included under Article 6 (OJ 2002 C 147E: 180 and C 160E: 215), the Commission continues to affirm its formal understanding that the principles on which the EU is based are: "the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law," excluding any explicit notation of the Copenhagen requirement of "respect for and protection of minorities" (COM [2003] 606 final, October 15, 2003). Nor are minority rights *per se* covered in the European Charter of Fundamental Rights, which refers instead to "cultural, religious and linguistic diversity."

2004, not only does this key accession requirement not apply to current member states, it also appears that it ceases to apply to candidates once they become full members.

In short, the bar for accession was initially higher than the bar for membership: at least at the outset, membership paradoxically requires less minority protection than candidacy. This imbalance could operate to undermine the EU's seriousness as a standard-bearer for and monitor of minority rights issues and threaten its credibility in pressing for improvement of minority rights policies beyond its borders.

3. The Impact of Accession: Policies for Roma in Candidate States

Despite these structural flaws in the process, CEE states still had a powerful motivation to heed the Commission counsel: the promise of admission to a club that they desperately wanted to join. The impact of *Regular Report* recommendations on the development of minority protection legislation and policy in CEE candidate states was immediate and significant.

The Commission repeatedly expressed particular concern about the disadvantages and discrimination faced by the Roma minority,⁸ and in many cases explicitly required that candidate state governments take appropriate action. CEE governments were encouraged to ratify international minority protection standards, and most quickly did so.⁹ Improving the situation for Roma was identified as a short- or medium-term priority in the Accession Partnerships of Bulgaria, the Czech Republic, Hungary, Romania, and Slovakia, and all of these states adopted special policies to this purpose.¹⁰ Several candidate states have taken visible first steps toward adapting their domestic legislation to meet the requirements of the Race Directive.¹¹

⁸ The need to improve the situation of the Roma minority was emphasized in Commission *Regular Reports* on Bulgaria, the Czech Republic, Hungary, Romania, and Slovakia, and to a lesser degree in those on Lithuania, Poland, and Slovenia, whose Roma populations, though small, were also identified as vulnerable. The Commission also expressed concern about the integration of Russian-speaking populations in Estonia and Latvia.

⁹ As of early 2004, nine of the ten CEE candidate states had signed and ratified the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM), though only ten of the fifteen EU member states had done so. The European Charter for Regional or Minority Languages had been ratified by only eight EU member states (Belgium, France, Greece, Ireland, Italy, Luxembourg, and Portugal had not ratified it).

¹⁰ A special policy to improve the situation for Roma has also been adopted by the governments of Lithuania, Poland, and Slovenia, while Estonia and Latvia have adopted "integration programs" to encourage greater integration of their large Russian-speaking populations.

¹¹ Bulgaria, the Czech Republic, Hungary, Romania, and Slovakia are all at various stages in the process of drafting and adopting comprehensive anti-discrimination legislation. See the report by the European Commission Directorate General for Employment and Social Affairs (2003).

European Commission officials and minority rights advocates alike were encouraged by the quick returns external pressure generated during the early years of the accession process. Pushing beyond formal compliance, however, has proven more difficult. CEE governments' willingness to adopt policies for Roma has not been matched by a commitment to ensure their effective implementation. The content of Roma policies is insufficiently elaborated; these policies attract little political backing and funding; and they enjoy scant public support, even from Roma communities.

3.1 *Policy Content and Structure*

Most candidate state policies for Roma are comprehensive at the declarative level; that is, they publicly commit the state both to protect against discrimination and to ensure the right to preserve and cultivate a unique minority identity, language, and culture. They set forth a broad range of highly ambitious goals and objectives, generally conforming to or even surpassing EU expectations. Yet they do not articulate a coherent, well-structured plan for translating these aspirations into actionable policy.

3.1.1 *Anti-discrimination*

Though most candidate states' policies identify discrimination as a problem, there has been considerable resistance to the EC's requirement to adopt comprehensive anti-discrimination legislation.¹² For example, Slovakia's "Strategy for the Solution of the Problems of the Roma National Minority" recognizes "past discrimination" but does not outline practical steps to address discrimination in the present, and attempts to draft anti-discrimination legislation have stalled. Those anti-discrimination provisions that do exist in some states are rarely implemented; though Hungarian and Romanian human rights groups in particular have won a number of landmark cases on behalf of Roma clients,¹³ knowledge of and willingness to apply anti-discrimination provisions within CEE judicial systems is still poor.

3.1.2 *Minority Rights*

Many Roma policies identify "Roma integration" as an objective. However, few include a well-elaborated and coordinated set of programs to reinforce and strengthen Roma language (Romanes) and culture. In fact, many policies allude to an objective to "socialize" Roma,

¹² For example, see EUMAP (2002: 88–90, 266, 385, 443, 500, 553–54).

¹³ See EUMAP (2002: 278, 506, 509).

suggesting that Roma culture is still identified with poverty, deviance and other negative characteristics, and is viewed as being at odds with majority culture. For example, the Slovenian Employment Program attributes the marginalization and segregation of Roma to “different sets of living standards and moral values followed by the Roma. ...” The “Program on the Integration of Roma into Lithuanian Society 2000–2004” attributes the persistent marginalization of Roma to their “linguistic, cultural, and ethnic features.”

Generally speaking, policy statements of global anti-discrimination and minority rights objectives have not been followed by the articulation of detailed sectoral policies with designated funding, implementing guidelines, and reporting responsibilities for civil servants in different ministries and at regional and local levels. This means that implementation is often dependent upon the discretion and good will of public officials at different levels, who in many cases must contend with considerable public opposition to the idea of special benefits for Roma.

The problems that have cropped up during the implementation of Roma policies reflect the tensions that must be negotiated by candidate state governments in trying to balance competing external and internal demands: though external pressure to demonstrate results in improving the situation for Roma is strong, domestic political and public support for initiatives to support specific actions in support of this objective is almost entirely lacking.

3.2 Lack of Political Support¹⁴

Roma policies do not enjoy strong domestic political support, a reality that is clearly reflected by the scant human and financial resources accorded to the official bodies tasked with overseeing implementation. These bodies are seldom authorized to do more than compile reports using whatever information the various government ministries voluntarily supply, and generally lack the capacity to coordinate ministerial, departmental, and local governmental activity. As a result, the marginalization of Roma in CEE societies has been mirrored by the marginalization of Roma policies within the context of broader governmental policy.

For example, the Bulgarian National Council on Ethnic and Demographic Issues (NCEDI) is responsible for managing the government’s Framework Program for the Equal Integration of Roma into Bulgarian Society. However, the NCEDI has no authority to require other government offices to participate in implementation and controls little funding. As a result, though the program proposal was widely considered one of the more comprehensive in the region, implementation has almost completely stalled. In Romania, the Joint Committee for Monitoring and Implementation has a weak mandate and has met irregularly, often with

¹⁴ Examples in this and the following section are drawn from EUMAP’s 2001 and 2002 reports on minority protection.

the participation of only lower-level ministerial staff without decision-making authority. The Inter-Ministerial Committee in Hungary can propose that the government address cases where ministries have failed to meet their obligations under the “Medium-Term Package of Measures for Roma,” but can only register its disagreement or disapproval by referring reports to the government if appropriate action is not taken.

Lack of effective coordination has also been evident in the allocation and use of international funding. In several cases, EU PHARE funding has been utilized to fund projects that do not correspond to the stated aims and goals of official national Roma policy. For example, though the Bulgarian Framework Program calls for structural measures to resolve the illegal status of the housing in many Roma neighborhoods, PHARE 1999 funding was used to construct new housing for a relatively small number of Roma (14 houses). The project not only fails to address the underlying problem of illegality, which affects thousands of Roma families; it is also likely to engender greater dissatisfaction within the Roma community (as demand for improved, legal housing far outstrips the scope of the project) and resentment from the majority community (as the allocation of heavily subsidized housing to Roma in a period of economic austerity appears unfair).

3.3 Lack of Public Support

Effective implementation of national Roma policies requires action at the regional and local level. Yet, as noted above, most central coordinating bodies lack competence to direct the development of suitably detailed sectoral policies by participating ministries or to oversee policy implementation by local public administrations. Working with extremely limited resources, few have proven effective in communicating policy goals or in providing detailed guidelines for policy implementation.

In the context of widespread negative attitudes towards Roma and towards the idea of special projects for their benefit, lack of clear information and official guidance has often created space for opposition to policy implementation from local officials and populations. Indeed, public resistance to positive measures to improve the situation for Roma has constituted one of the principle obstacles to effective policy implementation. For example, in Slovenia, one local official reported that politicians deliberately do not prioritize Roma programs because the local non-Roma inhabitants would react negatively; in Poland, one local council faced active opposition to proposed improvements to the infrastructure of a Roma neighborhood on the grounds that “if the situation improves, more Roma will move here.” Similar observations have been noted in Bulgaria, the Czech Republic, Hungary, Lithuania, Romania, and Slovakia. Thus, while some municipalities have developed and implemented effective projects on their own initiative, many others have refused to do so. Some have adopted positions that actually run counter to the aims and goals of national policy, or used the existence of a Roma policy as a pretext to divest themselves of responsibility towards Roma communities.

For example, the Czech Republic, Romania, and Slovakia have all appointed ‘Roma advisors’ to offices of regional and local public administration, ostensibly to promote policy implementation. However, most advisors work with little institutional support or funding, without a clear definition of their competencies or responsibilities, and without specialized training for their positions. In Romania, for example, ‘Roma experts’ were appointed in mayoral offices throughout the country on the basis of their political affiliation rather than their qualifications. Roma advisors in the Czech Republic and Slovakia and minority self-government representatives in Hungary have sometimes been asked to handle questions related to social assistance, though this is the responsibility of the local government. Struggling to address problems for which they lack training, authority, and resources, Roma advisors may end up confronting frustration, disappointment, and a lack of support from members of their own communities.

Policies which appear to absorb scarce government funding without leading to clear improvements have stoked resentment among local majority populations. Roma are widely perceived as passive recipients of social assistance—a drain on limited state resources. On occasion, unscrupulous politicians have garnered popular support by criticizing Roma for not wanting to help themselves, sometimes citing the ineffectiveness of ‘expensive’ government policies as evidence.¹⁵ Even small-scale projects that involve Roma in leadership and management roles could do much to counter this popular prejudice.

3.4 *Insufficient Minority Participation*

The European Commission and other external observers have repeatedly noted the importance of minority participation in the development, implementation, and evaluation of policies that affect their communities. However, though this has produced widespread rhetorical commitment to this objective, levels of Roma participation continue to be low, particularly at the management level and in positions of leadership.

Instead, governments have tended to demonstrate their commitment to participation by soliciting limited consultative input from designated ‘official’ representatives of Roma communities. This approach belies the diversity of Roma populations, perpetuates dependency on government recognition and funding, squelches critique (since official representative bodies are reliant on governments for political and budgetary support) and engenders competition and mutual distrust within minority communities (since access is effectively limited to a chosen few).

¹⁵ For example, popular Slovak politician Robert Fico has referred publicly to the Roma minority as a “time bomb that will cause trouble if not kept under control,” explaining that “we have a great mass of Roma who do not want anything except to lie in bed and survive on social security” (*RFE/RL Newslines* 2001). For additional examples, see EUMAP (2001: 38, 81–82, 217, 219–21, 390).

There are pragmatic reasons for encouraging broad-based engagement from the Roma community in the development, implementation, and evaluation of national Roma policies. First, governmental policies developed without extensive input from Roma fail to reflect accurately and with sufficient sensitivity the principal concerns and needs of Roma communities.¹⁶ Policies developed primarily in response to external pressures tend instead to reflect the demands and priorities of the EU and other international bodies. Purely externally-driven policies and projects are accurately perceived as an imposition by CEE populations (Roma and non-Roma alike) and have resulted in the implementation of a plethora of short-term, *ad-hoc* projects that expend available funding but have minimal long-term impact, as they do not address the root causes of the problems faced by Roma communities.¹⁷

Second, lack of engagement from Roma has meant that Roma communities are generally not well-informed about government policies for their benefit. This has led to misinformation and misunderstandings about the nature, extent, and use of government (and international) assistance for Roma as well as confusion over the roles of Roma community leaders and non-Roma involved in the administration of funding for Roma policies.¹⁸ It has also contributed to a general lack of engagement and investment in policies' success or failure within Roma communities.

3.5 *The Limits of External Pressure*

Though the European Commission quickly recognized and criticized the serious and persistent gap between paper policy and effective implementation, it has struggled with the question of how to compel a deeper level of compliance. Attempts to apply additional pressure have encountered growing ambivalence and resistance from CEE governments and have brought diminishing returns, suggesting that there are limits to what an externally-driven process of democratic reform can achieve.

¹⁶ One Slovak Roma woman, commenting on the health education courses offered among her community, noted that "they all insist on teaching us how to wash our hands, and always forget to ask if we have water" (EUMAP 2001: 484).

¹⁷ For example, the public works projects that have been developed to employ Roma in the Czech Republic, Hungary, Slovakia, and Slovenia offer neither a steady income nor the opportunity to develop marketable skills, and their efficacy as a means of addressing long-term unemployment among Roma communities is questionable. See EUMAP (2002: 533 and 593).

¹⁸ Roma throughout the CEE countries have expressed frustration with the fact that international and governmental funding for Roma has most often been channeled through non-Roma organizations. At the OSCE Conference on Roma and Migration, Warsaw, October 22–24, 2000, two of the largest international Roma associations, the Roma National Congress and the International Romani Union, have recommended the establishment of "a Romani-led study group to review the programs that have benefited from European financial support in these countries."

At the same time, though the persistent implementation gap has tempered early optimism, the accession experience does suggest that external pressure can be a powerful force for change. It is important to recognize that accession has put new tools into the hands of CEE minority rights advocates: more anti-discrimination and minority rights legislation; public policies to which their governments can be held accountable; an upsurge in the amount of reporting and information about the situation of minority communities; and greater savvy and experience in utilizing international mechanisms to draw attention to domestic concerns.

Meanwhile, a number of CEE governments have become more sophisticated in their level of receptivity to monitoring as a source of constructive input for policy development. The Hungarian government has made efforts to respond to critiques in its developing minority policy.¹⁹ The Czech government has incorporated a mechanism to ensure internal review and updating of its Roma policy on an annual basis in cooperation with minority representatives, district, and municipal officials from areas where large numbers of Roma live as well as Roma activists and experts.

Still, however, many CEE nongovernmental organizations feel that their critiques of governmental policies inspire hostility²⁰ or fall on deaf ears, and that the best way to compel the attention of their governments is to feed their observations through the mouths of international observers. These organizations have become adept at circumventing domestic resistance and opposition by using international standards and mechanisms to generate external pressure for the achievement of domestic policy objectives.²¹

But what happens when external pressure is absent? For the sake of comparison, let us briefly examine the development of policies towards vulnerable minority groups in several EU member states during the accession period.

¹⁹ Responding to domestic and international critiques that minority participation in formulation of the Medium-term Package of Measures had been insufficient, in 2002 the Hungarian government established an advisory body on policy development, reporting directly to the prime minister's office, and composed of a majority of Roma political and civil society representatives.

²⁰ For example, Slovak Deputy Prime Minister Pál Csaky recently responded to allegations of sterilization by domestic and international human rights NGOs by threatening to bring criminal charges against them. See *New York Times* (2003).

²¹ For example, CEE NGOs such as the Bulgarian Helsinki Committee have successfully argued cases pertaining to human rights violations against Roma before the European Court of Human Rights and regularly provide information and expertise to European organizations such as the Council of Europe, OSCE, and the EU.

4. The Impact of Accession— Roma and Muslims in EU Member States

As noted in Section 2, the Copenhagen criteria for accession applied only to candidate states; the Commission prepared *Regular Reports* only on these states. Without the scrutiny and critique of Commission observers, few EU member states have collected extensive data on the situation of vulnerable minority populations or adopted specific policies to ensure comprehensive minority protection. Few met the EU's deadline of July 2003 for full compliance with the Race and Employment Directives.²²

An examination of the situation of Roma in Germany and Spain, and Muslims in France, Italy, and the UK suggests both that member states struggle to comply with EU human rights standards and that the standards themselves should be subject to continuous review and revision to meet changing realities in Europe.

4.1 *Roma in EU Member States*²³

Like their counterparts in Central and Eastern Europe, Spanish Roma/Gitanos and German Sinti and Roma have suffered a history of persecution and exclusion and face serious discrimination and disadvantage at present. Yet the Spanish and German governments have been subjected to comparatively little external critique of their current policies towards Roma and Sinti. There is a paucity of comparative data on the situation of Roma communities; lobbying and advocacy efforts by Roma civil society organizations have had limited effect; and governmental policies to address the problems they face are weak or non-existent.

4.1.1 *Spain*

Roma have been present in Spain for 600 years, yet despite repeated requests by domestic nongovernmental organizations, they are not recognized as an ethnic minority or as one of

²² According to the European Network against Racism (ENAR), the governments of Austria, Finland, Germany, Greece, Ireland, Luxembourg, and Spain had not taken any official steps to transpose the directive by the deadline. France and Denmark had taken partial measures, and the Netherlands and Portugal were working on draft legislation. Only Belgium, Italy, Sweden, and Great Britain had adopted comprehensive legislation. See <http://www.enar-eu.org/en/brnews/docs/Implementation%20update%20July%202003.pdf>. For a comprehensive review of the state of play with regard to adoption of the Race Equality Directive as of October 2003, see http://europa.eu.int/comm/employment_social/fundamental_rights/legis/msleglnracequal_en.htm.

²³ Examples in this section are drawn from EUMAP 2002, Volume II, chapters on Germany and Spain.

the *pueblos* (“peoples”) of Spain.²⁴ As a consequence, Roma are not entitled to protection of their identity, culture, language, and other minority rights on a par with recognized Spanish minority groups.

Practices that have been criticized severely by international observers in candidate states, such as stereotyping of Roma in the media, placement of discriminatory housing advertisements to exclude Roma, widespread refusal to hire Roma by public and private employers, and channeling Roma children into segregated schools, have all been documented in Spain as well, yet Spanish legislation does not provide comprehensive protection against discrimination. When asked in December 2002 what measures his government was taking to ensure compliance with the Race Directive by the deadline of July 2003, a high-ranking Spanish official with competence on minority issues did not appear to have heard of it.²⁵

The Spanish government’s national policy towards Roma—the Roma Development Program (RDP)—has not been reviewed or revised since it was adopted in the 1970s. Spanish Roma leaders assert that the program reflects an outdated approach, claiming that it is primarily a scheme for delivering social assistance rather than a strategic plan to protect and promote the well-being of Roma communities. The level of Roma participation in the elaboration and implementation of the RDP and other policies that affect them directly has been extremely limited.

4.1.2 Germany

The German government has recognized Sinti and Roma as a national minority, and has expressed repeatedly its commitment to improve conditions among Roma communities and to promote their integration into German society. Yet Roma/Sinti participation in public life is minimal: government agencies charged with competence on human rights issues do not employ Roma/Sinti, and there is neither a governmental policy on minorities nor a special official body in charge of minority issues.

In striking similarity with a pattern that has been observed and criticized in candidate states, the German government structures its interaction with the Roma community through one official representative organization. Most government funding for Roma and Sinti is funneled through this single organization or through non-Roma organizations, leaving

²⁴ Recognized *pueblos*, such as Catalans and Basques, are guaranteed protection of their human rights, cultures, traditions, languages, and institutions in the Spanish Constitution. The National Statistics Institute collects data on the situation of recognized *pueblos* for the purpose of designing policies to address disparities among their communities and the majority population. See EUMAP (2002: 297, 338).

²⁵ Interview with Spanish official at which the author was present, Madrid, December 2002.

other Roma and Sinti groups with the impression that they are the targets of government policy—a problem to be solved, rather than active participants in confronting the problems faced by their communities.

German Roma and Sinti leaders maintain that a legacy of historical persecution persists in the contemporary expression of anti-Gypsy attitudes by private individuals and public authorities, manifested in a philosophy of ‘preemptive action’—that is, by the perceived need to monitor, control, and prevent ‘criminal tendencies’ among Roma and Sinti. For example, until recently law enforcement authorities openly collected statistics on criminality among Roma and Sinti. Though the government has acknowledged that the ethnicity of suspects as reported by the police is often reported in the media, attempts by Sinti and Roma to win representation on media self-regulatory commissions have been rebuffed by the Constitutional Court. Sinti and Roma organizations have reported police practices such as the involuntary collection of DNA samples among Roma communities and the removal of Roma children from their families “to protect them from their families and their environment ... [and] from themselves” (EUMAP 2002: 192).

The European Commission has harshly criticized several candidate states for segregating Roma children into special schools for the mentally handicapped. Yet German Sinti and Roma children are also heavily over-represented in special schools²⁶ and often live with their families in sub-standard, segregated housing on urban peripheries or in highly polluted areas. There appears to be insufficient official recognition of the seriousness of these problems by some German politicians. A senior German member of the European Parliament denied that Roma and Sinti confront segregation in Germany; rather, he said, “they just like to be together.”²⁷ The German government did not meet the July 2003 deadline for compliance with the Race Directive.²⁸

²⁶ Special schools in Germany include *Sonderschulen*, or schools for the mentally disabled, and *Förderschulen*, or “support schools,” for children with consistently lower levels of academic achievement or who come from difficult social backgrounds, manifest behavioral problems, or have difficulty coping in the school environment. Both types of special school separate their students from the mainstream schooling system, with little or no chance of reintegration, and prepare them for low-skilled labor positions rather than for continuing or higher education.

²⁷ Comment noted during author’s meeting with German MEP at European Commission, Brussels, November 2002.

²⁸ According to a July 2003 article in *Der Spiegel*, the German government does not intend to pass an anti-discrimination law in the foreseeable future. See <http://www.spiegel.de/spiegel.de/spiegel/0,1518,256941,00.html>.

4.2 *Muslims in France, Italy, and the United Kingdom*²⁹

The emergence of large Muslim communities with traditions and values different from those of the majority populations in France, Italy, and the United Kingdom—as well as their desire fully to participate in public life—poses challenges to the underlying assumptions of the European system for minority protection, which identifies and views minority communities primarily in terms of race and ethnic background rather than religion.

Muslim communities in all three countries are extremely diverse; they can trace their origins to a wide range of home countries, with differing historical, linguistic, and cultural traditions. Some communities have been settled in Europe for decades and have attained citizenship, but there are also many Muslim non-citizens and migrant workers. Many member state governments display ambivalence as to whether Muslims constitute a minority or not. Many Muslim communities appear to experience disadvantage and discrimination on the basis of their religious affiliation, and there are clear indications that levels of tension with the majority over the right to express Muslim identity are rising, particularly since the events of September 11, 2001.³⁰

4.2.1 *Anti-discrimination*

It is difficult to substantiate the extent of discrimination against Muslims, as little data has been collected using religion as an indicator. However, detailed statistics compiled by the UK government on the situation of racial and ethnic communities indicate higher levels of disadvantage among predominantly Muslim Bangladeshi and Pakistani communities with regard to education, employment, health and social services, and in the criminal justice system, suggesting a need for targeted policies to address the possibility of religious discrimination in the delivery of public services. No such statistics are available in France and Italy, yet considerable anecdotal evidence indicates similar patterns of disadvantage among Muslim communities in these countries.

Existing EU antidiscrimination structures are not sufficient to provide meaningful protection against these forms of discrimination. Though Article 13 of the Treaty on the European Union provides for protection against discrimination on grounds of religion and belief as well as race and ethnic origin, the Race Directive covers only the latter two categories. Thus, a government may be in compliance with the Race Directive and yet fail to provide adequate protection to Muslim residents. By contrast, the Employment Directive

²⁹ Examples in this section are drawn from EUMAP 2002: 69–141 (on France); 225–281 (on Italy); and 281–361 (on the United Kingdom).

³⁰ See EUMC 2002.

does require member states specifically and explicitly to prohibit direct and indirect religious discrimination in employment.³¹

4.2.2 *Minority Rights*

Muslims are largely excluded from protection under existing minority rights regimes in Italy and the United Kingdom, and France does not recognize the existence of minorities on its territory. The UK, though it has adopted an inclusive definition of national minority, does not extend minority protection to Muslims and members of other faith communities. Italy recognizes traditional groups such as French, German, and Slovenian minorities, but most Muslims in Italy are relatively recent arrivals and still lack citizenship; the idea of granting them minority status is seen as far-fetched.

There is increasing recognition that large numbers of Muslim immigrants are in Europe to stay. Their presence is already having a transformative impact on EU member states' appearance and character, which had been relatively homogeneous until quite recently. A majority of Muslims in the UK already have British citizenship (many of them for several generations), large numbers of French Muslims have obtained citizenship in the past decade, and a similar surge in the number of Muslim citizens in Italy can be expected in the near future.³²

At present, majority institutions, even when they are formally neutral or secular, often implicitly and explicitly favor the culture and religion of the majority. For example, Christmas, Easter, and other religious holidays are celebrated as public holidays; religious symbols and rituals are often used in public schools and during state ceremonies; and school curricula are informed by Christian traditions and history, even in schools with few, if any, Christians. As more and more Muslims have obtained citizenship, demands upon the state to protect and preserve their identity in relation to education, language, media, and political participation—the traditional objectives of minority rights regimes—have increased steadily.³³

The situation of Muslims will put the 'minority protection as conflict prevention' rhetoric developed *vis-à-vis* candidate states during the accession process to the test; it suggests that the traditional definition of minority should be reexamined if it is to retain relevance and

³¹ For detailed information on current levels of compliance with the Employment Directive, see <http://www.eiro.eurofound.ie/>.

³² According to recent estimates, there are approximately four million Muslim residents of France, an estimated three million of whom possess French citizenship; approximately 700,000 Muslims live in Italy, 40–50,000 of whom have attained Italian citizenship; a majority of the almost two million Muslims who live in the UK are citizens.

³³ For reports on recent controversies over the use of religious symbols in Italian and French schools, see Arie (2003) and Sciolino (2003).

utility in modern Europe. Standards should not be seen as static, but dynamic—subject to review and revision in light of changing realities. In a number of member states Muslims constitute a large, distinct group that looks like, acts like, and perceives itself as a minority.³⁴ Regardless of whether minority status is ultimately granted by individual states, existing minority mechanisms should be reviewed to determine whether they could be utilized to defuse tensions that arise as a result of that group's difference to the majority *before* tensions give rise to conflict.

4.3 Human Rights Monitoring in EU Member States

As noted above, though extreme disadvantage is evident among some Muslim and Roma communities in EU member states, the extent to which discrimination contributes to this situation is obscured by the unavailability of comprehensive statistics or other reliable data. As in candidate states, governments often explain that the absence of such data reflects a concern for individual privacy and the protection of personal data. However, the collection of ethnic data to advance the development of targeted minority policies without violating privacy is possible, as demonstrated in Spain and the UK, and is in fact called for by the Race Directive as an indispensable means of proving (or disproving) patterns of discrimination.

Decisions about monitoring reflect political priorities; lack of information reflects the vulnerability and marginalization of the Muslim and Roma communities and poses a clear obstacle to formulation of effective anti-discrimination and minority rights policies. In candidate states, the lack of government-generated data on the situation of Roma is balanced to some extent by the plethora of independent reports prepared by external and domestic human rights monitors,³⁵ but—in the absence of concerted international pressure and scrutiny—such reports on the situation of Muslims and Roma in member states are few.

As established democracies and would-be standard-setters for other states, EU member states have a special responsibility to encourage receptivity to civil society monitoring as an essential source of democratic input and critique, and to set an example by the manner in which they respond to independent critique of their human rights records.

³⁴ This tendency is clearest in the UK. French Muslims have not challenged the Republican structure and thus refuse to be designated as a minority, but they do increasingly see themselves as a distinct group which is treated differently from other religious groups. Relatively few Italian Muslims have attained citizenship as of 2003, but requests for certain group rights (i.e., the right to build mosques) have already surfaced.

³⁵ In addition to the EU's *Regular Reports*, in-depth reports on the situation of Roma in candidate states have been prepared by Human Rights Watch, the European Roma Rights Center, the Open Society Institute, Save the Children, the OSCE HCNM, the United Nations Development Program, and the World Bank, among others.

Unfortunately—and perhaps because they are unaccustomed to being monitored—this has not always been the case. The governments of some EU member states, including leading proponents of human rights such as Denmark, have reacted angrily to critical reports by the EU's own Center for Monitoring Racism and Xenophobia (EUMC), and have slashed their contributions to local civil society organizations that have voiced criticisms of domestic human rights policies.³⁶ Belgium, France, Germany, Greece, Italy, and Spain have all reacted defensively to critiques by international organizations such as the United Nations and the Council of Europe (CoE);³⁷ in 2003, Spain was the first member of the Council of Europe to refuse a visit by the FCNM Advisory Committee.

Clearly, there is a role for both domestic and external monitoring of compliance with human rights standards in EU member states as well as candidate states. Unless EU member states take compliance with human rights standards seriously, it is hard to see how candidate states or states with which bilateral treaties including human rights clauses are concluded will do so. Worse, if the EU fails to demonstrate seriousness about the common values to which it asks other states to make a commitment, it will breed cynicism about the legitimacy and credibility of human rights and rule of law discourse—far from what was originally intended with the adoption of the Copenhagen criteria.

5. Minority Protection: The Role of Monitoring in an Enlarged EU

The EU accession experience demonstrates that, though international pressure can exert a powerful influence in compelling formal compliance with human rights standards, human rights principles are not likely to be given anything more than lip service unless corresponding changes in contextual attitudes, behaviors, social norms, and political culture take place.

The EU has acknowledged the gap between law and practice in candidate states, but has stopped short of critical self-examination in speculating as to the reasons why. Perhaps the gap appeared and has widened due to shortcomings in the accession process; perhaps candidate state governments' mediocre performance on minority policy implementation represents an accurate reading of what accession actually demanded of them. But let us assume that the EU wishes to maximize returns on its investment in articulating and monitoring compliance with the Copenhagen criteria. How can it do so?

Meaningful compliance with human and minority rights principles is best promoted through a combination of domestic and international monitoring of the extent to which governmental policies express those principles, in word and in practice.

³⁶ See European Industrial Relations Laboratory (2003).

³⁷ For several examples, see EUMAP (2002: 63–64).

Domestic monitoring by civil society organizations engenders local involvement in the political process of translating general standards into context-specific objectives and policies and in holding governments accountable for their implementation. It can also provide a critical source of constructive input for effective policy development. Particularly with regard to minority protection, monitoring can help public officials ensure that their policies do not indirectly discriminate and that they are providing an equal service to all. Without monitoring, it is difficult to identify indirect, often unintended ways in which policies disadvantage minority communities or to see whether policies aimed at reducing inequality are having a positive impact. The EU should make special efforts to support the development of domestic monitoring capacity, particularly among minority organizations.

When governments are inattentive to or dismissive of domestic critique, the check provided by international monitoring of states' human rights performance is invaluable. In order to monitor effectively among a group of states, however, it is first necessary for them to define the content of their shared values, and then to make clear, demonstrable commitment to those values a condition of group membership. The EU must devote additional resources to reexamining and further articulating the obligations of minority protection in the European context, and it must make it clear that all member states are held to these obligations equally. Strong monitoring mechanisms at the EU level would be an effective means of promoting members' adherence to common minority protection standards and sharing best practices among member states; the operation of such mechanisms would also facilitate an ongoing process of reexamining and refining these standards over time.

There are hopeful signs that accession has already provided an impetus to reinforce and strengthen the EU's minority protection standards and institutions. As noted above, the adoption of the Race and Employment Directives represent a major step forward in the articulation of EU standards for protection against discrimination. Despite resistance and slow progress towards compliance in some states, the direction that all member states are expected to follow is clear, and progress (or lack of progress) can be monitored with relative ease by international and domestic monitors. Moreover, the entrance of candidate states in 2004 may provide fresh impetus to the 'emerging consensus' among EU member states on minority rights issues.³⁸

³⁸ The European Court of Human Rights (ECtHR) referred to an "emerging international consensus... recognizing the special needs of minorities and an obligation to protect their security, identity and lifestyle," but was "not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation." *Chapman v. United Kingdom*, ECtHR Judgment, January 18, 2001 (No. 27238/95), paragraphs 93–94. Hungary is among the states most likely to press for increased attention to minority issues within an enlarged EU, and in fact has already tabled a proposal to integrate minority and ethnic rights into the European Constitution. See Frydrych (2003).

Moreover, the first report of the EU's Human Rights Network, released in spring 2003, signals an important step in the development of an effective EU-level monitoring mechanism. The report affirms the importance of monitoring to effective standard-setting, policy formulation, and conflict prevention; underlines the post-accession relevance of Copenhagen criteria for old and new member states; demonstrates its intent by explicitly addressing minority protection issues—including the situation of the Roma minority—in individual member states and calls for extensive consultation and cooperation with civil society organizations.³⁹ It is too early to assess the impact of the network's activity, which will depend on the support and receptivity its findings and recommendations are accorded within the EU and by member states, but it has made a promising start.

At the outset of the enlargement project, the EU set out to transform post-communist Central and Eastern Europe through an infusion of not only economic assistance and investment, but of its common values—democracy, human rights, rule of law, and respect for and protection of minorities. In the process, it has created a higher standard for itself and growing consciousness of and commitment to the need for *self*-transformation in order to better exemplify the union of values it aspires to become.

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MINORITY RIGHTS AND EU ENLARGEMENT: NORMATIVE OVERSTRETCH OR EFFECTIVE CONDITIONALITY?

Gwendolyn Sasse

Abstract

The EU accession criteria were outlined at a time when the pan-European normative effects of the Conference for Security and Cooperation in Europe (CSCE) and Organization for Security and Cooperation in Europe (OSCE) were expanding and the danger of ethnic conflict was made apparent by events in Yugoslavia. Subsequently, the Council of Europe's Framework Convention for the Protection of National Minorities put in place a complex and legally binding instrument for the continuous assessment of minority issues. EU conditionality in the area of minority protection is, thus, best understood as the cumulative effect of different international institutions.

EU conditionality has anchored minority protection in the political agenda of the candidate states, but the EU had little to offer in terms of substantive guidance, as the lack of benchmarks, inconsistencies, and the limited scope for follow-up on implementation in the *Regular Reports* demonstrate.

In general, it is easier to trace the EU's impact on specific laws or regulations. The Hungarian case illustrates best how the domestic political will in favor of minority protection is critically shaped by national interests. Here, the EU acted as one of the brakes on the controversial Hungarian 'Status' Law. The adoption of Slovakia's language law of July 1999 is one of the best examples of a close link to the EU accession process, as reflected in the *Regular Reports*.

Important monitoring work formerly done under the auspices of the *Regular Reports* could now be included in the European Parliament's human rights reports.

MINORITY RIGHTS AND EU ENLARGEMENT: NORMATIVE OVERSTRETCH OR EFFECTIVE CONDITIONALITY?

Gwendolyn Sasse

1. Introduction

Minority rights have been both a prominent and paradoxical issue during the EU's eastward enlargement. The first Copenhagen criterion of 1993 enshrined "the respect for and protection of national minorities" as a condition for accession, and the Commission's *Opinions* of 1997 and the *Regular Reports* 1998–2003 have monitored compliance with this criterion. On the one hand, minority issues have been at the forefront of enlargement rhetoric and are often referred to as a prime example of the EU's positive stabilizing impact in Central and Eastern Europe (CEE). On the other hand, minority rights lack a basis in EU law and do not directly translate into the *acquis communautaire*. Thus, the EU has promoted norms and rules that have never been a priority on the EU's internal political or legal agenda. Instead, the EU's approach in this area was shaped by the following six interrelated developments:

1. It directly reflected widespread Western perceptions and security concerns *vis-à-vis* CEE where the post-communist potential for ethno-regional conflict amidst multifaceted transition processes appeared to be high.
2. The nexus between human rights and conditionality had been an integral part of the EU's external relations since the Luxembourg European Council of 1991.¹ Eastward enlargement increasingly blurred the distinction between the EU's internal policy and external relations, and an extension of this type of normative conditionality appears as a logical step in the EU's adaptation to a new political environment (although the emphasis on minority rights in addition to human rights cannot be explained by this logic).
3. The nexus between democracy and human rights had always been at the core of the Council of Europe's self-definition and membership criteria. The quick engagement of the Council of Europe in CEE—Hungary became a member as early as 1990, followed by the Czech Republic and Poland in 1991—turned it effectively into an

¹ For a reminder of the limits of this human rights conditionality, see De Witte and Toggenburg (2004: 59-82, 61-62). For a study of the inconsistencies of EU conditionality towards non-CEEC third countries, see Smith (2001).

institutional stepping stone towards the EU. When defining its own membership conditions for the new candidates from CEE, the Council of Europe's criteria provided the obvious normative basis for the EU to build on. After the EU Copenhagen criteria were formulated, but before the accession negotiations had begun, the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM) of 1995 put in place a complex and legally binding pan-European instrument for the continuous assessment of minority issues.

4. The reinvigoration of the CSCE/OSCE process from 1990 onwards further enhanced this normative basis by making explicit the link between democracy, human rights, conflict-prevention, and minority protection.² The CSCE Paris Charter of 1990 stipulated that "peace, justice, stability and democracy require that the ethnic, cultural, linguistic and religious identity of national minorities be protected, and conditions for the promotion of that identity must be created."³ The OSCE General Recommendations of 1996, 1998, and 1999 subsequently attempted to refine a European standard for minority protection.⁴
5. The EU explicitly adopted the CSCE norms in the context of the Badinter Arbitration Committee. Its emphasis on the rights of 'peoples and minorities' was affirmed by the EU Foreign Ministers' Declaration on the Guidelines for Recognition of New States in Eastern Europe and the Soviet Union and the Declaration on Yugoslavia of December 16, 1991, which made recognition conditional upon, amongst other things: "guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE."⁵ Thus, the EU's political accession conditionality took shape against the background of a widening pan-European normative and institutional framework. The norms of the Council of Europe and the CSCE/OSCE became an integral part of the EU's political agenda for enlargement.

² See OSCE (1990). The tension between advocates of a traditional concept of state sovereignty and those who favored a reformulation of sovereignty to include an obligation of minority protection first surfaced at the CSCE Copenhagen meeting in 1990.

³ See <http://www.osce.org/docs/english/1990-1999/summits/paris90e.htm#Anchor-Huma-3228>.

⁴ See the Hague Recommendations on the Education Rights of National Minorities (1996), the Oslo Recommendations on the Linguistic Rights of National Minorities (1998), and the Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999). <http://www.osce.org/hcnm/documents/recommendations/index.php3>.

⁵ In its first opinion, the Badinter Committee advised that the successor states to Yugoslavia must abide by "the principles and rules of international law, with particular regard for human rights and the rights of peoples and minorities." For the full text, see Pellet (1992 and 1998).

6. The Treaty of Maastricht (1992) entrenched, for the first time in the history of the EU, specific provisions on fundamental rights and a vague recognition of the requirement that member states respect “national and regional diversity” (then Articles F TEU and I28 TEC, later Articles 6 TEU and 151 TEC).⁶ Through the European Court of Human Rights (ECtHR) a direct link was established between EU membership and membership of the Council of Europe. And finally, in addition to the ‘burgeoning jurisprudence’ on the issue of minority rights protection in the ECHR,⁷ the European Parliament performed a showcasing role for the EU during the early 1990s by passing numerous resolutions on human rights and minority protection, thereby reinforcing the growing discourse on minority rights.

The end of communism in CEE was a catalyst for the contemporaneous processes of the deepening of the EU as a political union based on common values beyond the regulation of an internal market and its widening towards the east. The formulation by the EU of the conditions for membership, as set out by the Copenhagen Council of 1993, marked a significant disjuncture through the explicit mention of minority protection among the political norms listed as the first criteria. The reference to national minorities, and the recognition of group differences and rights, sits uncomfortably with the general principles of liberal democracy and their emphasis on procedural essence and individual rights. Consequently, the process of EU enlargement has underscored the difficulty to draw the line between rights protection and normative behavior or policymaking towards minorities (Deets 2002: 30). The model of democracy projected by the EU into CEE breaks, at least rhetorically, with the standard definition of western liberal democracy.

Minority issues have a significant historical resonance in CEE. The experience of genocide, expulsion, coercion, or accommodation is intrinsic to the emergence and development of many of the states in the region.⁸ After 1989 most of the post-communist countries prioritized the strengthening of central state capacity and the position of the titular nationality. EU conditionality has contributed to the salience of minority rights on the political agendas in CEE. A range of factors—the size of the minority, its location, resources and degree of political mobilization, the history of relations between majority and minority groups, the involvement of kin states, the constitutional design of the new regime and its transition path—has interacted with external conditionality and produced varied policy outcomes. In this context, the balance between domestic and external incentives for policymaking in the field of minority protection deserves closer attention, as does the question of where the EU’s

⁶ See <http://europa.eu.int/abc/obj/treaties/en/entoc01.htm>.

⁷ See Gilbert (2002).

⁸ For a general history that is sensitive to the issue of minorities in Eastern Europe, see Crampton (1994).

leverage has been anchored and how it has been communicated. This chapter will analyze the EU's conditionality and monitoring mechanism, locate it in the domestic political context of three accession countries (Hungary, Slovakia, and Romania), and draw some lessons from the enlargement process for the post-accession period.

2. Minority Rights and EU Enlargement

2.1 *The Scope and Limits of Conditionality*

Conditionality is widely seen as a primary means of “democracy promotion” in CEE (Smith 2001 and Zielonka 2001).⁹ The clear incentive structure for the candidate states and the power asymmetry characterizing the interaction between the EU and the accession countries have underscored the impact of the EU. As yet few studies have systematically analyzed the impact of conditionality on specific policy areas or countries.¹⁰ In the context of enlargement, conditionality is seen as the key mechanism of “Europeanization,” which in turn is defined as the diffusion of common political rules, norms, and practices in Europe.¹¹ At its most fundamental, Europeanization is viewed as a “way of doing things,” first defined and consolidated in the making of EU decisions and then incorporated into “the logic of domestic discourse, identities, political structures, and public policies” (Radaelli 2000).

The issue of minority rights cuts across the logic of ‘Europeanization.’ In the absence of an EU minority rights regime, ‘Europeanization’ can at best refer to a diffusion of norms and practices anchored in the Council of Europe and the OSCE. *Per definitionem* ‘conditionality’ implies a consensus on rules and their transmission within the EU and beyond, clear-cut benchmarks, and clear enforcement and reward mechanisms to ensure credibility, consistency, and continuity over time. The political Copenhagen criteria generally, but in particular the reference to national minorities, defies these basic principles of conditionality. Thus, the issue of minority rights is a test for the very notion of conditionality. Put another way, can the EU have an impact on minority rights without an internal consensus on norms and practices in this field? The Treaty of Amsterdam (TEU) of 1997 illustrates the underlying ambiguity best: it incorporated all of the values set out by the EU in the first Copenhagen criterion in Article 6 (1) as “liberty, democracy, respect for human rights and fundamental freedoms and the rule of law,” but expressly excluded “respect for and protection of minorities.” That Article

⁹ For a general discussion of EU conditionality, see Grabbe (2001).

¹⁰ Empirical evidence suggests a more uneven and inconsistent impact than generally assumed. See Hughes, Sasse, and Gordon (2004).

¹¹ See Featherstone (2003).

6 (1) was drawn from the Copenhagen criteria is specifically alluded to in Article 49, which specifies that the principles laid out in Article 6 (1) are preconditions for any state applying for EU membership.¹² A footnote in the 2002 *Regular Reports* stated that “the political criteria defined at Copenhagen have been essentially enshrined as a constitutional principle in the Treaty on the European Union.”¹³ The wording falls short of an explicit endorsement of the minority criterion, but it suggests that minority protection is subsumed under Article 6 (1).¹⁴

During enlargement, the minority ‘condition’ faced at least four compliance problems in CEE: first, it lacked a firm foundation in EU law and concise benchmarks. The practices of the current member states range from elaborate constitutional and legal means for minority protection and political participation to constitutional unitarism and outright denial that national minorities exist. Second, minority rights were not an internal EU policy priority. Third, the concept of what constitutes a ‘national minority’ and minority rights are deeply disputed in international politics and law. Fourth, there is the dilemma of implementation. The existence or even the perception of a double standard should limit the effectiveness of conditionality. A constitutional provision or piece of legislation may not be implemented because of deliberate non-compliance or ‘capacity’ weaknesses in states that are resource-stretched and lack experience with the rule of law. Moreover, the minority criterion did not figure in the EU’s pre-accession funding. PHARE has been the main instrument for the design and delivery of EU policy in CEE. Established as early as 1989, the program was reoriented to address the accession priorities set by the EU in 1997. PHARE did not have a separate budget line for assistance in the policy area of minority protection, and the most closely related activity heading “civil society and democratization” accounted for only about one percent of the total PHARE funds distributed.¹⁵

2.2 *The EU’s Monitoring Exercise*

The European Commission’s annual *Regular Reports*, following the Opinions of 1997 and the Accession Partnerships, have been the EU’s key instrument to monitor and evaluate the candidates’ progress towards accession.¹⁶ The reports indicate the main trends and results in the field of minority protection within the candidate countries. They have a formulaic structure, which broadly follows the Copenhagen criteria, and thereby permits cross-country

¹² http://europa.eu.int/eur-lex/en/treaties/dat/eu_cons_treaty_en.pdf.

¹³ See, for example, footnote 3 in the 2002 *Regular Report on Bulgaria’s Progress Towards Accession* (p. 18).

¹⁴ See Hoffmeister in this volume.

¹⁵ See http://europa.eu.int/comm/enlargement/pas/phare/statistics/commit_sector.pdf.

¹⁶ For a more detailed review of the monitoring exercise, see Hughes and Sasse (2003).

comparisons. At first glance, three characteristics frame the monitoring exercise: first, the explicitly-stated objective of the *Regular Reports* is to review each candidate country according to “the rate at which it is adopting the *acquis*.” This stipulation, laid down by the Luxembourg Council of the European Presidency on December 12, 1997,¹⁷ equates integration with the speedy adoption of the *acquis*. Thus, from the very beginning the emphasis was not on the monitoring of the broadly stated normative conditions of the political Copenhagen criterion, which does not directly translate into specific chapters of the *acquis*. Secondly, the introduction to the first volume of reports states that it is the EU’s priority “to maintain the enlargement process for the countries covered in the Luxembourg European Council conclusions.” This wording suggests that harsh criticism was to be avoided in order to sustain progress along the envisaged ‘road map.’ Thirdly, the reports are a compendium of results compiled from a variety of sources, drawing on information provided directly by the candidate countries, the Council of Europe, the OSCE, International Financial Institutions, and NGOs, as well as “assessments made by member states,” especially in the political sphere. It is difficult to measure the relative weight of these inputs and to assess the process by which they were filtered and evaluated, but it is clear that in the area of minority issues the Council of Europe and the OSCE were privileged sources of information. During the drafting stage, the European Commission scheduled a regular annual briefing session in Brussels with the Council of Europe and the OSCE. While the EU delegations in the candidate countries provided the basis for the reports, the country desks in DG Enlargement wrote up the drafts. The whole process, including cooperation with the relevant line DGs, was overseen by a Horizontal Coordination Unit within DG Enlargement. This unit produced a manual outlining issues to be addressed each year and streamlined the final version of the *Regular Reports* in terms of substance and language in order to ensure consistency and comparability within and across the reports.

Hierarchy of Minority Issues

Although most of the ten CEE candidate countries have significant minority populations, only two minority groups are consistently stressed in the *Regular Reports*: the Russophone minority in Estonia and Latvia, and the Roma minorities of Bulgaria, the Czech Republic, Hungary, Romania, and Slovakia.¹⁸ In the first reports on Bulgaria, Hungary, Romania, and Slovakia, Roma are the only minority commented on at all, despite the fact that there are numerically greater minority groups in these countries. This ‘hierarchy’ of minority issues reflects the EU’s interest in good relations with its most powerful neighbor and energy supplier Russia and its

¹⁷ See <http://ue.eu.int/Newsroom/LoadDoc.asp?BID=76&DID=43659&from=&LANG=1>.

¹⁸ Two other sizeable minority groups (the Hungarians of Romania and Slovakia and the Turks of Bulgaria) are occasionally mentioned.

own soft security concerns regarding migration. Furthermore, a non-territorialized, internally diverse, and marginalized minority like Roma is a politically less sensitive group to focus on, compared with territorialized and politically mobilized minorities, such as the Hungarians in Slovakia and Romania or the Turks in Bulgaria. Undoubtedly, Roma face severe problems of systematic discrimination, political and social exclusion, segregation, and poverty, but this is by no means a specific feature of the candidate countries.¹⁹

Measuring Progress in the Absence of Benchmarks

The *Regular Reports* illustrate the EU's lack of clear benchmarks in the field of minority rights. The emphasis is on the existence or absence of formal measures rather than their implementation. The reports track the adoption and amendment of laws on citizenship, naturalization, language, and elections; the establishment of institutions that manage minority issues within the executive or legislative structures; and the launch of government programs to address minority needs. Trends are evaluated by numerical benchmarks, such as the number of minority members obtaining citizenship, the number of requests for naturalization, the pass rate for language or citizenship tests, the number of schools or classes taught in the state or minority languages, the number of teachers trained to teach in the state or minority languages, and the extent of media broadcasting in minority languages. Overall, the EU's emphasis is on the "integration" of minorities, either linguistic integration, which the reports interpret as the need to make minorities proficient in the official state language, or social and political integration.

In essence, the reports are a patchwork of formulaic codes encapsulating 'progress' on the road to membership. The general commitment of the candidate countries to improve minority protection is taken at face value and described positively as "continuing commitment to the protection of minority rights," "a number of positive developments," "significant progress," "considerable efforts," "considerable progress," "consolidating and deepening... the respect for and protection of minorities."²⁰ Some candidate countries earn generic praise, for example, through the statement that minorities are "well integrated into Hungarian society" or that Hungary has a "well-developed institutional framework protecting the interests of its minorities and promoting their cultural and educational autonomy."²¹

The *Regular Reports* make frequent references to "international standards" or "European standards" without attempting to specify these standards from an EU perspective. The reports routinely cross-reference the recommendations, activities, principles, and documents of other

¹⁹ See Guglielmo in this volume.

²⁰ *Report on Romania* (1998: 12 and 2001: 29); *Report on Slovakia* (1999: 16 and 2002: 33); *Report on Estonia* (2000: 20 and 2001: 23).

²¹ *Report on Hungary* (2001: 22 and 2002: 30).

international institutions, in particular, the Council of Europe and the OSCE. This practice is most evident in the cases of Latvia and Estonia, where the Europe Agreements included a reference to the need to comply “*inter alia* with the undertakings made within the context of the Conference on Security and Cooperation in Europe (CSCE) and the Organization for Security and Cooperation in Europe (OSCE)—the rule of law and human rights, including the rights of persons belonging to minorities.”²² The 1998 *Report on Latvia*, for example, states that the European Commission based its evaluations of Latvia’s citizenship and naturalization policies on the extent to which they complied with OSCE recommendations.²³ The 1999 report asserts that: “Latvia now fulfils all recommendations expressed by the OSCE in the area of naturalization and citizenship.”²⁴ Yet, fresh concerns over the linguistic rights of the Russophone minority are expressed in the 2001 report, which refers to the “joint efforts” of the EU, the OSCE, and the Council of Europe to establish guidelines for the new language law.²⁵ The reports do not provide details regarding specific recommendations or activities referred to, and the generic references to the OSCE or the Council of Europe conceal the dynamics of the interaction among the different institutional (sub-)structures.

When European Commission officials are asked to explain how the monitoring process actually embodies the Copenhagen criteria with respect to minority protection, they emphasize the ratification of the FCNM as the main instrument for putting the criteria into practice.²⁶ The *Regular Reports* frequently remind the respective governments and parliaments of the candidate states to sign and ratify the FCNM—despite the fact that several EU member states have not done so. In contrast, the adoption of the even more controversial European Charter of Regional and Minority Languages is rarely mentioned in the reports. The reports indicate that the EU has relied on the OSCE (and presumably also the Council of Europe) for some basic information and data gathering activities that are essential to professional monitoring. For example, the 1998 *Report on Estonia* quotes OSCE data on the number of minority members who gained citizenship. Gaps in the data provided by other institutions are not filled by EU research. In these instances the reports record the unavailability of data, for example with regard to the implementation of language legislation in Slovakia in the 2000–2002 reports.²⁷

²² See OJ 1998 L 68: 3–4 and OJ 1998 L 26: 3–4.

²³ *Report on Latvia* (1998: 11).

²⁴ *Report on Latvia* (1999: 17).

²⁵ *Report on Latvia* (2001: 26).

²⁶ Author’s interviews with officials from the country desks in DG Enlargement, the Horizontal Coordination Unit, and the Legal Service, Brussels, January 12–13, 2004. The manual, which was prepared each year by the Horizontal Coordination Unit for the country desks in advance of the drafting of the *Regular Reports*, listed the FCNM as an explicit point of reference.

²⁷ *Report on Estonia* (1999: 13 and 2000: 18); *Report on Slovakia* (2000: 2, 2001: 23, and 2002: 32).

'Ad Hocism' and Inconsistency

The *Regular Reports* are designed in a way that renders them a cumulative success story for each candidate country. Positive developments are recorded, even when previous reports had not specified any problems in these areas. Examples of this practice include the reference to the improvement of the "conditions for the use of minority languages, in particular Hungarian" in Romania's 1999 report, and the positive mention of media programs in Turkish singled out in Bulgaria's 2001 report.²⁸ The reports do not systematically assess the structure and operation of institutional frameworks or policies for dealing with minority groups. Romania's 2002 report, for example, mentions that the legislation on the use of minority languages in public administration is being "successfully applied despite the reticence of some prefectures and local authorities."²⁹ However, no further evidence is provided to substantiate this claim to success.

Ad hocism and the borrowing of different external "standards" give rise to ambiguity and internal inconsistencies. The 2002 reports on Estonia and Latvia, for example, include the glaring contradiction that the OSCE mission in these states closed in late 2001, including the official OSCE reasons for this decision, whereas the section on minorities highlights the EU's continued concern. The *Report on Latvia*, for example, "urged" it to ratify the FCNM and noted EU and OSCE concerns over naturalization and effective political participation by minorities due to restrictive language laws, including a reference to the 2002 ruling of the European Court of Human Rights against Latvia's narrow application of the language proficiency criterion in the national parliament. Nevertheless, it concluded that "the country has made considerable progress in further consolidating and deepening . . . respect for and protection of minorities."³⁰ The overall assessment of the Roma issue is ill-defined, stating that the socioeconomic and political situation of the Roma has not improved while listing new activities and programs targeting the most pressing needs of the Roma.³¹ The fact that the treatment of Roma is harshly criticized in candidate countries recognized as continuing "to fulfill the political Copenhagen criteria" indicates that minority protection, in general, has not been the EU's main concern.

The Problem of Implementation

Throughout the accession process the Commission's emphasis has shifted gradually from the adoption of the *acquis* towards issues of 'capacity' and implementation. However, the

²⁸ *Report on Romania* (1999: 18); *Report on Bulgaria* (2001: 24).

²⁹ *Report on Romania* (2002: 35).

³⁰ *Report on Latvia* (2002: 30–35).

Regular Reports demonstrate that the Commission is less equipped to monitor and follow-up on implementation issues. Problems in the implementation of minority policy are dealt with in general terms, listing the lack of funding, weak administrative capacity, understaffing, and the low levels of public awareness in the candidate countries as the main shortcomings. The “gap between policy formulation and implementation” is addressed most explicitly with reference to the Roma, for example, in the reports on Slovakia for 2000 and 2001.³² The potential implications of weak policy implementation are referred to most explicitly in the 2002 *Report on Bulgaria*, which obliquely notes that there are “signs of increased tension between Roma and ethnic Bulgarians.”³³ Without referring back to this alarmist scenario, the 2003 report offers a much more optimistic assessment: “On the whole, initiatives have started to address the situation of the Roma minority.”³⁴ In particular, the budgetary provisions for the government program are deemed more realistic.

The EU and the candidate countries at times appear to be acting out a charade on Roma policy. For example, the 1999 *Report on Bulgaria* states that: “Significant progress was achieved concerning further integration of Roma through the adoption of a Framework Program for ‘Full Integration of the Roma Population into the Bulgarian Society’ and establishment of relevant institutions at the central and regional levels.”³⁵ By what measure this formal adoption of a program marks “significant progress” is not clear. Two years later, little of this program had been implemented.³⁶ It seems as if mere lip service can be paid to the Roma issue by the candidate countries’ governments without it raising domestic political tensions or seriously straining the relations with the EU. In some instances, EU-inspired policies can even have some counterproductive effects. In 2001 Romania adopted a package of policies targeting Roma for which it gained praise in the *Regular Report* of 2002. In Romania’s 2003 report the Commission notes progress but also an overall “uneven” implementation of the Roma strategy of 2001.³⁷ The package included the appointment of advisors who would advise the regional prefects on Roma-related issues. Though formally implemented, this measure has done little to change perceptions or policy outcomes (Pogány 2003). It has, however, separated “Roma issues” from mainstream policymaking, reinforces marginalization, and

³¹ This inherent tension is particularly striking in the reports on the Czech Republic, which refer to the construction of a wall in Ušti nad Lábem that physically separates Roma and non-Roma residents. See *Report on the Czech Republic* (1999: 16–17 and 2000: 25–27).

³² *Report on Slovakia* (2000: 22 and 2000: 31).

³³ *Report on Bulgaria* (2002: 33).

³⁴ *Report on Bulgaria* (2003: 26).

³⁵ *Report on Bulgaria* (1999: 75).

³⁶ See Rangelov (2001).

³⁷ *Report on Romania*, 2003: 30.

contributes to a growing frustration among office holders, Roma activists, and the wider Roma community. Moreover, there is a misfit between the political and civil rights promoted by the EU and other international organizations, which Roma at large have not benefited from, and the need for tangible social and economic rights in a post-communist context of high Roma unemployment.

3. Domestic vs. External Incentives for Minority Rights

It is self-evident that domestic political will is required to generate sustainable policy outcomes inspired by external conditionality. The exact relationship between domestic incentives and EU conditionality is difficult to pin down, and the interlocking conditions and recommendations of institutions like the EU, the OSCE, and the Council of Europe make it impossible to disentangle their respective effects. Nevertheless, the timing of the adoption of international instruments and other policies, including anti-discrimination legislation³⁸ as well as the domestic political context in individual candidate countries, provide insights into the effectiveness of EU conditionality, or more specifically the conditions facilitating or limiting its impact.

Given the EU's frequent references to external "standards" of minority protection, in particular the FCNM, the ratification of this document by the candidate countries provides for a rough correlation between enlargement conditionality and a degree of commitment to minority policy in CEE. All ten CEE candidate countries have signed the FCNM. Almost all of them signed shortly after the document was opened for signature on February 1, 1995, though the process of ratification and implementation has taken longer. Only Latvia has not ratified the document. This early commitment to the implementation of the FCNM contrasts with some of the EU member states (Belgium, France, Greece, Luxembourg, and the Netherlands) that have still not ratified it.³⁹ Among the CEE countries, Bulgaria, Estonia, Poland, and Slovenia have added special declarations, a practice fairly evenly spread among EU member states and candidate countries. The Bulgarian declaration, for example, cautiously refers to "the policy of protection of human rights and tolerance of persons belonging to minorities" and stipulates that the ratification and implementation of the Framework Convention do not imply "any right to engage in any activity violating the territorial integrity and sovereignty of the unitary Bulgarian state, its internal and international security."⁴⁰ Estonia's declaration is

³⁸ Non-discrimination as an EU norm is rooted in the Treaties of Maastricht and Amsterdam, the Directives 2000/78/EC and 2000/43/EC and ECJ rulings. The adoption of the *acquis* involves anti-discrimination legislation and the implementation of the Race Directive.

³⁹ France has not even signed it; see <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>.

⁴⁰ Bulgaria, Declaration of May 7, 1999.

concerned with specifying its own legal definition of ‘national minorities,’ who are stated to be “citizens of Estonia who reside on the territory of Estonia; maintain longstanding, firm, and lasting ties with Estonia; are distinct from Estonians on the basis of their ethnic, cultural, religious, or linguistic characteristics; and are motivated by a concern to preserve the cultural traditions, religion, or language which constitute the basis of their common identity.”⁴¹ Similarly, Poland’s declaration affirms that it recognizes as national minorities only those residing in the Republic of Poland who are Polish citizens. It also includes a reference to international agreements protecting “national minorities in Poland and minorities or groups of Poles in other states.”⁴² Slovenia’s declaration limits its definition of national minorities to “the autochthonous Italian and Hungarian national minorities,” but also states that the provisions also apply to “the members of the Roma community who live in the Republic of Slovenia,” while excluding its numerically largest minority group—Croats.⁴³

The Council of Europe’s European Charter for Regional or Minority Languages (ECRML) was opened for signature as early as November 1992. It proved more controversial among candidate countries (and member states), not least because of the specific obligations it imposes on the signatories, such as the establishment of a committee monitoring compliance. The *Regular Reports* record the ratification of the charter by individual countries, but they do not use it as a standard point of reference comparable to the FCNM. By the end of February 2004 only three of the ten CEE candidates (Hungary, Slovakia, and Slovenia) had ratified it.⁴⁴ All three countries ratified it in the latter stages of the enlargement process, between 1998 and 2002, but they added specific and rather complex declarations which tended to heighten the ambiguity in defining the differences between a regional and a national language. Slovenia’s declaration states that only the Hungarian and Italian languages “are considered regional or minority languages.”⁴⁵ It also limits the number of provisions applied to the above-mentioned languages. Slovakia’s declaration confers the status of regional or minority language to Bulgarian, Croatian, Czech, German, Hungarian, Polish, Roma, Ruthenian, and Ukrainian. However, it also establishes a hierarchy of languages according to which Hungarian, followed by Ukrainian and Ruthenian, enjoy more far-reaching rights, for example the availability of pre-school education in a particular language as opposed to the right to apply for this type of education. The Slovakian declaration also stipulates that it defines the ECRML’s term “territory in which the regional or minority language is used” as that provided for by Slovak

⁴¹ Estonia, Declaration of January 6, 1997.

⁴² Poland, Declaration of December 20, 2000.

⁴³ Slovenia, Declaration of March 25, 1998. According to the 1991 census, there were 81,220 Serbo-Croatian speakers, and 52,110 Croatian speakers, but only 9,240 Hungarian speakers, 4,009 Italian speakers, and 2,847 Romanes speakers. See http://www.ecmi.de/emap/slo_stat.html.

⁴⁴ Romania, the Czech Republic, and Poland have signed though not yet ratified the ECRML.

⁴⁵ Slovenia, Declaration of October 4, 2000.

law as those “municipalities in which the citizens of the Slovak Republic belonging to national minorities form at least 20 percent of the population.”⁴⁶

After the introduction of the *Regular Reports* all of the CEE candidates have formally adopted government programs to protect or integrate minority groups. According to EUMAP's 2002 monitoring reports, Bulgaria, the Czech Republic, Hungary, and Romania are committed to a comprehensive approach to minority protection, by policies to eliminate discrimination and actively promote minority identities.⁴⁷ Delays in legislation and implementation are attributed to the weak capacity of these states to deal with the issues (whether it be underfunding or lack of experienced staff). The newly established legal systems and judicial cultures are as yet unfamiliar with many of the norms of the EU and other international organizations. Moreover, there has often been a lack of political will both within the candidate countries and on the part of the EU to go beyond the rhetorical or formal legal and institutional change, leaving the bodies responsible for the monitoring and implementation of minority protection, such as ombudsmen, politically marginalized.⁴⁸

3.1 Hungary

Several countries introduced legislation on minority protection or were in the final stages of doing so prior to the Copenhagen criteria. Some of these were inclusive measures, providing autonomy and privileged quotas of representation in national parliaments. For example, Hungary passed the Law on the Rights of National and Ethnic Minorities in 1993 that granted collective rights and cultural autonomy to thirteen recognized minorities.⁴⁹ This law built on Article 68 in the amended Hungarian Constitution of 1990, which had anchored the protection of “national and ethnic minorities” as well as their collective participation in public life and representation through local and national government organizations. Most of Hungary's minorities are quite small and not politically mobilized. On the whole, they had little impact on the 1993 act. Instead, the historical resonance of the Treaty of Trianon (1920), which left large Hungarian territorialized minorities in neighboring states (Slovakia, Romania, Serbia, and Ukraine), has underpinned the political will in favor of minority protection both at home and abroad.

While the endogenous incentives for a far-reaching minority rights regime are easy to trace in the case of Hungary, the effects are more difficult to assess. In terms of intra-state relations, Hungary's policies have both encouraged bilateral agreements and provoked concern

⁴⁶ Slovakia, Declaration of September 5, 2001.

⁴⁷ EUMAP (2002: 18, 23–24).

⁴⁸ EUMAP (2002: 25).

⁴⁹ http://www.riga.lv/minelres/NationalLegislation/Hungary/Hungary_Minorities_English.htm

and angry responses from political groups in neighboring countries. Even the 1993 law itself contained a dual agenda: the active strengthening of the cultural and linguistic identity of Hungary's minorities was bound to exert explicit and implicit pressure on the governments and minorities in neighboring states. The implementation of the 1993 act indicates further peculiarities: local governments receive payments to offset the costs of minority education, thereby creating an incentive to inflate the number of children requiring education in their own language. According to Hungarian government statistics of 1998, almost 45,000 primary-school children were enrolled in German-minority programs, although the last census recorded only about 8,000 Germans living in Hungary.⁵⁰

Local minority self-governments have mushroomed as a result of the simple procedure by which they are set up.⁵¹ By 1999 there were already more than 1,400 registered across the country, half of which are Roma councils, followed by German councils as the second most represented group (Deets 2002: 49). The local councils, in turn, elect the national council. The councils are supposed to have extensive consent and consultation rights with regard to laws impacting on minority issues, such as culture, education, and the media. While there is evidence of such consultation between the national councils and the Hungarian Parliament, the involvement of the local level seems to be minimal. The main function of the councils, therefore, is to promote minority culture, but the limited funding at the local level has curbed their potential. While the national minority governments receive state funding according to the size of the minority, the local governments all receive a small flat sum. There is also evidence of local governments trying to shift responsibility for minority issues to the minority councils, especially in the case of the Roma. The election of the minority self-government councils takes place alongside the national elections in a two-ballot system. Anybody can vote for the members of self-governments irrespective of his/her nationality, which is not registered. The only restriction is that a vote can only be cast for one self-government. It is hard to track voting patterns in these elections, but the emergence of a Serbian nationalist on a Croatian council or the popularity of German councils, which are associated with external funding and travel opportunities, suggest a range of voting motivations (Deets 2002: 50). The minority groups, in turn, are interested in high voter turnout to boost their national-level funding.

Most importantly, Hungary's progressive 1993 law represents only one of several elements of minority-relevant policymaking. The highly controversial Hungarian 'Status Law' of 2001, giving rights and entitlements to Hungarians living in other countries, brings the primary rationale behind the 1993 act to a logical conclusion but can hardly be seen to contribute to the consolidation of good-neighborly relations and stability within neighboring states.⁵²

⁵⁰ See Deets (2002: 39).

⁵¹ Local self-governments are either set up by the local government or by the initiative of five minority members who gain the support of 100 people in the elections.

⁵² For a detailed discussion of the Status Law and its challenge to modern notions of territoriality and citizenship, see Fowler (2002).

Moreover, Hungary only produced a draft anti-discrimination law in the second half of 2003.⁵³ The case of Hungary demonstrates the overarching significance of domestic incentives for minority protection, the ambiguity and practical difficulties attached to the implementation of collective rights, and a certain corrective effect of EU conditionality (underpinned by the Council of Europe and the OSCE High Commissioner) on potentially destabilizing policies like the Status Law.⁵⁴

3.2 *Slovakia and Romania*

The presence of sizeable, politically mobilized Hungarian minorities in Slovakia and Romania allows for a comparison of their interaction with the respective majorities and sheds light on the dynamics between internal political developments and external interests and incentives—here represented by the Hungarian government and various European organizations. In Slovakia, four Hungarian parties emerged in the early transition phase, illustrating that the Hungarian minority did not represent a unified political force. The first ethnically inclusive government, involving a Hungarian party, collapsed quickly. The emergence of the sovereignty issue on the political agenda ‘ethnicized’ statehood and the political process as a whole. The Slovak majority and the Hungarian minority favored a common state with the Czechs, but the distance between the Slovak political elite and the Hungarian minority grew, especially when the Movement for a Democratic Slovakia (HZDS) formed a coalition with the Slovak National Party in 1992 (Csörgő 2002: 4–5).

Romania adopted extensive provisions for minority representation in its parliament. The 1992 Election Law enables minority organizations to field candidates in elections and guarantees a seat in parliament for a minority failing to cross the three percent threshold on the condition that they receive more than five percent of the average vote needed to elect one representative.⁵⁵ This provision was not the result of active minority campaigning, but an early signal to the West and the EU that the Romanian government protects its minorities. The law was a good-will gesture to smaller minorities, but it failed to address the most

⁵³ See Schweltnus (2003).

⁵⁴ The Council of Europe’s Venice Commission has not ruled out co-ethnic socioeconomic entitlements, as long as they are available to other foreign citizens, but the European Commission’s emphasis on the Schengen Agreement, the exclusion of Austria from Hungary’s law and the repeated references to the need to amend the law to comply with EC law (see *Regular Report on Hungary* 2001: 91; 2002: 122) have signaled the limited scope of the law after Hungary’s accession to the EU. In the context of the discussion about this law, the commission has diverged from its general approach, reproducing the wording of the recommendations of the Venice Commission and urging Hungary to complete agreements with Romania and Slovakia on the implementation of the law (*ibid.*).

⁵⁵ In the 1996 election this number was as low as about 1,800 votes; see Deets (2002: 46).

pressing minority issues concerning Hungarians and the Roma. The fact that representatives of the state-funded minority organizations—the state funds one organization per minority—dominate among the minority deputies in parliament and the low rates of ethnic voting of medium-sized minorities compared with a proliferation of very small minorities demonstrate the pitfalls of a policy that looks progressive at first glance (Deets 2002: 18).

In Romania a single Hungarian party, the Democratic Alliance of Hungarians in Romania, emerged as early as 1989, but it combined within its own ranks a range of different viewpoints. Iliescu's National Front initially proclaimed a commitment to collective minority rights in return for the Hungarian party's support, but Iliescu—like Mečiar—polarized ethnopolitical differences in their attempts to build nation-states. Iliescu's regime lasted from 1990 to 1996, while Mečiar stayed in power from 1992 to 1998. In both cases Hungarian minority parties were represented in parliament, questioning their respective governments' policies, especially institutional safeguards for minority representation, language, and regional administration. In Romania, the Hungarian party countered the increasing centralization and restrictive language legislation with calls for territorial autonomy. While national territorial autonomy did not emerge as the Hungarian parties' priority in Slovakia, they pursued a collision course with Mečiar's plan to gerrymander regional administrative boundaries so as to break up the relatively compact Hungarian settlements.

The Hungarian minority elites formed part of the political opposition in both countries, but the majority-minority ethnic division did not become the only or predominant cleavage. Instead, three clusters of parties representing 'majority-nationalist,' 'majority-moderate,' and 'minority-pluralist' perspectives on state-building crystallized (Csörgő 2002: 13). Gradually, the Hungarian parties increased their cooperation with the Slovak and Romanian opposition parties, although this interaction was initially overshadowed by frictions. In 1994 the Slovak–Hungarian opposition managed to topple the Mečiar government in a vote of no confidence, but already six months later the HZDS was reelected and, under Mečiar's leadership, managed to divide and suppress the opposition forces. Thus, the friendship treaty with Hungary, which clearly ruled out autonomy rights for minorities, was signed in 1995 and a number of laws was passed with the full or at least partial support of the Slovak opposition: the State Language Act of 1995, making Slovak the only official language; the act on the redrawing of the territorial-administrative boundaries in 1996, trying to minimize the political strength of the Hungarian minority in areas where it constituted a numerical majority; amendments to the act on school administration, limiting the authority of local communities over schools; and a law on the elevation of a national Slovak organization (*Matica slovenská*) to the highest national cultural, social, and scientific organization (Csörgő 2002: 17–18). On the basis of the political Copenhagen criterion, Slovakia was excluded from the first wave of candidates at the Luxembourg Council in 1997 and was sharply criticized in the report of 1998.⁵⁶

⁵⁶ By 1998 Romania was already seen to fulfill the Copenhagen criteria; see *Regular Report on Romania* (1998: 12).

The Hungarian parties' demands for regional self-government proved the biggest stumbling block for the cooperation between Hungarian and Slovak opposition parties. Over time the Hungarian parties switched to an emphasis on decentralization and local government, thus allowing for a narrowing of the political divide within the opposition. The electoral law of 1998 led to the consolidation of one moderate Slovak opposition party (Slovak Democratic Coalition) and the Hungarian Coalition, made up of three Hungarian parties. In Romania, the Hungarian party and the Romanian political opposition encountered similar differences in defining more coherent positions and reaching a compromise. Shared conceptions about what the post-communist state and its relationship with other European democracies should (and should not) look like was at the heart of the political coalitions toppling Iliescu in 1996 and Mečiar in 1998. In Romania the resulting coalition governments struggled for a political compromise on amending restrictive laws on language use, education, and administration and managed to forge a consensus in the end (Csergő 2002: 13). The regime change in Slovakia marked the beginning of new state policy on minorities, which quickly became an integral part of the attempt of Prime Minister Džurinda's government to speed up economic reforms and integrate into western security, political, and economic structures. In a direct response to earlier criticisms from the EU and the OSCE HCNM, it prioritized the adoption of a new language law in advance of the Commission meeting of July 1999, which was scheduled to review Slovakia's accession prospects.⁵⁷ The new language law came to symbolize regime change and placed Slovakia into the first wave of candidate countries. The language law allows the use of minority languages in local public administration subject to a minority population threshold of 20 percent in a given area.⁵⁸ The Commission's 1999 report declared that the requisite "significant progress" in this policy area had been delivered, despite the fact that the final text of the law was adopted without the support of the governing Hungarian parties. Definitional ambiguities in the text and a problem of legal precedence with regard to the more restrictive provisions of the Constitution of 1992 further overshadowed the implementation of the law.⁵⁹

Slovakia and Romania demonstrate that the predominant political conflicts between majorities and minorities did not hinge on ethnic divisions. In both cases divisions and coalitions emerged within and between majority and minority political parties. In the early transition period the main political majority embarked on centralized nation-state building,

⁵⁷ The coalition also agreed to sign the European Charter on Regional and Minority Languages and the FCNM.

⁵⁸ See Slovakia's Law on the Use of Minority Languages (July 11, 1999), Art. 2(1), 51; http://www.riga.lv/minelres/NationalLegislation/Slovakia/Slovakia_MinorLang_English.htm. The Romanian Law on Local Public Administration (April 23, 2001) envisages the same threshold; see: http://www.riga.lv/minelres/NationalLegislation/Romania/Romania_LocAdm2001_excerpts_English.htm.

⁵⁹ For a discussion of the interaction of Slovakia's laws and EU pressures, see Daftary and Gál (2000).

which was challenged by the Hungarian minority in opposition. The Hungarian parties fairly consistently represented the ethnic and political minority in opposition to the ruling party. Over time they built a joint electoral platform with the moderate Slovak and Romanian forces, thereby cutting across ethnic divisions and forging a new political majority. These coalitions proved essential for state consolidation and democratization, although the institutional responses to minority issues continued to be disputed and—as seen in the case of Romania—the new coalitions did not guarantee a smooth political and economic reform process.

4. Conclusion: Lessons for the Post-Accession Period

The empirical evidence suggests that, on balance, international actors framed the debates and perceptions and affected the timing and nature of specific pieces of legislation, while the domestic political constellations and pressures ultimately had a more significant effect on the institutional and policy outcomes. The EU has had an impact if its vague conditions in the field of minority protection fit the domestic political agenda. The policy domain of minority protection not only questions the effectiveness of EU conditionality *per se* and widens the notion of ‘Europeanization’ by highlighting the need to investigate the links (and gaps) between different international institutions and tools; it also uncouples ethnic minorities and majorities from political minorities and majorities. The states and societies in CEE are ‘divided’ in different ways. Minority rights form an integral part of the political process and, consequently, need to be continuously monitored and adjusted via a dynamic and ongoing procedure, preferably through a combination of domestic and external mechanisms.

The decision of the ruling elites in the candidate countries over whether to comply with EU conditionality has been shaped not only by their perceptions of how a particular decision may affect the accession process of their country, but also by the degree of domestic mobilization among majority or minority groups, the elites’ definition of “national interests” (Csergő 2002: 2), and personal concerns about power and political risks. EU conditionality has anchored minority protection in the political agenda of the candidate states, but the EU had little to offer in terms of substantive guidance, as the lack of benchmarks, inconsistencies, *ad hocism*, and the limited scope for follow-up on implementation in the *Regular Reports* demonstrate. The Hungarian case illustrates best how the domestic political will in favor of minority protection is critically shaped by national interests, namely the concern for the sizeable Hungarian minorities located in neighboring countries. Here the EU has acted as one of the brakes on the controversial Hungarian Status Law. In general, it is easier to trace the EU’s impact on specific laws or regulations. The adoption of Slovakia’s language law of July 1999 is one of the best examples of a close link to the EU accession process, as reflected in the *Regular Reports*.

It is often difficult to disentangle the role of the EU from that of other international actors, most notably the Council of Europe and the OSCE, and a range of other actors, such as NGOs. EU conditionality in the area of minority protection is, thus, best understood as the cumulative effect of different international institutions. The actual policy leverage of the EU in

the area of minority protection has been anchored in the instruments and recommendations of the Council of Europe and the OSCE. The changes to the citizenship and naturalization provisions in Estonia and Latvia, in particular, demonstrate to what extent the EU has drawn on the recommendations of these two institutions. One of the main achievements of the EU's normative overstretch has been to implant the value and objective of minority protection in 'EU-speak,' which could be a first step towards internalization, institutional change, and modified political behavior.

It is too early to tell what the outcome of the interaction between Western and Eastern European models of minority protection will be in the post-enlargement period. Rather than reinforcing the distinction between new and old member states, the issue of minority rights cuts across geographical and historical boundaries. Two major scenarios are feasible: on the one hand, a form of "reverse conditionality," emanating from the new member states, could infuse the EU with a new commitment to minority rights; on the other hand, a new tacit policy of consensus on inaction may emerge within an enlarged EU. In the new member states, a contraction in this domain could have a more immediate destabilizing effect. The potential for conflict involving the Roma has already been identified by the EU itself. For the time being, a combination of both scenarios appears to be the most likely outcome: minority rights will make for one of several issue dimensions for coalition-building across old and new member states. As long as the EU remains committed to further enlargement—to include Bulgaria, Romania, Turkey, Croatia, and possibly other South East European states—the "respect for and protection of national minorities" will remain an integral part of the rhetoric of accession. Though unlikely to become an internal EU policy priority, this momentum may suffice to promote awareness and best practice inside the EU and bolster the profile of related instruments, most importantly the FCNM and its complex and dynamic monitoring mechanism. The anti-discrimination provisions in Article 13 of the TEC and the Council Directive of June 2000, once transposed into domestic legislation in all member states, will legally embed the norm of "equal treatment between persons irrespective of racial or ethnic origin."⁶⁰

Despite the link between the EU's eastward enlargement and the ongoing constitution-making process at the European level, minority rights did not emerge as a prominent issue during the Convention on the Future of Europe. The resulting draft Constitutional Treaty was void of any mention of minorities. The values and principles stipulated in the preamble, Part I and the preamble and the text of the Charter of Fundamental Rights would have provided indirect avenues for minority rights protection.⁶¹ Article 2 of the draft Constitutional

⁶⁰ See http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf; Council Directive 2000/43/EC of June 29, 2000: OJ 2000 L 180.

⁶¹ The preamble is potentially contradictory in its claim that the Union respects the "diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States"; see <http://ue.eu.int/dl/default.asp?lang=en>. For a discussion of the legal and political norms that inform the Charter, see Schweltnus (2001).

Treaty concealed the ambiguity surrounding the EU's internal values and its conditions for membership somewhat 'better' than its predecessor (Article 6 TEU), as the wording no longer copied the language of the first Copenhagen criteria.⁶² During the IGC, which initially failed to generate an agreement, Hungary took the lead in a last-minute attempt to enshrine explicit minority rights in the final version. Hungary's proposal triggered an instant negative response from the Slovak and Latvian governments, but the final amendments, tabled by the Italian Presidency, included a prominent reference to the "respect for human rights, including the rights of persons belonging to minority groups."⁶³ When the negotiations resumed, this amendment remained unchallenged. It now forms part of Article I-2 of the Constitutional Treaty of Europe, which was adopted at the European Council meeting on June 18, 2004. Moreover, Article 21 of the Charter of Fundamental Rights (Part 2 of the Constitutional Treaty) explicitly singles out "membership of a national minority" among the grounds of discrimination to be prohibited.⁶⁴

At least three basic lessons can be drawn from the current wave of enlargement with a view to sustaining and reinforcing the momentum for minority rights inside the EU: first, despite—or because of—its evident shortcomings, the European Commission's monitoring exercise has underscored the importance of a regular and systematic review of minority issues. For example, the European Parliament's annual human rights reports could follow the *Regular Reports* in addressing minority rights under a separate heading in order to highlight both the distinctions and links between the two concepts. The Network of Independent Experts, which was set up upon a request by the European Parliament and is funded by the Commission, marks an important step in this direction. Its task is to monitor fundamental rights in the member states, and its first two reports—in particular, the forthcoming 2003 report—adopt a wide definition of fundamental rights, explicitly including minority issues. However, these annual reports of independent experts will only have clout if they become mandatory items on the agenda of all the main EU institutions. Moreover, a re-design of the remit of the European Center on Racism and Xenophobia is still under discussion.⁶⁵ The widening of the remit to include a human rights dimension could allow for more systematic minority-relevant research. Second, the fact that the EU extensively drew on the Council of Europe and the OSCE during accession demonstrates the need for more effective cooperation between these three actors. The aim should be to avoid the duplication

⁶² "The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination."

⁶³ See the text of Article I-2 proposed by the Italian Presidency on November 25, 2003, CIG 52/03; see <http://www.euitaly2003.it/EN/ConferenzaIntergovernativa/DocCIG2.htm>.

⁶⁴ CIG 73/04 (Annex 1), Brussels, April 29, 2004 and CIG 85/04, Brussels, June 18, 2004.

⁶⁵ Representatives of the member states, meeting at head-of-state or government level in Brussels on December 13, 2002, agreed to extend its mandate to become a human rights agency.

of tasks and build on the respective strengths and expertise of each institution. The EU, with its lack of track record in the area of minority rights, could provide the meeting-place for the other institutions (including NGOs). Third and most generally, the enlarged EU will be confronted with an even greater political, economic, and cultural diversity. Awareness of this diversity is a basis for wider public debate about the objectives of the EU, the nature of European values and the relationship between the accommodation of diversity and minority rights.

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MONITORING MINORITY RIGHTS IN THE ENLARGED EUROPEAN UNION

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Abstract

Minority rights and the protection of minorities constitute a fundamental EU principle. EU monitoring *vis-à-vis* candidate countries had an impact on the ground. It could be demonstrated by the example of Latvia and Estonia where regular reporting and benchmarking led to an improvement of the situation of minorities. EU monitoring also contributed to de-escalate an otherwise potentially dangerous conflict between Hungary, Slovakia, and Romania about the treatment of Romanian and Slovakian citizens of ethnic Hungarian origin. Both tools relied to a large extent on external expertise from the Council of Europe or the OSCE. Inside the EU, minority rights monitoring is less intensive. The sanctioning system of Article 7 TEU presupposes the high standard of serious and persistent breaches, whereas the situation in candidate countries had to be checked as to their overall compatibility with the standards of Article 6 TEU. Nevertheless, the European Parliament and to a lesser degree the European Commission carry out some monitoring on the situation in member states. Where a European Commission monitoring center on human rights in the member states probably cannot be established without a proper legal basis, a more active role of the European Commission might be possible under Article 7 (1) and (2) TEU. In particular, the enlarged Commission might consider establishing regular reports on the situation of human (including minority) rights in the member states, drawing from the encouraging experience of the enlargement process.

MONITORING MINORITY RIGHTS IN THE ENLARGED EUROPEAN UNION

Frank Hoffmeister

1. Introduction

Substantial minorities live in most of the ten states acceding to the European Union in 2004. In the context of the accession negotiations of the past seven years (1997–2003), the European Union paid great attention to their situation. The question arises whether comparable scrutiny could apply in the enlarged European Union of 25 member states.

This contribution will begin by discussing why minority rights form a part of fundamental EU principles. It will then review the EU's monitoring activity *vis-à-vis* the candidate states for EU membership and assess its efficiency. The next focus concerns the present status of European law. Does it empower European Community institutions to monitor minority rights in EU member states? Against this background, some thoughts about perspectives for an enhanced monitoring mechanism in the enlarged EU will be presented.

2. Minority Rights as a Part of Fundamental EU Principles

2.1 *Minority Rights and Article 6 (1) TEU*

For a long time, the accession criteria for membership were not set out in the treaties establishing the European Communities. Former Article 237 TEC invited any European state to apply for membership. Article O of the 1992 treaty establishing the European Union, which defined accession procedures, also kept silent on the question of possible political requirements.

In a remarkable contrast, the Copenhagen European Council of June 22–23, 1993 concluded that an accession country must have achieved “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.”¹ This view could be understood as an effort to clarify the extent of *implied* accession criteria. The

¹ EU Bulletin 6/93, I.13.: 13.

European Commission followed the guidelines of the Council. After having presented a first opinion on each candidate country in 1997, it annually reviewed the situation of “minority rights and the protection of minorities” as part of the political criteria for accession.²

In May 1999, the Amsterdam Treaty entered into effect. According to Article 49 TEU, any European state that *respects the principles set out in Article 6 (1)* may apply to become a member of the EU. The article in question refers to the “principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law.” It is unclear whether these “human rights” include *minority* rights or if one could be tempted to assume a deliberate intention to separate the latter from human rights.³ In any case, the practice of the EU institutions did not change. The European Commission continued to review progress on the situation of minorities in candidate countries on the basis of the Copenhagen criteria. In the *Regular Reports* of 2002,⁴ it also furnished a cryptic explanation for this approach. In a common footnote to all the reports, the relationship between the Copenhagen criteria and Article 49, 6 TEU is explained as follows: “In the meantime, through the entry into force of the Treaty of Amsterdam, *the political criteria defined at Copenhagen have been essentially enshrined as a constitutional principle* in the Treaty on the European Union” (emphasis added). In the accession partnerships of 1998, following decisions by the Council of the European Union, the same logic can be found.⁵ Under the heading “political criteria,” there are short- and mid-term priorities to improve the situation of minorities in Slovakia, Latvia, Estonia, the Czech Republic, Hungary, Bulgaria, and Romania. Also the European Parliament frequently addressed minority questions in its resolutions dedicated to the enlargement process. Such a broad understanding is finally supported by Article 1 of the Council of Europe Framework Convention. It presents minority rights as “an integral part of the international protection of human rights.” Hence, taking into account the latter text and unanimous practice by the EU institutions, Article 6 (1) TEU could be interpreted widely, so as to encompass minority rights and the protection of minorities under the heading “human rights.”⁶

On the other hand, no comparable practice can be found regarding minorities within EU

² See the European Commission’s *Regular Reports*.

³ See Toggenburg (2000).

⁴ Neither the *Regular Reports* of 2000 nor 2001 addressed the relationship between the Copenhagen criteria and the new Articles 49, 6 EU. The *Regular Reports* of 2001 contained a (rather obscure) footnote stating that the Copenhagen political criteria “have been emphasized in the Charter of Fundamental Rights of the European Union that was proclaimed at the Nice European Council.”

⁵ Article 2 of the Framework Regulation 622/98 (OJ 1998 L 85: 1) empowered the Council to decide for each country on the principles, priorities, aims, and conditions of the partnerships. The first set of Council decisions was adopted in 1998 (OJ 1998 L 121: 16).

⁶ See Hoffmeister (2002).

member states. Furthermore, as of February 1, 2004, only ten out of fifteen of the present member states ratified the Council of Europe Framework Convention for the Protection of National Minorities. Belgium, Luxembourg, Greece, and the Netherlands signed but did not define an instrument of ratification. France did not even sign. It may be questioned, therefore, whether minority protection indeed constitutes a principle of EU law that is “common to member states” as required by Article 6 (1) TEU.

The virtual absence of EU statements on the minority situation in its member states can be explained by differences in procedure. EU institutions have been empowered to carry out a yearly review of progress in candidate countries, whereas there is no clear procedure regarding member states below the threshold of the sanctioning system of Article 7 TEU.⁷ The ratification of the Framework Convention by ten member states serves as a clear indication that these states regard minority protection as part of their legal systems. The non-ratification by Belgium, Luxembourg, and the Netherlands may be explained, *inter alia*, by a possible wish not to be subject to the monitoring system of the convention. In view of their domestic systems, it cannot be assumed that the Benelux countries reject the substantial principles contained in the convention. The constitutional tradition of Greece may not be open to ethnic minorities, but it certainly recognizes religious minorities, inspired from relevant provisions of the 1923 Treaty of Lausanne. Finally, the French constitutional system, aptly described as the model of an “agnostic liberal state,” is surely based on the fiction of ethnic neutrality and the recognition of individual rights only.⁸ It follows from the principle of “*l’unité du peuple français*” that group rights are deemed to be unconstitutional.⁹ For that reason, the *Conseil Constitutionnel* advised the French government not to ratify the European Charter of Regional and Minority Languages, as the charter was understood to confer rights to linguistic groups.¹⁰ Nevertheless, it is perfectly possible for the French state to offer financial help to associations which aim to safeguard regional languages as long as French remains the dominant language taught in public schools.¹¹ Regional and minority languages may well receive a semi-official status in future following constitutional reforms on further decentralization.¹²

⁷ For details, see Section 4, page 102, on the differences between EU monitoring mechanisms *vis-à-vis* candidate countries and member states.

⁸ For an excellent overview of different constitutional models for minority issues, including the French model, see Marko (2003: 176).

⁹ *Conseil Constitutionnel*, Decision No. 99-412 DC of June 15, 1999, *considérant* 6: “Considérant que ces principes fondamentaux s’opposent à ce que soient reconnus des droits collectifs à quelque groupe que ce soit, défini par une communauté d’origine, de culture, de langue ou de croyance.” Available at <http://www.conseil-constitutionnel.fr/decision/1999/99412dc.htm>.

¹⁰ *Ibid*, *considérant* 10.

¹¹ *Conseil Constitutionnel*, Decision No. 456-DC of December 27, 2001, § 49. Available at <http://www.conseil-constitutionnel.fr/decision/2001/2001456dc.htm>.

The French Constitution is predominantly skeptical with respect to group rights, but does not exclude the fostering of minority rights by other means.

This—admittedly somewhat erratic—overview leads to the conclusion that the principle of minority protection is well anchored in the constitutional traditions of the current EU member states. The statement that “virtually all democratic states recognize the necessity to protect minority groups” (Constantin and Rautz 2003: 190) certainly applies to EU member states. The level of recognition may vary, sometimes even substantially. But as in the area of EU human rights,¹³ such variety does not exclude the affirmation of a common principle as such. Rather, it is significant to look at these different constitutional approaches within the enlarged, 25-member EU when identifying the exact scope of a particular rule derived from that principle.¹⁴

2.2 *The Contents of Minority Rights and the Protection of Minorities*

There is no definition of minority rights in ‘hard’ EU law yet. As can be drawn from Article 6 (2) TEU, the body of human rights in the EU are usually explored through a reference to the European Convention on Human Rights and to the common constitutional traditions of member states.

The Human Rights Convention contains the accessory prohibition of discrimination on ethnic or religious grounds under Article 14 ECHR. Questions involving minorities can also arise in the area of Article 11 ECHR, when a state does not allow minorities to found associations¹⁵ or impedes the holding of public commemorative meetings or marches.¹⁶ The right to freedom of expression (Article 10 ECHR) and the right to family life (Article 8 ECHR) may also become relevant for persons belonging to minorities. Religious minorities may, of course, rely on the freedom of religion (Article 9 ECHR).¹⁷ These provisions do, however,

¹² See Poggeschi (2003: 218).

¹³ Compare, e.g., case 44/79 of December 13, 1979 (Hauer). The ECJ referred to the constitutions of only three member states (Germany, Italy, and Ireland) to affirm the rule that the right to property may be restricted by its social function (ECJ 1979: § 22).

¹⁴ Compare, e.g., case 155/79 of May 18, 1982. The ECJ found that the legal privilege of free correspondence with an independent lawyer forms part of Community law. The exact scope of that right was identified by determining the common criteria found in the national laws of the member states (ECJ 1982: §§ 18–21).

¹⁵ European Court of Human Rights, *Sidiropoulos and others v. Greece*, July 10, 1998, Rec. 1998–IV: § 44.

¹⁶ European Court of Human Rights, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, October 2, 2001: §§ 76–112.

hardly cover the most salient issues of minority law related to the protection and preservation of identity through affirmative action.¹⁸

In the enlargement process, the European Commission opted to “devote particular attention to the implementation of the various principles laid down in the Council of Europe Framework Convention for the Protection of National Minorities” (European Commission 2002: 9). It urged candidate countries which had not done so (like Latvia),¹⁹ to ratify the Convention. From 1998–2002 the reports also relied more and more on the material available from the monitoring bodies of the Council of Europe. For example, in 2002, the European Commission systematically reasserted the views of the Committee of Ministers of the Council of Europe, insofar as it had adopted conclusions on the country in question.²⁰ Sometimes, it also cited the preceding view of the Advisory Committee on National Minorities.²¹

Again, it may be questioned whether a reference to the Framework Convention standards in Article 6 TEU would not bypass the resistance of those EU member states that did not ratify it. When the European Court of Justice developed its human rights standards, it expressly referred to the European Convention of Human Rights as a source for European Commission human rights standards only after the ratification by France as the last outstanding member state in 1974.²²

However, judiciary caution notwithstanding, the Luxembourg Court never legally required full ratification of an international convention by all member states in order to serve as a reference point for EU standards. Rather, the court “draws inspiration from . . . the guidelines supplied by international treaties for protection *on which member states have collaborated or to which they are signatories*” (emphasis added).²³ That includes the Framework Convention for the Protection of National Minorities, which was elaborated in the Council of Europe—to which all EU member states belong. Furthermore, the lack of complete ratification of the

¹⁷ For a good overview of Strasbourg practice, see Medda-Windischer (2003: 253).

¹⁸ A telling example is the judgment in *Chapman v. United Kingdom* from January 18, 2001, where the European Court of Human Rights was split on the question of affirmative action under Article 8 ECHR to facilitate traditional Roma way of life.

¹⁹ See the 2002 *Regular Report on Latvia*: 30. The 2002 *Regular Report on Turkey* is less demanding. It notes that Turkey did not sign the Convention without urging it to do so (42). On the other hand, Turkey is invited to enter into a dialogue with the OSCE High Commissioner on National Minorities (43).

²⁰ See the 2002 reports on Slovakia, Malta, Hungary, Czech Republic, and Cyprus.

²¹ *Regular Report on Cyprus* (2002: 23).

²² ECJ, Case 4/73 – *Nold*, ECR 1974, 504, § 13.

²³ ECJ, Opinion 2/94 – Accession to the European Convention on Human Rights, ECR I-1759 (1789), § 33.

Framework Convention did not hinder the Strasbourg Court from making the following observation under the aegis of the European Court of Human Rights:

*The Court observes that there may be said to be an emerging international consensus amongst the contracting states of the Council of Europe to recognize the special needs of minorities and an obligation to protect their security, identity and lifestyle (see paragraphs 55–59 above, in particular the Framework Convention for the Protection of National Minorities), not only for the purpose of safeguarding the interests of minorities themselves but to preserve a cultural diversity of value to the whole community (emphasis added).*²⁴

Hence, there is ample evidence that non-ratification of the Framework Convention by some EU member states does not bar the ECJ from referring to it—either directly or by elaborating a standard of the European Convention on Human Rights, as did the Strasbourg Court—in light of the Framework Convention. Accordingly, the principles of the Framework Convention may also apply in an EU context.

First, in the absence of a general definition of what constitutes a minority, government declarations as to which groups they define as constituting a minority are of relevance.²⁵ However, if a government makes an arbitrary decision not to regard a certain established group as a national minority, this does not deprive them of their rights under the convention. Second, the convention grants rights to “persons belonging to a national minority” rather than group rights. This approach applies in the EU context as well, as confirmed by a statement from the European Commission to the European Parliament in 2001.²⁶ Third, the convention rights are not directly applicable through claims by individuals in the judicial branch, but call upon states to guarantee and protect them by legislative or executive action. Here, the task of identifying the concrete scope of a right, applicable in the EU context, should take into account the opinions delivered by the Advisory Committee of the Framework Convention. Judicial interpretation may also have to dwell on a comparison of the domestic rules in place, thereby giving due attention to the constitutional systems of EU member states.²⁷

Other than the Framework Convention, inspiration for EU standards could also be drawn from Article 27 of the UN International Convention on Civil and Political Rights, a convention ratified by all current EU member states and sometimes referred to by the ECJ.²⁸ The fact

²⁴ European Court of Human Rights. 2001. *Chapman v. UK*, Judgment of January 18: § 93.

²⁵ On the legal significance of such declarations, see Frowein and Bank (1999).

²⁶ Response of the European Commission of November 23, 2001 to written question E-2538/01, OJ 2002 C 147E: 27 (28): “De l’avis de la Commission, les droits des personnes appartenant à des minorités font partie des principes communs aux Etats membres, énumérés à l’article 6, paragraphe premier, du traité sur l’Union européenne (traité EU)” (emphasis added).

²⁷ See note 13, above.

²⁸ ECJ, Case 374/87—Orkem, ECR 1989, 3283, § 18; Case C-249/96, ECR 1998 I-621, §§ 43–47.

that France made a reservation on one article does not change this analysis. As the Director-General of the Commission Legal Service pointed out in the Convention's working group II: "the Court of Justice does not feel inhibited from seeking inspiration in such agreements solely because certain member states expressed reservations about them ...; the Court of Justice never agreed to implement a version of the Convention 'reduced' by the amount of all national reservations made by all the member states to this text, which would considerably reduce the protection offered by Community fundamental rights" (Petite 2002).

Finally, once the Charter of Fundamental Rights of the European Convention will become part of primary law—as stipulated in the draft Constitution²⁹—Articles 21 (non-discrimination) and 22 (cultural, religious, and linguistic diversity) could play a significant role in defining the applicable minority standards inside the European Union.³⁰

3. Monitoring Minority Rights in Candidate Countries and Member States

3.1. *Monitoring Minority Rights in Candidate Countries*

3.1.1 *The Efficiency of Regular Benchmarking and Reporting*

The main instruments for monitoring minority rights in candidate states for EU Membership were the Commission's *Regular Reports* and the Council's Accession Partnerships. Although formally separate, they can be understood as a strategic tool. The Commission annually reviewed progress of the candidate countries in the areas of minority protection. The Council then formed its Accession Partnerships with the shortcomings identified by the Commission in mind, setting priorities for each candidate to receive pre-accession funds under PHARE. To use an example borrowed from natural sciences: where the Commission report contained the diagnosis, the Council recommended therapy.

Ideally, the efficiency of benchmarking and reporting should be assessed in detailed case studies. A full overview of EU monitoring for all accession candidates is not possible in the context of this paper.³¹ However, certain general characteristics of this tool can be shown using the examples of Latvia and Estonia.

²⁹ This article cannot review other possible changes of primary law under the draft Constitution. For a discussion of minority-related proposals in the Convention, see Toggenburg (2001: 279).

³⁰ See De Witte in this volume.

³¹ For an attempt to that effect, see Riedel (2001).

Both states gained their independence after the First World War. Soviet rule was established in 1940. During the military coup in Moscow in August 1991, they seized the opportunity to reestablish their sovereignty and became members of the United Nations in September 1991. In 1992 both states adopted democratic and liberal constitutions, either by way of returning the prewar constitution (Latvia) or by voting for a new constitution in a referendum (Estonia). Although these constitutions contained specific provisions on minority protection,³² the position of the Russian minority represented a particular challenge to both young democracies. Three areas attracted the particular attention of European institutions: citizenship, language requirements, and participation in public life.

As regards *citizenship*, the demographic situation was quite alarming. In 1995, when the Baltic states applied for EU membership, about 28 percent of the population in Estonia³³ and about 30 percent in Latvia were ethnic Russians. Most had immigrated during the Soviet reign. According to the citizenship laws of April 1994 (Estonia) and August 1995 (Latvia), they did not satisfy the criteria for citizenship, which required ethnic links to prewar Latvia or Estonia. Hence, 23 percent of the Estonian population and 28 percent of the Latvian population were non-citizens. As the Framework Convention covers “national minorities” only, i.e., citizens of a state belonging to a minority, the delicate question arose whether non-citizens should enjoy minority rights as well. Remarkably, the Commission included the situation of non-citizens in its initial assessment of 1997,³⁴ thereby adopting a broad approach to minority protection (De Witte 2000).

In the case of Estonia, it first criticized the high fees and the inadequate training for Russians to meet the language requirements of naturalization. The European Parliament stated openly that Estonia should offer citizenship to members of “minority groups.”³⁵ In December 1998 the Estonian Parliament adopted a law on facilitated naturalization of stateless children, and an amended citizenship law lifted the language and civic test requirements for disabled people. In 2000 the commission found that, overall, Estonia had complied with the recommendations of the OSCE in the area of naturalization.³⁶ However, in 2001 and 2002 the commission recommended an acceleration of the relevant procedures as the quorum of non-citizens persisted at 13 percent in 2001 and 12.5 percent in 2002.³⁷

Similarly constant reminders from Brussels helped Latvia adopt a modification to its citizenship law by referendum in October 1998, thereby abolishing the ‘window system’ which used age criteria (with priority to younger age groups) to limit applications for citizenship that

³² See Schmidt (1993).

³³ On further details on the demographic situation, see Schmidt (1999).

³⁴ Page 18 of the Opinion of July 16, 1997 on Estonia (Agenda 2000) states: “The situation of non-citizens must also be taken into consideration in this assessment.”

³⁵ European Parliament, Resolution on Commission Agenda 2000, December 4, 1997.

³⁶ *Regular Report on Estonia* (2000: 18).

³⁷ *Regular Report on Estonia* (2001: 22; 2002: 31).

would otherwise have been in place until 2003. In addition, the obligatory tests in Latvian history were made easier, and the naturalization fees were reduced.

In relation to *language requirements for professional activities*,³⁸ both Baltic states insisted on high levels of command even in parts of the private sector. In Latvia certain liberal professions could not be exercised without a proof of Latvian language skill in the 1990s. Here, criticism from the OSCE and the EU led to the abolishment of these requirements in the Official Language Law of December 1999³⁹—noted with satisfaction by the Commission in the 2000 report.⁴⁰ Estonia only introduced language requirements for the private sector, including one-man-firms and NGOs, in July 1999. This was criticized harshly in the 1999 report as a retrogression that would endanger compliance with minority standards under the political criteria and conflict with the Europe Agreement.⁴¹ Shortly after, in April 2000, Estonia reverted to acceptable standards by keeping language requirements only if and insofar as they are justified by a clear public interest (e.g., in the case of the police).

Finally, in the area of *political participation* of minorities, intensive EU monitoring of the Baltic states took place. The *Regular Report* of 2000 concerning Estonia raised some criticism against the December 1998 modifications to the laws on elections, according to which a candidate would have to prove sufficient knowledge of Estonian even to run in local elections.⁴² Tallinn was criticized again, and the requirements were abolished by an amendment in November 2001. In Latvia language requirements restricting participation in the democratic process were also eased, although much more slowly. It took three reminders from the Commission from 1999 to 2001,⁴³ a decision by the UN Human Rights Committee in 2001,⁴⁴ and a condemnation by the European Court of Human Rights in 2002⁴⁵ for the Latvian Parliament to abolish the language proficiency provisions in May 2002.

This short overview demonstrates the interaction of national reforms—or sometimes setbacks—and vigilant comments from Brussels. An important factor in credibility was the reliance of EU institutions on expertise gathered in the relevant expert bodies of the OSCE

³⁸ Language requirements in education are a separate and fairly controversial area, in which discussions in the Baltic states are ongoing. On this issue, see ECMI (2002).

³⁹ Available online at <http://ttc.lv/New/lv/tulkokjumi/E0120.doc>.

⁴⁰ *Regular Report on Latvia* (2000: 24).

⁴¹ *Regular Report on Estonia* (1999: 15).

⁴² *Regular Report on Estonia* (2000: 20).

⁴³ *Regular Reports on Latvia* (1999: 18; 2000: 23; 2001: 27).

⁴⁴ View of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the Covenant Concerning Communication No. 884/1999, UN Doc. CCPR/C/72/D/884/1999 (2001).

⁴⁵ *Podkolzina v. Latvia*, European Court of Human Rights, April 9, 2002, nyr, with annotation by F. Hoffmeister, 97 AJIL (2002): 664.

and the Council of Europe. Whereas these institutions could offer valuable advice regarding applicable standards, the EU had the unique incentive of membership at its disposal, combined with substantial amounts of aid that could be concentrated on minority protection projects (for example, financing language courses through PHARE). Therefore, it can be concluded that regular benchmarking and reporting was dependent on certain external input, but constituted a quite powerful tool of EU monitoring in the field of minority rights *vis-à-vis* candidate countries. It was—despite certain ‘black spots’ such as Latvia’s failure to ratify the Framework Convention—an overall success in initiating progress.

3.1.2 *The Efficiency of Informal Mediation*

A less visible tool of EU monitoring of minority rights in candidate countries developed in enlargement practice when the situation of minorities involved several candidate countries at the same time. In such a situation, there was a natural tendency to turn to the Commission as an impartial mediator. The most important case relates to the so-called Hungarian “Status Law.”

According to Article 6 (3) of the Hungarian Constitution, the Hungarian state takes responsibility for Hungarians living abroad and promotes their relationship to Hungary. Government policy under Prime Minister Antal (1990–1994) put special emphasis on the situation of ethnic Hungarians living in parts of Slovakia and Romania. These territories formed part of the Austro-Hungarian Empire before its defeat in the First World War and were ‘lost’ in the Hungarian historical perception by the Treaty of Trianon in 1920. This particular element of Hungarian foreign policy was not acceptable to neighboring countries. Although under Prime Minister Horn (1994–1998) Hungary concluded international agreements with Slovakia (1995) and Romania (1996) containing guarantees of minority protection, the situation of ethnic Hungarians in these states was deemed to be insufficient by then Prime Minister Orbán (1998–2002). Trying to revive the unity of the nation, Parliament adopted the ‘Status’ Law on Hungarians Living in Neighboring States on June 19, 2001, Act LXII (2001) which went into effect in 2002.

Under the act as originally adopted,⁴⁶ ethnic Hungarians and their families (spouses and dependents) living in a neighboring state—without Hungarian citizenship or a Hungarian residence permit—were entitled to certain benefits. Among those was access to educational facilities equal to Hungarian citizens (Article 4), integration into the Hungarian social security system provided that contributions had been paid during work periods in Hungary (Article 7), and reductions in public transport fees (Article 8). Concerning education, the law provided financial support for students studying in Hungary (Article 9), for students studying in their home country (Article 10), or Hungarian language teachers abroad (Article

⁴⁶ Act LXII of 2001 on Hungarians Living in Neighboring Countries, June 19, 2001. English translation in the Council of Europe Document CDL (2002) 77, available at [http://www.venice.coe.int/docs/2002/CDL\(2002\)077-e.html](http://www.venice.coe.int/docs/2002/CDL(2002)077-e.html).

11, 12). According to Articles 15 and 16, a temporary work permit in Hungary for three months and reimbursement of expenses related to the fulfillment of the legal conditions for employment was secured.

The important question of identifying beneficiaries was addressed through the following procedure: anyone who believed that he qualified for support under the act may apply for a "Certificate of Hungarian Nationality." He would have to prove his Hungarian ethnicity through a written confirmation by an organization representing the Hungarian national community operating in the neighboring country (Article 20). The card itself would be issued by a special body of the Hungarian administration.

The adoption of the Status Law provoked harsh reactions in Romania and Slovakia.⁴⁷ The governments in Bucharest and Bratislava claimed that the law contravened international law because it contained extraterritorial aspects. Furthermore, it would discriminate against their citizens on the basis of ethnicity. They immediately asked the European Commission through diplomatic channels to intervene. It was agreed first to submit the question to a competent expert body that could illuminate the difficult legal questions involved on an advisory basis. Hence, in early July 2001 Romanian Prime Minister Nastase and Hungarian Foreign Minister Martonyi requested the Council of Europe's Venice Commission (on Democracy through Law) to render an opinion about the legal standards regarding support for minorities by their kin state.

In its opinion of October 22, 2001 (European Commission for Democracy through Law 2001), the Venice Commission reviewed the applicable principles and limits for such support. It focused, *inter alia*,⁴⁸ on the international legal customs and principles regarding territorial sovereignty and human rights.

With regard to territorial sovereignty, two important aspects were outlined. First, the principle excludes that any state exercises its powers on the territory of another state. Without citing the Hungarian status law directly, the Venice Commission felt that the role of the Hungarian institutions situated in the neighboring countries to certify the Hungarian ethnic origin was close to a *de facto* exercise of sovereign powers. Although the Hungarian administration (situated in Hungary) should deliver the "certificate of Hungarian nationality," the wide discretion of the Hungarian institutions to recommend who qualifies as ethnic Hungarian would give these nongovernmental institutions considerable power. In the view of the Venice Commission, such power, exercised on Slovakian or Romanian territory, should

⁴⁷ For a short summary of first reactions to the draft law, see Nemes (2001) and an editorial in the *Neue Züricher Zeitung* from April 27, 2001 at <http://www.nzz.ch/2001/04/27/al/page-article7CXSN.html>.

⁴⁸ The Venice Commission also discussed the principles of *pacta sunt servanda* and of friendly relations between states. It mentioned that any mechanisms for minority protections in bilateral agreements should be applied in good faith and in a spirit of good neighborliness. Those yardsticks did not, however, offer any relevant guidance on the limits to unilateral acts that work on the hypothesis that minority protection offered by bilateral agreements is insufficient.

be left to official Hungarian consulates. Second, national laws with effects abroad could unduly interfere with the sovereignty of the neighboring country. In principle, any affected country should be consulted whether it agrees with such programs. In particular, provisions on support for ethnic Hungarian citizens of Slovakia or Romania to study any subject they wish in their own country could be acceptable. Support was not specifically defined to go toward study of the national language or culture, which would have been more acceptable, as an international practice for such scholarship already exists.

Concerning applicable human rights standards, the Venice Commission recalled that, under Article 14 of the European Convention on Human Rights, different treatment could be justified on objective grounds. The cultural affiliation of minorities to their kin state could, in principle, be a legitimate reason for support schemes. However, any such schemes should be proportional. In the view of the Commission, educational support for ethnic minorities to study abroad without any link to the culture or language of the kin state would be inappropriate.

The timely report allowed the European Commission, in its *Regular Report* of 2001, to fully align itself with the findings of the Venice Commission. In addition, the report stressed that the Status Law was inconsistent with the principle of non-discrimination under EC law. On procedures, it stated the following:⁴⁹

As the law itself represents framework legislation, it will not be applicable without the adoption of implementing decrees. Hungary will therefore need to comply with the above principles and hold the necessary consultations in order to agree with its neighbors also as regards future implementing legislation. Consultations with the Romanian and Slovakian governments started in summer 2001, so far without concrete results. However, by adopting the Venice Commission's report, Hungary has committed itself to compliance with the report's findings.

Indeed, Hungary passed implementing legislation on December 2001 and January 2002 which the European Commission found to be "broadly compatible" with the recommendations.⁵⁰ For example, the role of the Hungarian institutions abroad was watered down, insofar as they had to communicate their recommendations to Hungarian consulates. Also the presentation of the "Certificate of Hungarian Nationality" was somewhat modified so as to remove any appearance of being a national passport. The Hungarian government committed itself in late 2001 to grant equal treatment to all Romanian citizens wishing to work in Hungary, regardless of their ethnicity. For the Romanian government, the practical advantages of the Status Law now prevailed over any misgivings. It did not criticize the law thereafter (Tuney 2002).

⁴⁹ *Regular Report on Hungary* (2001: 91).

⁵⁰ *Regular Report on Hungary* (2002: 125).

Nevertheless, for the Slovakian government the extraterritorial effects of the law still led to objections. Their concerns were largely shared by the Commission, which was particularly leery of discrimination among future EU citizens. After a standstill (Hungarian parliamentary elections took place in April 2002), the new socialist government presented a draft amendment in January 2003. Overcoming harsh opposition from deputies, and under pressure by the European Commission, Parliament finally modified the law in June 2003.

Most importantly, the law now distinguishes clearly between benefits and grants claimable on the territory of Hungary or on the territory of neighboring states (Article 3 [1] and [2], respectively). As regards the latter benefits, it removed discrimination on grounds of ethnicity insofar as all students and teachers of Hungarian language or culture in neighboring countries (irrespective of the fact whether they are ethnic Hungarians or not) are eligible for the benefits pursuant to international agreements (Article 27 [2] and [3]). The privileges of ethnic Hungarians as regards social security benefits and health services (former Article 7) were abolished. Employment conditions were equalized by the new Article 15. It states that employment of ethnic Hungarians in Hungary shall be governed by the general rules concerning the issuance of work permits to foreigners in Hungary and that derogations may be provided by treaties only. Under this clause, Hungary would have to conclude an agreement with Romania, which could ensure that an opening of the Hungarian labor market would be valid for any Romanian citizen. The provisions on issuing the former certificate (now called the “ethnic Hungarian card”) mandated the Hungarian diplomatic missions or consulates operating in the state of residence to issue the card (Article 20 [2]). Finally, Article 27 (2) contains the general disclaimer that from the date of accession “the provisions of this Act shall be applied in accordance with the *acquis communautaire* of the European Union.” The government is empowered to regulate by decree the rules related to benefits available in Hungary and assistance available in the neighboring countries for nationals of the EU member states which are not covered by the act (Article 28 [1] [g]).

In light of these modifications, the European Commission concluded in its *Comprehensive Monitoring Report* of November 2003 that “attention must be paid to ensuring that the implementing legislation... will be fully in line with the *acquis*. Also, any extraterritorial benefits provided for by the law have to be agreed in advance by the neighboring countries concerned.”⁵¹

At present, implementing legislation on the basis of the amendments from July 2003 is not yet adopted. The Slovak government insists that any benefits cannot be paid out on its territory unless it has consented to such extraterritorial effect of the law. Consultations between Bratislava and Budapest are ongoing. One compromise could be to establish a common commission that would ensure payments from Hungary are indeed carried out with Slovak consent under the bilateral Hungarian-Slovak Treaty.

⁵¹ *Comprehensive Report on Hungary* (2003: 52).

In conclusion, this example demonstrates that informal mediation by the European Commission played a significant role in a highly complex issue of minority protection, involving deep differences in the historical perceptions of the future member states. Again, EU monitoring benefited from external expertise (here, the Council of Europe's Venice Commission). Nevertheless, the EU exercised the decisive leverage on the countries concerned to strive for a compromise, when the European Commission put its political weight behind the Council of Europe's expert advice. Furthermore, the Commission did not tell the candidate countries in question to wait for the publication of the next *Regular Report* but engaged them in bilateral dialogue to find a compromise as early as possible. Encouragingly, the result of these mediation efforts can be clearly demonstrated through the modifications to the Hungarian Status Law in July 2003.

3.2 Monitoring Minority Rights in EU Member States

Present EU member states must respect minority rights and foster the protection of minorities as a fundamental principle of EU law under Article 6 (1) TEU. Nevertheless, monitoring mechanisms inside the EU are quite different from the monitoring practice *vis-à-vis* candidate states. Whereas the EU institutions have to verify whether a candidate actually 'respects' the accession criteria, a sanctioning mechanism *vis-à-vis* a member state can be triggered only in exceptional circumstances. Under Article 7 TEU, as amended by the Treaty of Nice, two main phases can be distinguished. According to Article 7 (1) TEU, the European Parliament or the European Commission may decide by a four-fifths majority, on a proposal by one-third of all member states, that there is a *clear risk of a serious breach* by a member state. Such a decision may be preceded by a request from the Council to independent experts to deliver a report about the situation in question. In the second phase, the Council may decide unanimously that there exists a *serious and persistent breach* of the principles of Article 6 (1) in a member state (Article 7 [2] TEU). In such a situation certain sanctions can be taken against this member state (Articles 7 [3] TEU and 309 TEC). As the Commission explained in a recent document, the expression of a serious breach can also be found in Article 6 of the UN Charter and Article 8 of the Statute of the European Council, dealing with exclusion or suspension of voting rights in these organizations. Its legal significance lies in the fact that it adds the dimension of a *systematic* problem.⁵²

On the other hand, the high threshold of triggering the *sanctioning* system has to be distinguished from the possibility of *monitoring* the situation in the member states. It can be argued that the right of the European Parliament or the European Commission to propose that the Council initiate procedures under Article 7 (1) or (2) TEU presupposes that both institutions keep a vigilant eye on developments in member states. The more an institution

⁵² Communication from the Commission to the Council and the European Parliament on Article 7 EU, COM (2003) 606 final, October 15, 2003: 7, 8.

assembles relevant data on a regular basis, the better it can respond to any proposal it would eventually adopt. Thus the preventive purpose of the provision is met.

Since 2000 the European Parliament has taken the lead in adopting yearly reports on the situation of fundamental rights within the European Union, including minority rights. Hence, Parliament already engages in some sort of monitoring of minority rights in member states.

Inside the European Commission, a unit of the Directorate-General for Justice and Home Affairs deals, *inter alia*, with the human rights situation in member states. The unit receives many complaints from citizens and may therefore be able to elaborate an idea of vulnerable areas within member states. For the time being, it is neither empowered nor equipped to operate a systematic review on its own. However, the Commission responded favorably to the request from the European Parliament to create an expert network. In 2002 it concluded a contract with a university to finance a pilot project for the EU Network of Independent Experts on Fundamental Rights. The network, comprising a representative from each member state under the guidance of Professor De Schutter of the Catholic University of Leuven, has the mandate to perform the following duties:

- Draft an annual report on the state of fundamental rights in the European Union and its member states, assessing the application of each of the rights set out in the European Union's Charter of Fundamental Rights.
- Provide the Commission with specific information and opinions on fundamental rights issues when requested.
- Assist the Commission and the European Parliament in developing a European Union policy on fundamental rights.⁵³

The 2002 expert report uses the Charter on Fundamental Rights of the EU as its reference point to assess the human rights situation within member states. As Article 22 of the charter enshrines the protection of cultural, religious, and linguistic diversity, the situation of minorities in EU member states is also touched upon. The experts take the view that those member states which have not done so should ratify the Framework Convention for the Protection of National Minorities. Individual developments in Austria and Spain are recorded. The situation of Roma and Sámi in member states is discussed horizontally in the report (EU Network of Independent Experts 2000: 176).

It can be concluded that monitoring *vis-à-vis* EU member states is developing. The European Parliament is empowered to take official positions. The European Commission finances a network to carry out systematic reviews. It must be added, however, that neither the permanence of such a review nor official input from member states is guaranteed. Finally, annual reports from independent experts—no matter how well known and respected they might be—do not carry nearly the same political weight as official reports from the European Commission.

⁵³ See more information at http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm.

4. Prospects for Enhanced Monitoring of Minority Rights in the Enlarged EU

What are the prospects for addressing the two shortcomings mentioned in the last section? What could be done to ensure permanent review of minority rights in member states which includes official input from the states themselves? And how could the European Commission involve itself more visibly in the monitoring process?

In response to the first question, one might consider the creation of a monitoring center for human rights, including minority rights, using the model of the existing EU Monitoring Center on Racism and Xenophobia in Vienna. This center assembles information and operates a European Racism and Xenophobia Information Network, to which member states are linked. It also publishes an annual report on the situation regarding racism and xenophobia in the Community.⁵⁴

This might be an attractive perspective from a political point of view,⁵⁵ but an important legal consideration must first be addressed: on which legal basis could a center be established? Article 179 TEC provides for the adoption of a human rights policy regarding developing countries⁵⁶ since that aim is expressly stated in Article 177 (2) TEC. Article 308 (formerly 235) TEC can be used to foster such policy regarding non-developing countries as well.⁵⁷ But can the same be done regarding member states? In its famous Opinion 2/94, the European Court of Justice held that no provision empowers institutions to adopt internal provisions in the field of human rights protection.⁵⁸ At the same time, it is stressed that observance of human rights is a condition of the legality of EU acts. Article 308 EC was deemed insufficient as a legal basis for the EC's accession to the European Convention on Human Rights only because of the constitutional implication such accession would have on the institutional relationship between the European Court of Human Rights and the ECJ.⁵⁹ Thus, Article 308 TEC provides for a horizontal competence of the European Community to conduct a policy of human

⁵⁴ Article 2 (2) (g) of Council Regulation No. 1035/97 of June 2 establishing a European Monitoring Center on Racism and Xenophobia, as amended by Regulation (EC) No. 1652/2003 of June 18, OJ 2003 L 245.

⁵⁵ See, for example, European Academy Bolzano (1998: 42). The package includes a proposal for a Council regulation for the creation of a European monitoring center in the field of minority protection.

⁵⁶ Compare Regulation 975/1999 (OJ 1999 L 120: 1) which allows the financing of human rights projects in developing countries.

⁵⁷ Compare the 'twin' Regulation 976/1999 (OJ 1999 L 120: 8) which allows the financing of human rights projects in non-developing countries.

⁵⁸ ECJ, Opinion 2/94, ECR 1996-I, 1759 (1787): § 28.

⁵⁹ *Ibid.*: §§ 34–35.

rights protection ensuring that the EC *itself* observe the legally binding standards. Following this logic, the establishment of the European Monitoring Center on Racism and Xenophobia on the basis of Article 308 TEC is motivated by the need “to provide full information to the Community on those phenomena *so as to enable the Community to meet its obligation to respect fundamental rights and to enable it to take account of them in formulating and applying whatever policies and acts it adopts in its sphere of competence.*”⁶⁰

The situation is less clear when it comes to the EU member states’ human rights policies. Under the case law of the European Court of Justice, they are bound to apply Community human rights standards *when they implement Community law.*⁶¹ Regarding minority protection, this situation can at present arise with regard to the Antidiscrimination Directive 2000/43/EC adopted on the basis of Article 13 TEC.⁶² It prohibits discrimination on the grounds of race or ethnic origin. The second directive issued on the basis of Art. 13 TEC, the Employment Directive 2000/78/EC might also become relevant for religious minorities as it prohibits discrimination in employment and occupation on the grounds of, *inter alia*, religion and belief.⁶³ Certainly, the EU can monitor the implementation of these directives by member states. The collection of information on this area could, in principle, also be delegated to an EC monitoring center under Article 308 TEC. Nevertheless, the main tool of the European Commission, namely to start infringement proceedings under Article 226 TEC in cases of non-transformation or failure to properly apply the directive must remain in the hands of the Commission itself.

In fields where a member state would apply its own standards only and not implement European Community law, this possibility does not exist. The only way forward would be to argue for an implied EU power under Article 7 (1) and (2) TEU. One would have to deduct from the competence of the European Commission and the European Parliament to initiate the sanctioning mechanism that a power to monitor member states in the areas of their own competence had been vested in the EU. However, the sanctioning procedure is laid down by the EU Treaty, which does not confer any powers on the EU. It only entrusts certain functions to EU institutions for internal matters. Hence, Article 7 TEU cannot be read as the basis of an EU policy to safeguard human rights in the member states. As a result, Article 308 TEC

⁶⁰ Recital 2 of Council Regulation (EC) No. 1035/97 of 2 June 1997 establishing a European Monitoring Center on Racism and Xenophobia, OJ 1997 L 151: 1 (emphasis added).

⁶¹ The ECJ always stressed this scope of application of Community human rights standards. See the judgments of July 13, 1989, Case 5/88 Wachauf, ECR 1989: 2609; judgment of June 18, 1991, Case C-260/89, E.R.T., ECR 1991: I-2925. The rule is now codified in Article 52 (1) of the Charter of Fundamental Rights of the EU.

⁶² Council Directive 2000/43/EC of June 29, 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 180: 22).

⁶³ Council Directive 2000/78/EC of November 27, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 203: 16).

can hardly lend itself to the establishment of a center whose main task would be to monitor member states acting outside the realm of European law. Hence, the establishment of such a center would run considerable risk of being *ultra vires*.

In contrast, there would be no legal objections if the institutional functions of the European Parliament and the European Commission under Article 7 (1) and (2) TEU were to be developed. The Commission, as a political body, could engage in a more systematic review. It could enrich its present monitoring through the experience gained in the enlargement process by publishing regular reports on the state of democracy, human rights (including minority rights), and the rule of law in member states, perhaps offering specific recommendations. The reports could take the form of a Communication to the Council and the Parliament. Their frequency could be less stringent than the yearly interval *vis-à-vis* candidate countries. Designed as an early-warning system under Article 7 TEU, these reports would need to focus on systematic issues. To increase credibility, they should build on expert input from the Council of Europe and the OSCE and not be framed as a rival to existing monitoring mechanisms. Finally, one might even think of a European Commission role of active mediation in cases of minority conflicts involving several member states on the request of a member state. However, as can be drawn from the conclusions in the Communication on Article 7 TEU,⁶⁴ current thinking in the European Commission is less ambitious. This attitude may change in an enlarged Commission with members from the new member states who are used to a strong EU role in monitoring human (including minority) rights in their home countries.

5. Conclusion

Minority rights and the protection of minorities constitute a fundamental EU principle. EU monitoring *vis-à-vis* candidate countries had an impact on the ground. It could be demonstrated by the example of Latvia and Estonia that regular reporting and benchmarking led to an improvement of the situation of minorities in these countries. EU monitoring also contributed to the de-escalation of an otherwise potentially dangerous conflict among Hungary, Slovakia, and Romania about the treatment of Romanian and Slovakian citizens of ethnic Hungarian origin either in Hungary or in their own country. Both tools relied to a large extent on external expertise from the Council of Europe or the OSCE. Inside the EU, minority rights monitoring is less intensive. The sanctioning system of Article 7 TEU presupposes the high standard of serious and persistent breaches, whereas the situation in candidate countries had to be checked

⁶⁴ The Commission's conclusion to its Communication of October 15, 2003 (see note 36 above) states: "The Commission believes it is contributing to achievement of that objective by insisting on measures based on prevention, strict monitoring of the situation in the member states, cooperation between the institutions and with the member states and lastly, public information and education."

as to their overall compatibility with the standards of Article 6 TEU. Nevertheless, the European Parliament and to a lesser degree the European Commission do carry out some monitoring on the situation in member states. Where a European Commission monitoring center on human rights in the member states probably cannot be established without a proper legal basis, a more active role of the European Commission might be possible under Article 7 (1) and (2) TEU. In particular, the enlarged Commission might consider establishing regular reports on the situation of human (including minority) rights in the member states, drawing from the encouraging experience of the enlargement process.

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THE CONSTITUTIONAL RESOURCES FOR AN EU MINORITY PROTECTION POLICY

Bruno de Witte

Abstract

As the words ‘minority’ and ‘minority protection’ do not appear anywhere in the EU and EC treaties, the emerging EU minority protection system rests largely on principles that are implicit rather than explicit.

Turkey’s possible accession, the association and stabilization process in the western Balkans, and the desire to implement a coherent foreign policy demand an upgrade in the quality of the EU’s monitoring and leveraging ability regarding minority issues in countries outside the EU.

The legal basis for such policies to be exercised *internally* rests in the Race Discrimination Directive and Article 21 of the Charter on Fundamental Rights. The Race Directive is particularly broad in scope, extending beyond employment and education to include housing and social protection.

The Ebner report, sponsored by the European Parliament, calls for the creation of an agency for linguistic diversity and language learning. Presently these issues are funded by modest cultural programming such as Culture 2000 and the Socrates program.

In the future, issues of cultural diversity could come to bear on policies dealing with market integration and the mobility of persons.

THE CONSTITUTIONAL RESOURCES FOR AN EU MINORITY PROTECTION POLICY

Bruno de Witte

1. Introduction: In Search of Constitutional Resources

The general title of this volume invites us to enquire, appropriately, about the 'way forward' for minority protection in and by the European Union. May 1, 2004 is indeed an important turning point. The mechanism through which the European Union monitored the minority protection record of the ten acceding states during their approach to the EU and made recommendations for reform of their minority protection laws and practices will cease to exist when the countries become members of the European Union.¹ The monitoring mechanism will continue to operate, as before, only for the three remaining applicant states: Bulgaria, Romania, and, most importantly in this context, Turkey. In addition, minority protection will continue to act as an important political condition for the development of relations between the EU and the western Balkan countries that are part of the stabilization and association process. Finally, minority rights will also continue to be part and parcel of the human rights policy which the European Union seeks to mainstream in its external relations generally.

However, as far as the ten accession countries are concerned, the infamous double standard will come to an end. They will no longer be subject to the pre-accession monitoring of the political conditions for membership, and will henceforth be treated in the same way as the 'old' member states, on which the European Union did not, so far, impose any explicit minority protection requirements. We come therefore to the end of an epoch of EU minority protection policy, and two possible scenarios arise for the future:² in the *spill-over scenario*, accession of the new states will promote the development of a new and comprehensive minority protection policy in the EU; in the *status quo scenario*, the present state of EU law and policy will not be meaningfully affected by enlargement, and minority protection questions

¹ In this paper, I do not express any judgment on the effectiveness or even-handed nature of minority rights monitoring through the European Commission's *Regular Reports*. On this subject, see the chapters by Sasse and Hoffmeister in this volume. See also the detailed assessment in OSI (2001). For a very critical view, focusing particularly on EU action in the Baltic States, see Maresceau (2004).

² On these two scenarios, see Sasse in this volume and also De Witte (2002).

will basically remain within the competence of each individual member state, not within that of the European Union. In this paper, I will not attempt to make a prediction as to which of the two scenarios is most likely to unfold. Rather, I will briefly examine the possibilities and mechanisms provided by the constitutional law of the European Union to develop a common EU approach to minority protection and suggest that, taken together, they offer an intermediate scenario between spill-over and status quo. I will primarily examine the *current* constitutional law of the European Union, based on the EC and EU Treaties as they stand at present, although one should also keep an eye on the changes that could occur if the draft Constitution of the European Union proposed in July 2003 were to be adopted and enter into force (in 2006 at the earliest, it seems).

The European Union has developed policies on almost everything. There are hardly any public policies that remain within the exclusive control and responsibility of the member states or the regions within those states. Yet, the legal basis remains the principle of enumerated powers, meaning the European Union can only act in the areas and for the purposes for which the founding treaties allow it to act. We are therefore faced with the simple fact that the words “minority” and “minority protection” do not appear anywhere in the EU and EC treaties. They are neither mentioned as being part of the values recognized by the European Union nor are they listed among the policy competences of the EU. This could have been changed by an ambitious effort, undertaken in 2000, to draft an EU Charter of Fundamental Rights. However, the text of the charter, adopted in December 2000, is rather modest with respect to minority rights. Although membership of a national minority is included as a prohibited ground for discrimination in Article 21 (following the example of Article 14 of the European Convention on Human Rights), the drafters of the charter did not include positive minority rights in a separate article, despite proposals made by various NGOs such as Minority Rights Group International.³ Already in 1981, the European Parliament had adopted a resolution calling for the drawing up of a ‘Bill of Rights’ for minorities,⁴ but twenty-three years later, there still is no such document. Also with respect to the prominent role of minority rights among other human rights in the EU’s external policy—particularly regarding candidate countries—one would have expected at least some reflection of it in a charter intended to enact a comprehensive and up-to-date codification of fundamental rights. However, as unanimity could not be reached on this point, none was elaborated.

Similarly, the draft Constitution of the EU presented in July 2003 does not mention “minority protection” at all, despite repeated attempts and proposals by individual members of the convention and by NGOs. However, a surprising development occurred during the Intergovernmental Conference that followed the convention. The Hungarian government strongly insisted on the inclusion of minority rights in the introductory articles of the

³ CHARTE 4478/00 (contribution by the Minority Rights Group), available at <http://db.consilium.eu.int/DF>. See Schweltnus (2001).

⁴ OJ 1981 C 287/106.

Constitution, and despite the initial opposition of some delegations (particularly Latvia and Slovakia) an agreement emerged among the 25 governments to amend Article 2 of the draft Constitution (which lists the fundamental values of the EU) so as to include a reference to the rights of persons belonging to minorities.⁵ The wording of that reference is highly ambiguous: it could be read either as stating that the (general) human rights of members of minorities must be respected like those of everyone else (a redundant statement) or as stating that additional rights are in order for minorities. In any case the question remains, what the policy significance is of a recognition of this “value” in the absence of any concrete follow-up reference in the Charter of Fundamental Rights (which is to become Part II of the EU Constitution) and in the absence of any explicit legislative competence for EU institutions in the field of minority protection. It forms a foundation on which it would be difficult to build a solid edifice.

However, rather than deploring the lack of a clear constitutional commitment by the EU to minority protection, one could argue that there is really no need for ambitious European Union action in this field, since Europe-wide minority protection instruments do exist in another context: that of the Council of Europe, with its Framework Convention for the Protection of National Minorities and its Charter of Regional and Minority Languages. In my view, this argument must be taken seriously and should lead us to reflect on the contours of an autonomous European Union minority protection policy. What can or should the EU do and what should be left to either the member states or the Council of Europe (following the principle of subsidiarity both in a downwards and an upwards direction)?

Presently, the European Union has no role, and should not have a role in the future, in detailed standard-setting as regards minority rights. What has not been defined by other organizations (mainly the Council of Europe) should be left to the states. However, there is scope for building on the dynamics created by pre-accession monitoring and on the increased political prominence of minority issues that may well result from enlargement. In doing so, the European Union can start from existing EU policies and competencies and develop them in minority-friendly directions.⁶ These are the “constitutional resources” referred to in the title of this paper which could provide a legal policy agenda for minority rights advocates. In the remainder of this paper, I will look at five different headings under which elements of an

⁵ The amended text of Article 2 can be found in Document CIG 60/03 ADD 1 of December 9, 2003 (amended bits in italics): “The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, *including the rights of persons belonging to minority groups*. These values are common to the Member States in a society in which pluralism, *non-discrimination*, tolerance, justice, solidarity and *the principle of equality between women and men prevail*.”

⁶ This is also, basically, the approach advocated by Guido Schwellnus (2001) and Gabriel N. Toggenburg (2003). It was also the underlying framework of an earlier policy initiative of the European Academy Bolzano’s *Package for Europe*.

EU minority protection policy could be developed in years to come: accession negotiations and external relations, general human rights protection, the effective application of the Race Directive, cultural policy funding programs, and the mainstreaming of the value of cultural diversity. This analysis is only exploratory and incomplete at this stage. It could be complemented by examining the 'minority potential' of *cohesion policy* (i.e., the operation of the structural funds, particularly in as far as they support transfrontier cooperation), *social exclusion policy* (and the so-called 'Lisbon process'), and *immigration policy*.⁷

2. Accession Negotiations and External Relations

As was briefly recounted above, minority protection as a deliberate EU policy up to this point has been almost exclusively an external matter. The accession of the ten new member states in May 2004 will terminate much of this external minority protection policy, but not all of it. In particular, it will remain a part of the political conditionality imposed on the three remaining candidates for EU membership, and there is therefore a clear case for trying to upgrade the quality of the EU's performance. This need to improve minority protection monitoring is perhaps less crucial with respect to the accession applications of Bulgaria and Romania. These countries have been held to comply with the political conditions for membership for many years already, and it is unlikely that minority questions will reemerge as central issues in their final approach to European Union membership. Things are different, arguably, for Turkey and, if accession talks are to be opened, for Croatia and Macedonia. For those countries, human rights conditionality in general, and minority protection standards in particular, are vital elements on which the decision whether to proceed towards membership continues to hinge. In the latest *Regular Report on Turkey*, the question of human rights is addressed in more complete detail than ever before. As regards minority protection, the European Commission salutes the impressive constitutional modifications recently enacted by Turkey but also warns that the actual implementation of these reforms is, and will remain, a crucial factor in its evaluation. This cautious attitude is justified by the many signs that the 'implementation gap' between lofty constitutional proclamations and the situation on the ground is particularly wide in Turkey.⁸ If the European Commission and the EU want to be able to make a credible assessment of Turkey's political readiness for membership, they must find ways to obtain a detailed and balanced view of the implementation record by using all available (official and non-official) sources, and also, contrary to their past practice, by acknowledging those sources of information more openly so as to allow for transparency in the decision-making on Turkey's accession. Concretely speaking, this means that the European Commission will need to beef up its expertise and manpower in the field of minority protection monitoring. This is

⁷ See Peers in this volume.

⁸ For a detailed critical account, see Kurban (2003).

not a luxury expenditure, but one that would contribute to the credibility of the momentous decisions on Turkey's application for membership.

Apart from the enlargement context, minority protection will continue to form part of the external relations of the European Union. It is a key concern in the stabilization and association process for the countries of the western Balkans, but is also part of the wider 'human rights conditionality' which the European Union seeks to infuse, more or less successfully, in its foreign policy and its treaty relations with third countries.⁹ Two regulations from 1999, which set out the criteria for funding of external human rights and democratization projects by the European Community, are still the only binding pieces of EU legislation that openly refer to support for minorities as part of their aims.¹⁰ The insistence on minority protection in external relations remains, as before, open to the criticism that the EU is using a double standard, requiring third states to comply with standards that the EU does not impose on its own member states. In order to see whether that criticism is still justified in the current context, I will now turn to the *internal* dimension of EU policy.

3. General Human Rights Monitoring and Protection

What is the place that minority protection could occupy in the development of a general EU human rights policy towards its own member states?¹¹ The legal foundations of that human rights policy are uncertain and controversial. The European Community was not created as a human rights organization, and concern for the protection of human rights only gradually appeared on the agenda of the European Union, developing in a rather piecemeal fashion. In this context, the *first question* to be answered is to what extent European institutions are allowed, under the present EU Constitution, to monitor the human rights performance of the member states and take steps to prevent or sanction human rights violations by them. Overall, there is no great space for this, as member states have a duty to respect human rights, *as a matter of EU law*, only when they act within the particular scope of EU law, that is: when they implement European Union legislation or when they enact restrictions to the fundamental freedoms contained in the EC Treaty.¹² That is a broad field, but it still leaves a large part of the states' human rights records outside the control of EU institutions (although they are subject to

⁹ See generally Fierro (2003).

¹⁰ Regulations 975/1999 and 976/1999, OJ 1999 L 120/1.

¹¹ In this section, I deliberately use the term 'human rights policy' in order to emphasize that not only the *judicial* enforcement of human rights is relevant for minority groups, but also, and perhaps principally, the action of the *political* institutions of the EU to protect and promote human rights. For this inclusive notion of an EU human rights policy, see, e.g., Craig and de Búrca (2002).

¹² This is a well-known feature of EU human rights law that has been repeatedly highlighted and analyzed in legal writing. See, among many others, Craig and de Búrca (2003).

other international human rights obligations, most prominently under the European Convention for the Protection of Human Rights). An exception to this rule of restricted EU human rights authority arises only when the state in question commits a *serious and persistent breach* of one or more human rights: in that case, EU institutions can set up sanctions under Article 7 of the EU Treaty; and the competence argument cannot be used to deflect EU interference with a member state's general human rights performance. Article 7, only recently inserted in the EU Treaty by the Treaty of Amsterdam, provides for the suspension of the rights of a member state that is in persistent breach of the fundamental principles and human rights on which the European Union is declared (by Article 6) to be founded. The procedures for applying this sanction mechanism were improved by the Treaty of Nice, but remain very cumbersome, and have not been tested.¹³ However, since the mechanism of Article 7, as modified by the Nice Treaty, provides for a preventative mechanism allowing the EU institutions to send a warning when there is a mere *risk* of persistent and serious human rights violations, it has been correctly argued that the European Union could (and perhaps should) set in place a permanent monitoring mechanism, so as to allow for the timely signaling of an alarming human rights situation in some country of the Union. In this way, the European Parliament has justified and strengthened its existing practice of preparing annual reports that comment on the human rights situation in member states, whereas the European Commission has, again on request of the Parliament, set in place a network of experts¹⁴ charged with elaborating an annual human rights report that is more detailed and couched in tighter legal language than the European Parliament's reports. The first of the reports (under the directorship of Professor Olivier de Schutter) was released in 2003. It is a goldmine of information and a major source for reflection on the human rights situation in the various countries of the European Union (EU Network of Independent Experts 2003). It may be noted that both the European Parliament and the network of experts use the EU Charter as the substantive basis for judging the performance of the states, even though the charter is not yet, as such, a binding legal document.

Having delineated the extent to which the EU can control the general human rights performance of its member states, the *second question* that arises is whether this 'internal' human rights policy includes within its scope minority rights of the kind contained in the Framework Convention for the Protection of National Minorities. In this context, it is important to note that minority rights were not included in so many words in the Charter of Fundamental Rights. My assumption is that rights not contained either expressly or implicitly in the charter cannot be part of the core human rights values which every member state must respect under Articles 6 and 7 of the EU Treaty. Whereas it is undoubtedly true that a

¹³ However, the 'Austrian crisis' provoked by the entry of the FPÖ into the Austrian government could, to some extent, be seen as a testing ground for the procedure of Article 7. It also contributed to the refinements in the Treaty of Nice. See De Witte and Toggenburg (2004: 59).

¹⁴ See Communication of the Commission on Article 7 of the Treaty of the European Union, COM(2003) 606 of October 15, 2003: 9.

serious and persistent breach of the *human rights of the members of a minority* could trigger the Article 7 mechanism, it does not follow that *minority rights*, as such, form part of the fundamental principles to be guaranteed by Article 7.

Admittedly, the report by the network of experts takes a more encompassing view of this question. In this report, Article 22 of the charter (“The Union shall respect cultural, religious and linguistic diversity”) is read as a minority protection clause. Indeed, the authors of the report write that the state of ratification of the Framework Convention for the Protection of National Minorities, and of the Charter for Regional and Minority Languages, “gives a first indication of the willingness of the member states to respect the rights enshrined by Article 22 of the charter” (EU Network 2003: 175), and they accordingly proceed to examine the signature and ratification practice of the EU member states. This is an application of a general methodological choice made by the authors of the report: that they read the charter in the context of the international human rights instruments acceded to by all member states and indeed even those “which are not in force as regards all member states but which are widely recognized internationally” (EU Network 2003: 21-22). Thus, the report of the network is making two interesting but highly disputable assumptions here: (a) that the Framework Convention and the Charter of Regional and Minority Languages can be used as sources for the interpretation of EU Charter rights, despite the fact that those two treaties are not referred to in the preamble to the charter and have not been ratified by all EU member states; and (b) the specific assumption that the content of these two Council of Europe instruments is relevant to the interpretation of Article 22 of the charter.

I tend to disagree with both these assumptions. Particularly as regards Article 22, it appears that the commitment to protect linguistic and cultural diversity does not translate easily into concrete minority protection standards.¹⁵ Indeed, one of the EU governments that has championed the use of ‘cultural diversity’ language in EU constitutional documents (particularly in the context of the EU’s external trade policy) is France. The diversity which the French government seeks to preserve is primarily that existing between the *national* cultures and languages; it certainly does not imply a commitment to give constitutional recognition to minority groups within France. This does not make Article 22 entirely meaningless. The commitment to cultural diversity may, for instance, affect the way in which the European Court of Justice interprets and applies internal market and competition laws.

However, Article 21 may be more immediately relevant than Article 22, insofar as it prohibits discrimination on any ground, especially “membership of a national minority.” This formulation is borrowed from Article 14 ECHR, but whereas the latter provision only applies in cases that fall within the scope of one of the convention’s human rights, the EU Charter

¹⁵ Apart from failing to give any specific indications about the need to recognize minority rights, Article 22 is also much broader than the traditional notion of minority protection; see on this point Picocchi (2002).

provision applies to *any action* by EU institutions and to action by member states when implementing EU law. It will thus be possible, particularly once the charter becomes fully binding, to contest European Union policies that treat members of national minorities less favorably than members of a majority group, be it directly or indirectly.¹⁶ However, one does not need to wait for the ‘constitutionalization’ of the EU Charter: there is already a binding instrument of EU law that achieves that purpose, at least to some extent—the directive prohibiting discrimination on grounds of racial or ethnic origin, which I will examine in the next section.

4. The Prohibition of Discrimination on Grounds of Ethnic Origin

Only one year after the Treaty of Amsterdam went into effect, granting the European Community an express competence to adopt measures which combat discrimination based on a variety of grounds, the European Council enacted, in a surprisingly rapid way, the important Race Discrimination Directive of 2000.¹⁷ This directive seeks to ensure, according to its full title, the “equal treatment between persons irrespective of racial or ethnic origin.” It seems clear to me that the prohibition of discrimination on grounds of *ethnic origin* applies to discrimination based on membership of a cultural or linguistic minority. Even if the authors of this directive may have been aiming primarily at the protection of groups such as African immigrants and their descendents,¹⁸ the general wording used in the directive also provides protection against invidious discrimination for Roma or Basques living in France.¹⁹

The Race Directive (as it is commonly but improperly known) is innovative and quite radical in a number of respects which may lead it to become the most efficient minority protection tool in the EU for the years to come. Its scope is broad, as it prohibits both direct

¹⁶ For an exploration of the potential of Article 21 of the EU Charter (and Article 14 of the ECHR) as minority protection instruments, see Hillion (2004).

¹⁷ Council Directive 2000/43 of June 29, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

¹⁸ All immigrants and their descendents are among the potential beneficiaries of the rights granted by the directive, including those known as *third-country nationals*. With respect to the latter category, though, a provision of the directive states that distinctions on the ground of nationality *as such* do not constitute discrimination in the sense of the directive. See Brown (2002). Equal treatment of third-country nationals is also addressed separately in the recently adopted directive on the status of long-term resident third-country nationals within the EU (see Peers in this volume).

¹⁹ For an elaboration of this point, see in particular Petrova (2001: 45), as well as Chalmers (2001: 193). For an analysis of the directive emphasizing its minority protection dimension, see Toggenburg (2002).

and indirect discrimination; it applies both vertically (as a duty for public authorities) and horizontally (to private legal relations); it contains strong remedial provisions and its material scope is not limited to employment but also extends to discrimination, again by both public authorities and private persons, in the fields of education, housing, and social protection. The directive thereby follows the model of EEC Regulation 1612/68 on the free movement of workers that also set a wide scope for the protection of EU citizens against discrimination. For example, linguistic proficiency requirements that are not justified by the nature of a job could be considered an indirect form of racial or ethnic discrimination in the terms of the directive, irrespective of whether they are imposed by public or by private employers. Similarly, employment conditions unduly prohibiting the use of minority languages during work could be indirect discrimination on grounds of race.²⁰ But also, for example, discrimination against Roma is covered with respect to housing or education. A report for the European Commission on the implementation of this directive in the new and applicant member states highlights, in fact, the potential importance of this legal instrument for the protection of national minorities and the Roma minority in the Central European member states.²¹ However, the directive should not be seen as a functional replacement for the minority monitoring undertaken by the European Commission prior to accession: first, its impact on daily life is potentially more incisive than that of the EU's earlier minority protection policy; secondly, there is no longer a double standard since the directive is asked to play an equally important role in the 'old' member states, all of which are faced with the need to make important legislative changes as a result of the directive.²² The directive allows (but does not impose) positive action in favor of ethnic minorities, although it is questionable whether quotas for access to public employment or education would be compatible with it.²³

²⁰ An example from practice is the decision by the Dutch Equal Treatment Commission (2000). It held that the internal rules of firms that impose the use of Dutch as the language of communication among the workforce could be disproportionate and therefore discriminatory. This is the case, for example, where no linguistic conditions have been formulated upon recruitment for the job.

²¹ See in particular the overview in Part I of the study (Bell 2003). On the question of whether human rights policies are an adequate instrument for addressing the complex plight of Roma, see Pogany (2004). See also Guglielmo in this volume.

²² See the detailed country reports in a study by the European Monitoring Center on Racism and Xenophobia (2002).

²³ For the argument that the directive must allow member states sufficient freedom to experiment with affirmative action schemes, and that the European Commission and the Court of Justice should adopt a policy of restraint in the scrutiny of positive action schemes, see Caruso (2003).

5. Cultural Diversity Policy: Specific Actions

A concern for the advancement of minorities could, furthermore, be integrated into the modest but well-established European cultural and educational policies. The way the powers of the European Community in the fields of culture and education are defined puts special emphasis on their subsidiary nature. According to both Articles 149 and 151 TEC, action by the Community shall be (only) for “supporting and supplementing” the action of the member states. Moreover, the Community is not allowed to enact “any harmonization of the laws and regulations of the member states” in those policy areas. What is allowed is, rather, the enactment of incentive measures for helping to achieve the aims set in the articles. Whereas incentive measures may not amount to harmonization, it is not clearly spelled out, in a positive way, what they are. In practice, they have taken the form essentially of so-called ‘action programs,’ through which the European Union is funding projects proposed either by member state authorities or private actors and organizations within the framework of policy objectives set at the European level.

For many years, the European Community budget has offered some modest financial support in this framework to projects aiming at “the promotion and preservation of regional and minority languages and cultures.” Budget line B3-1006 was created in 1982 at the insistence of the European Parliament and was continued year after year as a pilot program.²⁴ The European Bureau for Lesser-Used Languages was set up for the purpose of accompanying the implementation of the program.²⁵ However, in a judgment on May 12, 1998, the European Court of Justice annulled a Commission scheme of financial grants for projects fighting social exclusion.²⁶ The general point made by the court in that ruling was that significant European Community expenditure required the prior adoption of a basic act by the Community legislative authority. The judgment therefore ended a series of funding programs covered by an annual budget heading but not based on a legislative act setting out the goals and instruments. One of these budget headings was the long-standing EC funding program for regional and minority languages.

Following this judgment, the Commission considered the feasibility of proposing a genuine multiannual action program for the benefit of regional and minority languages, which would put funding for this purpose on a firm footing.²⁷ Although the European Parliament,

²⁴ The story is recounted in Ó Riagáin (2001b).

²⁵ See the web site of the bureau: <http://www.eblul.org>. It publishes a periodical contact bulletin dealing with minority language questions in the EU context. On the history and role of the bureau more generally, see Ó Riagáin (2001a).

²⁶ Case C-106/96, *United Kingdom v. Commission*, [1998] ECR I-2729.

²⁷ Commission Notice, *Support from the European Commission for Measures to Promote and Safeguard Regional or Minority Languages*, OJ 1999 C 125/14.

the traditional champion of minority interests in the EU, supported the plan, several member states in the Council working groups did not. Therefore, nothing came of it.²⁸

In the absence of a dedicated minority languages funding program, funding has been continued in a piecemeal and indirect way. In 2001 money was made available on a one-off basis, and for rather ephemeral events, in the framework of a special European Year of Languages project.²⁹ Currently (in the 2003 budget), support is provided for two particular bodies: the European Bureau for Lesser-Used Languages, and the Mercator research and documentation centers.³⁰ They are part of the European Commission's funding for a miscellaneous group of "institutions of European interest."³¹ In addition, projects can provisionally be funded under the general heading "preparatory cooperation measures in the fields of education and youth policy."³²

In order to circumvent the continuing misgivings of several member states against a separate minority language program, the Commission's latest plan is to include support for regional and minority languages in a broader action plan on language learning and linguistic diversity. Such a plan was called for by a Council resolution on February 14, 2002 and was drawn up in the summer of 2003.³³ According to the plan, financial support for linguistic diversity projects would be made available as part of the current EU funding programs. However, the plan only applies to the educational sector and would therefore not cover projects designed to foster the use of minority languages in other contexts. In addition, when reading the Commission document, it is clear that the main emphasis is on the improvement of language skills of EU citizens in general, and the encouragement of the teaching of minority languages is included only as a very secondary policy objective. There is thus the danger that, by failing to create a dedicated funding base for minority language projects, and instead funding them from existing programs with multiple policy goals, the minority dimension will become extremely diluted. On this, the European Parliament advocates a different approach. In its recent resolution on September 4, 2003, based on the Ebner report, it calls for the

²⁸ Since, presumably, Article 151 TEC would have been the legal basis, or one of the legal bases, of the program, it would have required the unanimous agreement of all member state delegations. See Ó Riagáin (2001b).

²⁹ Decision 1934/2000 of Parliament and the Council of July 17, 2000, OJ 2000 L 232/1.

³⁰ There are three such Mercator centers: Mercator Education (in Leeuwarden), Mercator Legislation (in Barcelona) and Mercator Media (in Aberystwyth).

³¹ EU budget for 2003, item A-3015. The amount of appropriations for 2003 is EUR 1,050,000.

³² See EU budget for 2003, explanation under budget line B3-1000: "An amount of EUR 1,000,000 is destined for the promotion and safeguard of regional and minority languages, dialects and cultures."

³³ Communication from the Commission: *Promoting Language Learning and Linguistic Diversity: An Action Plan 2004-2006*, COM(2003) 449 of July 24, 2003.

establishment of an autonomous European agency for linguistic diversity and language learning (at arm's length from the European Commission) and for the adoption of a distinct program for linguistic diversity and language learning, with its own separate funding.³⁴

The European Commission's plan, if adopted as it stands, would not be a significant change to the status quo. Today, linguistic diversity is present as an aim or as an object of special consideration in the description of several EC programs. Thus, one of the objectives of Media Plus, the well-funded program for the development, distribution, and promotion of European films, is "to support linguistic diversity."³⁵ The Culture 2000 program has, among its many goals, that of "supporting the translation of literary, dramatic, and reference works, especially those in the lesser-used European languages and the languages of Central and East European countries."³⁶ The most important example is the Socrates program in the field of education. It incorporates the formerly separate Lingua program dedicated to the improvement of language skills of students and pupils and to language teacher training, by means of mobility grants and the development of language learning materials. The objective of the Lingua part of the Socrates program is "to promote a quantitative and qualitative improvement of the knowledge of languages of the European Union, in particular those languages which are less widely taught, so as to lead to greater understanding and solidarity between the peoples of the European Union and promote the intercultural dimension of education."³⁷ This statement could give the mistaken impression that regional and minority languages are included. In fact, the annex of the Socrates decision makes clear that only the official languages of the European Community are covered, together with Irish and Letzeburgesch. On the basis of the EEA (European Economic Area) Agreement, Norwegian and Icelandic were also included. Therefore, the special priority given to the "less widely used and less taught languages" does not refer to regional and minority languages (such as Catalan, Basque, and Welsh). This is odd, because improved knowledge of these languages seems equally able to "lead to greater understanding among the peoples of the European Union," which is the declared underlying aim of Lingua. There is an obvious double standard here, which contradicts the modest EU funding for minority language projects.

The question is whether the European Commission's proposed new approach of mainstreaming linguistic diversity concerns in a variety of existing programs will correct this bias against minority languages and lead to an increase in overall funding. As to the content, much will depend on what happens with one of the central elements in the Commission plan, namely the aim that "every European citizen should have meaningful communicative

³⁴ European Parliament resolution with recommendations to the Commission on European regional and lesser-used languages—the languages of minorities in the EU—in the context of enlargement and cultural diversity, September 4, 2003 (A5-0271/2003).

³⁵ Decision 821/2000 of December 20, 2000, OJ 2000 L 336/82.

³⁶ Decision 508/2000 of February 14, 2000, OJ 2000 L 63/1, Annex II, I b.

³⁷ Decision 253/2000 of January 24, 2000, OJ 2000 L 28/1, Article 2, sub b.

competence in at least two other languages in addition to his or her mother tongue.”³⁸ If that ambitious aim is adopted, it will be vital for regional or minority languages to be included among the “two other languages” so that they can be selected in addition to English (which will undoubtedly be the first of those other languages). As to the funding, the fact is that the financial amounts allocated over the years to language-related projects were very limited. For their immediate beneficiaries, this European funding is meaningful, but the overall impact of this on the preservation of linguistic diversity is negligible. Whereas the European Parliament traditionally pleads for increased funding for media, culture, and education programs, the Council has always been very reluctant. In the particular case of the Culture 2000 program, potentially important due to its broad scope, Council decision-making requires unanimity, in accordance with Article 151 TEC. The United Kingdom, for one, has not shown any interest in substantial funding for measures to promote linguistic diversity. This is quite understandable since these measures are, in fact, to a very large extent aimed at limiting the expansion of the use of the English language. The further steps of EU decision-making on this linguistic diversity program (more particularly, the choices made regarding its overall funding and the place of the minority languages component) will be indicative of the European Union’s willingness to take minority protection seriously.

6. Cultural Diversity Policy: General Mainstreaming

In addition to the specific funding instruments mentioned above, the text of Article 151 also contains an *indirect foundation* for a cultural diversity policy and, hence, for a policy protecting the cultural distinctiveness of minority groups. Article 151, par. 4 contains a so-called horizontal integration clause stating that “[T]he Community shall take cultural aspects into account in its action under other provisions of this treaty, in particular in order to respect and promote the diversity of its cultures.” This anodyne phrase recognizes an important reality that predates the Treaty of Maastricht, namely the fact that cultural policy objectives may sometimes be achieved under other EU policy headings. In fact, EU cultural policy norms have been typically enacted, both before and after Maastricht, on the basis of such ‘other provisions’ of the EC Treaty, rather than as part of EU cultural or educational policies themselves.

However, this indirect approach contains an inherent limitation. In the system of EU competences, as it was patiently constructed by the European Court of Justice through its many ‘legal basis’ cases, the main content of EU legislation should always correspond to the specific aims or objectives mentioned in the treaty article that serves as its legal basis. Therefore, minority protection measures cannot be enacted for their own sake but only as an integral part of a measure whose central aim is defined otherwise. In this way, a limited

³⁸ *Promoting Language Learning and Linguistic Diversity: An Action Plan 2004–2006*, COM 449 of July 24, 2003.

(‘ancillary’) power to harmonize national laws can be construed, so that national minority protection regimes (or non-regimes) can be affected sideways by forming the object of European legislation whose central aim is non-cultural.

This regulatory phenomenon finds its natural home in internal market law; that is, EC legislation harmonizing national laws in order to facilitate the free movement of persons, goods, or services. One of the oldest but still most striking examples is the directive of 1977 on the language of education of migrant children.³⁹ This directive imposes a duty on member states to organize special language education for children of EU migrants in order to facilitate these EU citizens’ integration into their country of residence. The special educational entitlements relate to both the language of the country of origin and the language of the host country. The implementation of this directive has been quite erratic, and the control of its implementation by the European Commission very feeble—partly due to the ‘soft’ language used in its substantive provisions. If it had been taken more seriously, it would have constituted a rather intrusive form of EU regulation justified by the aim of facilitating the free movement of workers. The functional powers of the European Community thus served as a vehicle for legislation dealing with a subject matter (namely, language policy in education) that one would have thought to be within the residual competence of member states. Today, with the heightened political impact of the doctrine of subsidiarity, such a directive would probably not be enacted by EU institutions, although the underlying reasoning that internal market powers may justify the enactment of minority-related cultural policy measures is still perfectly valid. In the future, it could form the basis of more ambitious attempts by the EU to integrate cultural diversity into concerns for market integration and the mobility of persons.

7. Conclusion: Towards a Comprehensive EU Approach to the Question of Minority Protection, or Not?

One point, arguably, that emerges from the preceding analysis is that we are witnessing the gradual emergence of an EU minority protection system whose contours are blurred and whose treaty bases are largely implicit rather than explicit. What we see for *minority rights* is a replication, at a later stage and at a much lower level, of the gradual emergence of a *human rights* system within the European Union. It seems possible now for scholarly writing to speak about an incipient EU minority rights policy constituted by specific (and often quite limited) activities in a number of different fields; and in any of these specific fields, it is possible also to criticize both the approach and the degree of overall coherence between them. The logical recommendation would be that the European Union institutions themselves should, in turn, take a more holistic approach to the matter and look toward an EU minority protection policy in an open and comprehensive way. For instance, one might recommend that the

³⁹ Council Directive 77/486, OJ 1977 L 199/32.

European Council should devote a section of its periodical *Conclusions* to minority protection, or that the European Commission should draft a comprehensive 'green paper' examining the various aspects of the question, rather than operating in an incremental way, and continue the European Union's approach of minority protection 'through the backdoor.' However, from a political perspective, this may not be the wisest course. A policy document that carries the words 'minority protection' in its title might well provoke the principled opposition of several member states who would argue that the Union lacks express powers in this field, or should leave this question to each state separately, in the name of subsidiarity. The advantage of the current piecemeal approach is that it does not provoke such principled opposition. It allows a case to be made for some limited degree of minority protection in accordance with the inherent logic of every EU policy area.

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THE ENLARGED EU AND THE COUNCIL OF EUROPE:
TRANSFER OF STANDARDS AND THE QUEST
FOR FUTURE COOPERATION IN MINORITY PROTECTION

Rainer Hofmann and Erik Friberg

Abstract

It is in the interest of the enlarged European Union (EU) to support stable inter-communal relations also beyond its new external borders. The Council of Europe (CoE) remains the only pan-european intergovernmental organization which offers legally-based instruments and mechanisms on minority protection across the wider Europe. Currently, the ratification of the CoE Framework Convention by all EU member States provides the best opportunity to put an end to the existing 'double standards' of minority protection in Europe.

The inter-institutional coordination and task-sharing in minority protection in Europe must be viewed in light of developments of overall relations, and accession to instruments, between the EU and the CoE. In any way, the standards developed through the CoE should be regarded as part of the legal order of the EU, by building on the constitutional traditions of EU+25 member states. The standards and expertise of the Council of Europe should be used as cultural diversity policies are being developed in the EU, and as a basis for draft constitutional clauses on minority protection.

The CoE and the European Commission have not yet been close partners in planning and agenda setting in areas of common concern—the CoE has mainly served as an implementing partner. However, several joint initiatives between the European Commission and the Council of Europe Secretariats have originated from informal contacts between staff members. Nevertheless, closer legal ties with regularized inter-institutional meetings should be promoted to encourage cooperation in programming, efficient use of resources and to avoid duplication.

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1. Introduction

Considerations concerning the future cooperation between the Council of Europe (CoE) and the European Union (EU) in the field of minority protection include mechanisms and aspects of judicial, quasi-judicial, and political nature. The enlargement of the EU and the work on the EU Constitution pose possibilities as well as challenges towards ensuring a coherent system of minority protection throughout the 45 CoE member states, many of which are unlikely to become a member of the EU for a long time to come. EU+25 will have continued self-interest in supporting stable ethnic relations within the EU as well as among the CoE states surrounding the new external borders of the EU. Also beyond EU+25, the CoE will remain the only pan-European intergovernmental organization pursuing as a main goal the legally-based protection of human rights, including minority rights, with the potential of putting all European states on an equal footing in this regard. The unsolved underlying question is how the European Union and the Council of Europe can coordinate their increasingly overlapping mandates and activities, in order to optimize the minority protection within Europe and beyond?

This chapter will address three sets of issues: (1) it will briefly identify some of the CoE standards on minority rights as developed by the jurisprudence of the European Court of Human Rights (ECtHR), the monitoring work under the Framework Convention for the Protection of National Minorities (FCNM) and the Charter for Regional and Minority Languages (CRML); (2) it will examine whether and how these standards can be transferred to the EU; and (3) it will look at how synergies can be created in coordinated policy and programming in minority protection between the CoE and the EU.

2. Has a Standard of European Minority Rights Developed through the Council of Europe Treaties and Monitoring Mechanisms?

2.1 *Overview of Council of Europe Bodies Addressing Minority Protection*

Although this article is limited to discussing the three, arguably, primary CoE mechanisms directly relevant for minority protection, it should be emphasized that there are several other CoE institutions or bodies which through their activities, directly or indirectly, also promote minority protection in CoE member states. These include the European Commission against Racism and Intolerance (ECRI), the European Commission for Democracy through Law (the Venice Commission), the Congress of Local and Regional Authorities of Europe (CLRAE), the Commissioner for Human Rights, the Parliamentary Assembly, and the Committee of Ministers.¹ In addition, the Committee of Experts for the Protection of National Minorities (DH-MIN) will likely reemerge in 2005 as a general forum of intergovernmental cooperation dealing with policy issues in different fields of minority protection. It is this comprehensive and complimentary approach of various judicial, juridical, and political mechanisms that provides the web of minority protection that constitutes the Council of Europe's full contribution to promoting the rights of persons belonging to national minorities within the CoE region.

2.2 *European Convention of Human Rights and Fundamental Freedoms (ECHR)*

The ECHR provides no explicit provisions on minority rights and the preparation of an additional protocol of individual rights in the cultural field was discontinued.² However, the case law of the ECtHR has arguably, and increasingly, paved new ground in the field of protecting

¹ For a recent comprehensive account of the overall activities within the CoE with regard to minority protection, see Thornberry and Estebanez (2004).

² At the Vienna Summit (October 8–9, 1993), the heads of state and of government of the member states of the Council of Europe asked the Committee of Ministers to “begin work on drafting a protocol complementing the European Convention on Human Rights in the cultural field by provisions guaranteeing individual rights, in particular for persons belonging to national minorities.” An Ad Hoc Committee for the Protection of National Minorities (CAHMIN) was set up to examine the question and met six times. The CAHMIN was faced with many problems in the course of its work, both of a legal nature (interpretation of the ECHR and its Protocols, identification of new individual rights such as the right to cultural identity) and of a political and economic nature (the possible expense of securing these rights might force states to restrict their obligations). Another difficulty identified was that some of the rights suggested might involve a “transfer of competencies” between the executive and legislature, on the one hand, and the judiciary, on the other—for example, in the field of national education.

various elements of minority identity, including the protection of ways of life under Article 8,³ freedom of expression and association in Articles 10 and 11,⁴ and through developments of the interpretation of the principle of non-discrimination, as enshrined in Article 14.⁵ A positive reading of ECtHR non-discrimination jurisprudence could point in a direction favorable to the achievement of substantive equality by indicating the requirement that “equal situations are treated equally and unequal situations differently,”⁶ and opening up, although hesitantly, to the idea of indirect discrimination.⁷ The addition of Protocol 12 to the ECHR, once it enters into force, will provide a general non-discrimination clause, making non-discrimination an independent right under the convention, which in its current form under Article 14 has been deemed accessory to the other articles of the ECHR.⁸ However, comprehensive accounts of

³ See, *inter alia*, *Buckley v. United Kingdom* (Eur Comm. H.R., Report of January 11, 1995, 19 E.H.R.R. CD 20), *Beard v. United Kingdom* (ECtHR, judgment of January 18, 2001), *Chapman v. United Kingdom* (ECtHR, judgment of January 18, 2001). In the latter, the ECtHR refers to an “emerging international consensus” within the CoE “recognizing the special needs of minorities and an obligation to protect their security, identity and lifestyle.” However, the majority held that this “emerging consensus” was not yet sufficiently concrete, while there was a significant joint dissent of seven judges arguing that Article 8 prescribed a positive duty to ensure that Roma be afforded an effective opportunity to enjoy their rights to home, private, and family life.

⁴ See, *inter alia*, *United Communist Party of Turkey and Others v. Turkey* (Report 1998-I ECtHR, judgment of January 30, 1998); *Socialist Party and Others v. Turkey* (Reports 1998-III ECtHR), *Freedom and Democracy Party v. Turkey*; *Yazar, Karatas, Aksoy and the People’s Labor Party v. Turkey* (Reports 1999-VIII ECtHR, judgment of December 8, 1999); *Sidiropoulos and Others v. Greece* (Reports 1998-IV ECtHR, judgment of July 10, 1998); *Stankov and the United Macedonian Organization Ilinden v. Bulgaria* (ECtHR, Appl. 29221/95 and 29225/95, judgment of October 2, 2001); *Gorzelik and Others v. Poland* (ECtHR, Appl. 44158/98, judgment of December 20, 2001 upheld by Grand Chamber on February 17, 2004); and *Metropolitan Church of Bessarabia and others v. Moldova* (ECtHR, Appl. 45701/99, judgment of December 13, 2001).

⁵ Article 14 provides the right against discrimination in the enjoyment of the rights and freedoms set forth in the ECHR. ECtHR judgments finding discrimination has generally in the past seemed to require a high standard of proof, displaying some reluctance to find discrimination relevant and proven; dealing with discrimination only when a “clear inequality of treatment in the enjoyment of the rights in question is a fundamental aspect of the case.” See *Airey v. Ireland* (ECtHR judgment of October 9, 1979).

⁶ *Thlimennos v. Greece* (ECtHR, judgment of April 6, 2000). According to this judgment the right not to be discriminated against in the enjoyment of the rights guaranteed under the ECHR is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different. Pentassuglia argues persuasively, however, that interpreting this case as the recognition of an automatic general duty to ensure positive equality would probably amount to a misperception (Pentassuglia 2004: 434).

⁷ *In Kelly v. UK* (ECtHR, judgment of May 4, 2001, par. 148) the ECtHR explicitly acknowledged for the first time that “where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group.”

ECtHR jurisprudence relevant to minority issues have been dealt with elsewhere (see Pentasuglia 2004; Thornberry 2002; Gilbert 2001) and will not be further elaborated upon here, since the intention is mainly to address the question of the *transfer* of standards from the CoE to the EU.

2.3 *Framework Convention for the Protection of National Minorities (FCNM)*

The FCNM went into effect in 1998 and is the most comprehensive legally binding multilateral instrument yet designed to protect the rights of persons belonging to national minorities.⁹ Upon completion of the first cycle of monitoring, the FCNM mechanism has gained widespread appreciation and developed a significant source of 'soft-law jurisprudence' with its body of Committee of Ministers' (CoM) Resolutions and Advisory Committee (AC) Opinions. The evolution of inclusive country visits as an integral part of the monitoring undertaken by the Advisory Committee, the increasingly early publication by states of the AC Opinions and the arrangement of follow-up seminars have all contributed to a constructive and continued dialogue between states, minorities, and the CoE. By February 2004, 34 state reports had been submitted, the ministers' deputies had adopted 20 country-specific resolutions, the AC had adopted 31 opinions (of which, at the time, 27 were publicly available), 27 country visits had been conducted and 10 follow-up seminars had been organized.¹⁰

⁸ Additional Protocol 12 to the ECHR requires ten ratifications to enter into force. By July 2004 the Protocol had been ratified by eight states: Bosnia and Herzegovina, Croatia, Cyprus, Georgia, the Netherlands, San Marino, Serbia and Montenegro, and the former Yugoslav Republic of Macedonia. The new protocol removes the limitation contained in Article 14 ECHR and guarantees that no one shall be discriminated against on any grounds by any public authority and will provide further protection for persons belonging to national minorities. It has been argued that Additional Protocol 12 possibly could include some positive obligations for states (Morawa 2002: 7). The extent of such positive obligations are however likely to be limited (Thornberry 2002: 147). The Explanatory Report to the Additional Protocol 12 specifies that it is not intended to impose a general positive obligation on the parties (para 25).

⁹ The FCNM of 1994 entered into force on February 1, 1998. Thirty-five states are currently parties to this instrument: Albania, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Ireland, Italy, Liechtenstein, Lithuania, Malta, Moldova, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, the Republic of Macedonia, Ukraine and the United Kingdom. Belgium, Georgia, Greece, Iceland, Latvia, Luxembourg, and the Netherlands are signatories to the FCNM.

¹⁰ For State Reports, Committee of Ministers' Resolutions, AC Opinions, comments by the states concerned, and information on follow-up seminars, see the homepage of the Secretariat of the FCNM, <http://www.coe.int/Minorities>. The three Activity Reports of the AC are found in documents ACFC/INF(1998)001, ACFC/INF(2000)001 and ACFC/INF(2002)001.

The FCNM mainly provides program-type provisions concerning state obligations rather than individual or collective rights. The provisions are often accompanied by multiple qualifications and have been argued to, in some aspects, fall short of international standards elaborated upon at the UN level (Alfredsson 2000: 294). On the other hand, some provisions appear to go beyond existing international minority rights standards, such as Article 9 FCNM concerning access to and the creation of minority-run media, Article 11 FCNM concerning use of personal names and topographical names, and also Article 16 FCNM on changes in the demographic composition of the population (cf. Åkermark 1997: 232).

The central tool of the FCNM, however, is the process backing up the statutory provisions. It was the first international human rights treaty to be monitored on the basis of state reports that has country visits as a regular component of the monitoring. The legal duty to maintain a continuous dialogue with the AC is also a unique characteristic compared with other international human rights treaty monitoring mechanisms. In addition, similar to the ECHR, the FCNM is a living instrument and has developed new standards through its interpretations, providing the backbone of the 'soft jurisprudence' from the increasing body of AC opinions and CoM resolutions from the first cycle of monitoring.¹¹ Some examples:

Article 9 FCNM. In relation to the media, the AC has taken the position that the question of when a language quota is too far reaching has to be decided on a case-by-case basis. Issues to be taken into account have been specified to include the size of the minorities concerned, their needs in terms of programs, to what extent they are territorially concentrated, the extent to which the authorities already provide support for minority media, and the extent to which the majority population has access to other corresponding media and the possible existence of private media broadcasting in minority languages in addition to public broadcasting services.¹² Importantly, the AC has stated that the mere fact that minorities can receive programs broadcasted in their language by their kin state or neighboring countries does not eradicate the need for and the importance of domestically produced broadcasting in their

¹¹ For a more detailed review of the pertinent developments of standards and the monitoring mechanism under the Framework Convention, see Hofmann (2001), Hofmann (2001/2002), Hofmann (2003). The Advisory Committee has also commenced a work to systematize its adopted country-specific opinions, which in time and through a participatory process could develop into publicly available thematic 'General Comments' to further guide state parties in implementing the FCNM, similar to what has been developed by the UN human rights treaty-monitoring bodies. Advisory Committee members were in December 2003 intending to commence this thematic work with regard to minority protection in the fields of education, media, and participation in public life.

¹² See AC opinions on Ukraine, par. 43–47; Croatia, par. 40–42; Estonia, par. 35–37; Moldova, par. 56–57; and Armenia, par. 48. In order to access these and other AC Opinions referred to in this chapter, see <http://www.coe.int/minorities>.

language since the specific needs of the minority in question are often not taken care of by foreign programs.¹³

Article 10 FCNM. In relation to contacts with public authorities, the AC has held that the requirement that at least half of the permanent residents of a locality belong to a national minority for the right to receive replies from state or local government agencies in a minority language is too high a threshold to be compatible with the FCNM.¹⁴ The AC expressly welcomed the legislative provisions and practice in Austria, where the right to use minority languages in dealings with administrative authorities applies to all municipalities when a minority population exceeds 10 percent of the population.¹⁵ These two examples may provide a parameter for future decisions. The AC has also underlined that command of the state language by persons belonging to the national minority concerned is not a decisive criterion for the language to be used in dealings with administrative authorities.¹⁶

Article 11 FCNM. It has been similarly concluded by the AC that a numerical threshold of 50 percent of the population concerned for the introduction of place names to be displayed in the minority language constitutes an obstacle with respect to certain minority languages in areas traditionally inhabited by substantial numbers of persons belonging to national minorities.¹⁷ In contrast thereto, the AC expressly welcomed thresholds of 10 percent of the total population so as to entitle the inhabitants to display bilingual topographical indications, as in Austria, or 20 percent, as in the Czech Republic.¹⁸

Articles 12 and 14 FCNM. The compulsory placement of Roma children in so-called 'special schools' designated for mentally handicapped children has been deemed incompatible with the FCNM.¹⁹ With regard to language of education, the AC has indicated, in some instances, that it considered a truly bilingual education to be a most appropriate mode of implementing the obligations enshrined in Article 14.²⁰

Article 15 FCNM. The AC has found situations of substantial lack of adequate minority representation in public decision-making organs and public services to not be compatible with that Article's provisions on ensuring effective participation in public life.²¹

¹³ See AC opinions on Germany, par. 46; and on Estonia, par. 37.

¹⁴ AC opinions on Estonia, par. 39–41; Croatia, par. 44; and on Ukraine, par. 49–53.

¹⁵ AC opinion on Austria, par. 45.

¹⁶ AC opinions on Czech Republic, par. 58; and on Slovakia, par. 37.

¹⁷ AC opinion on Ukraine, par. 57.

¹⁸ AC opinion on Austria, par. 48–53, in particular par. 50; Opinion on Czech Republic, par. 59.

¹⁹ AC opinion on Slovakia, par. 39; AC opinion on Czech Republic, par. 61.

²⁰ AC opinions on Austria, par. 61–65; Estonia, par. 51; and Switzerland, par. 72.

²¹ AC opinion on Croatia, par. 57. It should be noted that participants at the Council of Europe conference to mark the 5th anniversary of the entry into force of the FCNM, October 30–31, 2003,

2.4 Charter of Regional and Minority Languages (CRML)

The CRML was opened for signature in 1992, entered into force in 1998, and has currently been ratified by 17 states.²² The CRML was instigated by the Standing Conference of Local and Regional Authorities of Europe (CLRAE), and the overriding aim of this instrument is cultural. Thus, rather than concerned with the protection of members of, or collectivities of, national minorities *per se*, the CRML focuses on preserving minority and regional *languages* as an essential part of the European cultural heritage. The definition of regional or minority languages provided for in the CRML does not include dialects of the official language(s) of the state, the languages of immigrants, or recently invented languages. Compared with the broader approach concerning personal scope of application under the FCNM, where the AC favors an article-by-article approach opening the door for the application of some provisions also for 'new' minorities, the beneficiaries by consequence under the CRML are exclusively 'traditional' or 'historical' minorities. Despite the often criticized 'à la carte' approach of the CRML, providing states with a great extent of choice regarding the provisions they want to adhere to, some provisions do go into considerably more detail and entail more extensive state obligations, where the corresponding standards under the FCNM are either weak or non-existent (Dunbar 2003: 6). It has been argued, for example, that Britain's linguistic minorities (Welsh, Gaelic, Irish, and Scots language speakers) generally look at the CRML, rather than (but not excluding) the FCNM, as the instrument best suited to advance their claims and meet their aspirations (Dunbar 2003: 5).

3. Can the Council of Europe Standards on Minority Protection Be Transferred to the European Union?

3.1 Overview of Minority Protection Provisions in EU Instruments

It would seem difficult for the Union, either as a matter of fairness or logical consistency, to be imposing requirements on applicant states to meet a level of Community *acquis* which has yet to be fully met [in the EU].

—Cassese et al. 1998: 53

called upon the AC to pay greater attention to the 'non-political' elements of participation in the second round of monitoring—minority participation in economic, cultural, and social life. In order to meet this request, the AC in its turn requested state and non-state actors to improve access to pertinent disaggregated data (CoE 2004).

²² For information of the Charter on Regional and Minority Languages, see http://www.coe.int/T/E/Legal_Affairs/Local_and_regional_Democracy/Regional_or_Minority_languages.

Hoffmeister argues convincingly in this volume that Article 6(1) of the Treaty of the European Union (TEU) could be interpreted broadly to include minority rights under this provision's reference to "human rights."²³ With the normative developments in universal and regional international human rights instruments throughout the 1990s, it should be clear that minority rights form an integral part of the corpus of international human rights law, which is also explicitly reiterated in Article 1 of the FCNM. However, the question remains controversial whether the particular standards as developed under the ECHR and the FCNM should be read into Article 6 TEU. While the minority relevant jurisprudence under the ECHR should be included, the question is less clear with regard to the FCNM standards. Alternatively, could the FCNM standards be read into the Article 22 of the European Charter on Fundamental Freedoms, which proscribes that the EU shall respect cultural, religious, and linguistic diversity? Whereas some international lawyers disagree with this kind of inclusive readings into these treaty articles, it should be noted that the authors of the Network of Independent Experts in Fundamental Rights—in their monitoring of member states with regard to the Charter of the Fundamental Rights of the European Union (EU Charter)—evidently read its Article 22 as a minority protection clause, by their references and linkages to whether member states have ratified the FCNM and the CRML.²⁴ In any way, the EU Charter does not contain any specific minority rights provisions. However, a general non-discrimination clause, including on grounds of national minorities, is provided in its Article 21, whose scope of application thus reaches beyond the more limited one of Article 14 ECHR. Then there are the related developments under Article 13 TEC, with the Council Directive 2000/43/EC of June 29, 2000 to implement the principle of equal treatment between persons irrespective of racial or ethnic origin. This "Race Directive" was to be implemented by July 9, 2003, a deadline few EU member states met. By covering public and private sectors, indirect discrimination, and harassment, this directive can potentially go further in the role non-discrimination matters than the additional Protocol 12 to the ECHR would do when the latter instrument enters into force. Critics of the directive have pointed out the omission of references to religious discrimination, and that incitement to racial hatred or violence is not included in its provisions (Tsilevich 2001: 2). This restrictive approach to religious minorities contrasts to the position of the AC, which in its recent practice implies that the FCNM can also apply to religious groups.²⁵

Taking the divergent opinions into account, what can be said is that there are no *clear*, legally binding measures towards EU member states in the area of minority protection, and that there currently exists no explicit EU policy in this field. The Amsterdam Treaty transposed all

²³ See Hoffmeister in this volume.

²⁴ Critical in this respect is De Witte in this volume.

²⁵ The AC adopted the approach taken by the Cypriot government which had explained in the state report that the FCNM applied to the Maronites and other religious groups such as the Latin and Armenian communities. See the AC opinion on Cyprus, par. 18–21.

the Copenhagen criteria into primary law except for the issue of minority protection. While the draft EU Constitution at the beginning of the 2003 EU intergovernmental conference did not contain references to minority protection among its fundamental principles, this reference was included in the final compromise version as presented by the Italian presidency, and remained in the later agreed upon draft EU Constitution, largely due to lobby pressures from Hungary. This would be an important step towards recognition of minority protection within the EU statutes, although it would hold limited operational value if not complemented with references in the more operative provisions. Calls were also made to amend Article I–57 of the draft Constitution with regard to EU accession in order to include specific reference to the Copenhagen criteria (MRG 2003b). Elaborated provisions directed to minority protection would resolve the current unsatisfactory situation of applying different standards to EU member states and those states seeking accession, and would effectively eliminate the possible argument of future accession states that it would be unfair to impose any additional requirements on them from full-fledged EU member states.

In the absence of substantive provisions relevant to minority protection in the internal institutional framework, a positive development was taken in September 2003 when the Ebner report gained support in the European Parliament (European Parliament 2003a). The report included a suggestion to augment the draft constitutional provisions on cultural policy with a reference to the promotion of linguistic diversity, including regional and minority languages, as an expression of cultural and linguistic diversity. The suggestions in the Ebner report are more likely to gain sufficient political support than, for example, other suggestions that have been proposed, such as amending the European Charter for Fundamental Rights to embody collective protection for minorities or the establishment of a Committee of National and Ethnic Minorities with advisory functions in the institutional system of the EU.

3.2 The Transfer of Minority Related Standards from the ECtHR to the ECJ: Minority Rights as a General Principle of EU Law

Much attention of the future relations between the CoE and the EU on human rights protection, with its consequences for minority protection, has been focused on the status between the ECHR and the EU Charter, and the future interplay between the ECtHR in Strasbourg and the European Court of Justice (ECJ) in Luxembourg, including the risks of partly overlapping and possibly divergent rights protection (Krüger and Polakiewicz 2001: 1–13). One can speculate upon what impact a potentially increasingly minority-friendly jurisprudence from Strasbourg would have on the interpretation of non-discrimination by the ECJ?

The Amsterdam Treaty commitment that the EU is to “respect fundamental rights, as guaranteed by the European Convention on Human Rights” has been accompanied by references been made to Strasbourg jurisprudence in the rulings by the Luxembourg Court, which in general have interpreted the so far unwritten specific human rights guarantees under EU law in line with the Strasbourg court, although some discrepancies have existed

(Spielmann 1999: 757–781). While the draft EU Constitution intended to make the EU Charter provisions legally binding, the draft also included the provision that the Union *shall seek* accession to the ECHR, which indicates a more active notion than passively enabling an accession.²⁶ Before an EU Constitution has been adopted, the question of accession is likely to remain unsolved, since the European Commission needs to be empowered with a sufficient legal and political mandate to begin serious negotiations with the Council of Europe. Whether or not the European Community/European Union (EC/EU) will accede to the ECHR, the existing and evolving jurisprudence under the ECHR should be taken by the ECJ as a minimum standard.

Recent developments in European Community law include two ECJ judgments, which have considerable impact with regard to the EU and minority protection.²⁷ In the case of *Roman Angonese v. Cassa di Risparmio di Bolzano* in 2000, the ECJ explicitly recognized that the protection of an “ethno-cultural minority” (i.e., a national minority in the sense of international law) constitutes a “legitimate aim” of domestic legislation as concerns the proportionality test under European Community law (Hofmann 2002: 172). These judicial remarks remain, however, still very far from a clear commitment on minority protection as a ‘general principle’ of Community law. Neither can the Race Directive compensate for the serious legal *lacunae* in present EC/EU primary law (treaties) when it comes to minority protection (Abdikeeva 2001: 2). It is troubling that some bureaucrats in Brussels allegedly have held that the Race Directive could mean the end of enabling positive discrimination. While it is impossible to assess in which direction the ECJ will go in terms of accepting, or demanding, affirmative action policies to achieve substantial equality, there is little basis for such categorical claims since the ECJ does not operate in a vacuum. Both in the jurisprudence on non-discrimination under the European Convention of Human Rights and the standards of other international human rights instruments, including the UN International Convention on the Elimination of All Forms of Racial Discrimination, it is provided that positive discrimination should not be viewed as discrimination along certain criteria. On the contrary, there are situations where states can have a positive obligation to treat differently persons whose situations are significantly different.²⁸ Steps to remedy structural inequalities are admissible and under some conditions necessary.

²⁶ Article 7.2 of the draft EU Constitution. It has been argued that a previously perceived resistance from the ECJ towards accession has considerably declined since it gave its opinion that the European Community had no competence to accede to the ECHR (2/94 of March 28, 1996. ECR I-1763, par. 34–35).

²⁷ *Horst Bickel und Ulrich Franz*, Case No. C-274/96 (1998), ECR I-7650; *Roman Angonese v. Cassa di Risparmio di Bolzano*, Case C-281/98 (2000), ECR I-4139. The ECJ checked regional provisions aiming at the protection of the German minority living in the Autonomous Province of Bolzano against Community law (Hofmann 2002: 159–174).

²⁸ Cf. *Thlimmenos v. Greece* (ECtHR, judgment of April 6, 2000 and Arts. 1.4, 2.2 and 4.1 of the UN International Convention on the Elimination of All Kinds of Discrimination. See Myntti (2002).

There are increasingly strong arguments towards the recognition of an EU-wide common general principle of law in the area of minority protection (Toggenburg 2000). The different levels of minority protection in the constitutional traditions of member states, considering the French and Greek exceptions, does not necessarily exclude the affirmation of a common principle as such. Discrepancies existed (and exist) in the levels of human rights protection between member states when human rights developed into a general principle of EC law. In the absence of legislative developments explicitly providing minority protection, this can still develop silently through ECJ jurisprudence, possibly under headings of cultural and linguistic diversity.

Which court has then the best potential to develop minority-friendly jurisprudence? While this speculative question will not be elaborated upon, it should be stressed that the ECJ remains very restrictive with regard to individual and group standing when challenging Community measures directly before the ECJ (cf. Alston 1999: 52–54). Although ongoing discussion of the reform of the ECtHR point towards possibly more restricted standing through higher tests of admissibility, the ECtHR remains the only court of the two where any individual, following the applicable admissibility criteria, can petition directly without going through the government in question. Also, with regard to the debate of the coexistence of the ECHR and the EU Charter, the provisions of the EU Charter only relate to EU institutions and member states only when implementing European Community law, in accordance with their respective powers.

3.3 *EC/EU Accession to the FCNM?*

Could and should the EC/EU accede to the FCNM, with the EC/EU having a seat in the Committee of Ministers as the control mechanism of the FCNM?²⁹ There are no restrictions as such in EC/EU primary law to prevent the EC/EU from joining a supervision system based on an international treaty. In fact, the EC has ratified eight CoE Conventions, including treaties on issues such as medical standards and wildlife protection. If minority rights could be interpreted as present in the existing Article 6 of the TEU, this could provide sufficient legal basis to enable EC/EU accession to the FCNM. Amendments to the CoE Statute would, however, be necessary and various technical issues in the texts would need to be resolved, raising similar issues to those concerning the possible accession of the EC/EU to the ECHR.³⁰ It is, however, likely that the measure of formal accession of the EC/EU to the FCNM currently would draw

²⁹ Critical in this respect is Toggenburg in this volume.

³⁰ According to Article 14 of the CoE Statute, only member states can be represented and vote; moreover, there would be a need to amend its Art 46(2) to allow EC/EU to participate in Committee of Ministers meetings. Formal alterations would need to include changing formulations from “states” to “contracting party,” while substantial alterations might need to include the reconsideration of provisions on “national security” and “national laws.”

political resistance from some capitals. The explicit proposal to insert a provision that the EC/EU should seek to accede to the FCNM, in addition to the ECHR, was in fact suggested during the drafting of the EU Constitution by a Hungarian member of Parliament, a proposal that did not gain sufficient support. One could, nevertheless, innocently question why it, in principle, would be deemed inappropriate to enable an independent expert body to review Community acts in relation to their impact on interethnic relations under the FCNM? In all, at least currently, the prospect for the FCNM to be accepted as part of EU law appears to be far away (cf. Phillips 2001: 4).

3.4 *The Potential Impact of FCNM ‘Soft Law Jurisprudence’ on ECJ*

To what extent can the AC Opinions of the FCNM affect the future case-law of the ECJ? The principles of the FCNM should be able to apply also in the ECJ context, since the non-ratification of the FCNM by a few EU member states does not prevent the ECJ from drawing upon the FCNM directly, or by elaborating upon a standard that the Strasbourg Court jurisprudence has developed under the ECHR, which in its turn could have developed in light of the FCNM’s ‘soft jurisprudence.’ While in this way AC opinions can certainly constitute one source of inspiration to the ECJ judges, and assist them in their search for what constitutes the constitutional traditions common to member states, realistically this indirect transfer of standards is likely to be limited, although not irrelevant, considering that the ECtHR has also proven reluctant to draw upon the FCNM standards. This point became apparent in the ECtHR’s assessment in the case *Chapman v. United Kingdom* in 2001, where the court stated that the signatory states to the FCNM had been unable to agree on its implementation, which “reinforces the court’s view that the complexity and sensitivity of the issues involved... renders the court’s role a strictly supervisory one.”³¹ Pentassuglia argues that this would mean a move away from its traditionally dynamic role as interpreter of the ECHR and conceal different understandings of the issue of minorities within the human rights framework in general (Pentassuglia 2004).

Thornberry argues that the above mentioned Additional Protocol 12 could open up juridical space between the FCNM and the ECtHR (Thornberry 2002: 146–147). It has also been suggested that a (further) additional protocol to the FCNM could be prepared, giving the ECtHR advisory functions in the interpretation of the FCNM. This suggestion has yet to gain sufficient support. In this context, it is often reiterated that the FCNM neither was intended nor is suitable for judicial enforcement, the latter considering its nature of programmatic state obligation provisions, rather than stipulating rights for individuals or groups. However, the potential remains for the FCNM to provide a judicial impact ‘indirectly’ via the ECtHR and the ECJ.³²

³¹ *Chapman v. United Kingdom* (ECtHR, judgment of January 18, 2001, par. 94).

³² See PACE Recommendation 1492 (2000), par. 12; PACE Recommendation 1623 (2003), par. 12. Curiously, this proposition was voted out from the preamble of the PACE Recommendation in

3.5 CoE Standards of Minority Protection in EU Monitoring Mechanisms after Enlargement

Despite the obvious importance of settling the commonly posed question of the future judicial protection of human rights (including minority rights) in Europe, careful thought should also be devoted to the institutional cooperation concerning quasi-judicial or political monitoring which involves questions relevant for minority protection.

The issue of minority protection has played an increasing role within the EU common foreign and security policy. Systematic monitoring of minority protection has taken place in the procedures of enlargement with the European Commission's annual *Regular Reports* as the key document to monitor and evaluate the candidate countries' progress towards accession, on the basis of the Copenhagen criteria.³³ The monitoring of the criteria of respect for and protection of minorities borrowed heavily from the CoE and the OSCE standards. The Accession Partnerships adopted in 1998 indicated certain short-term and medium-term priorities for the candidate states, including issues related to the identity of minorities. The explicit references to the FCNM that the European Commission has made in its *Regular Reports*, including quotes from Advisory Committee opinions, demonstrate that the EU considered candidate countries' implementation of the FCNM an important element in the accession criteria of minority protection. These reports have thereby displayed that the EU lacks clear benchmarks of its own to measure progress in this field (Hughes and Sasse 2003: 13). Further, the *Regular Reports* have been criticized for being sweepingly general, lacking coherence and continuity, and rarely providing any substantive suggestions for improvements. The Latvian Human Rights Committee argues in this regard that the EU's lack of a strict legal framework and limited professional expertise in minority issues enabled the Latvian authorities to largely bypass crucial issues including the issue of non-citizens during the negotiation process (Latvian Human Rights Committee 2003: 2).

What is then the future of the European Commission's monitoring of minority protection and human rights in general, post-accession? A European Parliament Resolution in 2003 questions the European Commission's rejection of the establishment of an EU Human Rights Monitoring Agency, and called upon the European Commission to examine how the *ad hoc*

2003, while it remained in the operative provisions, requesting the Committee of Ministers to commence the work towards drawing up the Additional Protocol in question.

³³ See, for example, the explicit reference made in the *Regular Report on Cyprus* (2002: 23) to the Advisory Committee's opinion and Committee of Ministers' references in regard to Article 2 of the Cyprus Constitution. This provision held that all Cypriots were deemed to belong to either the Greek community or to the Turkish community. Considering that the three minority religious groups—Armenians, Maronites, and Latins—had to make this choice, the Advisory Committee expressed that this constitutional provision was not compatible with Article 3 of the FCNM, which provides that every person belonging to a national minority shall have the right to freely choose whether to be treated as such.

network of human rights experts could develop into a genuine monitoring agency.³⁴ Recent indications hold that the European Commission may propose that this ‘outsourced’ system of independent experts who are to examine the human rights situation in EU member states becomes formalized within the EC structure. This monitoring could be mandated with a preventive, information-gathering function with its legal basis being the sanctions procedure enshrined in Art. 7 TEU. As Hoffmeister argues in this volume, such a monitoring capacity would be undertaken in order to provide information necessary to determine whether a serious and persistent breach of the principles listed in Art. 6 TEU is at risk. If it will be determined that systematic human rights monitoring could take place in this format, the subsequent question is whether it *should* take place. While questions of duplication should be seriously addressed in the relations between the European Union and the Council of Europe, it would be important to ensure that any human rights monitoring conducted within the EU would also include monitoring indicators of minority protection. If the Country Strategy Papers (CSPs) which the European Commission draws up in relation to countries where the EU operates would be a yardstick to evaluate what prominence would be given to minority rights under the general banner of human rights, this would clearly be insufficient (MRG 2003c: 1).³⁵

The greatest potential for integrating minority rights within the EU machinery is likely to take place indirectly through cultural, linguistic diversity, and educational policies, what De Witte calls the “backdoor entrance.” While one can question whether this, in the longer term, is a sufficient approach to address the full scale of identity concerns, the potential impact in substance should certainly be assessed considering this wider approach, with its less sensitive appeal. Numerous initiatives have been undertaken through creative interpretations of the legal foundations in treaty provisions, in effect circumventing some member states continued misgivings. However, De Witte’s contribution in this volume provides ample evidence that, despite the five different headings under which an EU minority protection policy could be developed in this indirect manner, there are inherent structural limitations of what this subsidiary approach can achieve. The clear risk is that the minority dimension becomes increasingly diluted, and minority protection a mere fiction. Under these circumstances De Witte’s conclusion appears reasonable, that the European Union presently has no role, and should not have a role, in detailed standard-setting as regards minority rights.³⁶

³⁴ The European Parliament resolution on the situation concerning basic rights in the European Union (2001) (2001/2014(INI)), January 15, 2003, para 8. In an attempt to demonstrate the appropriateness of also monitoring current EU member states, the EUMAP 2002 reports included reports on the five largest EU member states, thereby explicitly moving towards a monitoring framework for the post-enlargement period.

³⁵ The Minority Rights Group points out in its briefing paper, prepared to assist staff of the European Commission, that in the past minorities have not figured adequately into the analysis for preparing CSPs and that minority rights should factor into the CSPs analysis of human rights within the political, economic, and social situation in the country.

³⁶ See De Witte in this volume.

4. How to Create Synergies in the Field of Minority Policy and Programming between the Council of Europe and the European Union?

General inter-institutional cooperation between the CoE and the EU has intensified during the last years, notably with the April 2001 Joint Declaration on Cooperation and Partnership, endeavoring to intensify the dialogue aimed at identifying countries and objectives for joint action (Council of Europe 2002: 4). This agreement has led to greater input by the European Commission into joint program planning and steering committees than before, identifying those countries and objectives where joint action adds value. An example of concrete CoE-EU cooperation was the joint project designating 2001 as the European Year of Languages, including the lesser used regional and minority languages (spoken by 46 million people in EU+25), and the attempts at joint sessions of the two parliaments (although the substance of these deliberations is questionable). A 2002 CoE discussion paper expresses that the CoE and the European Commission have, in fact, not yet been close partners in planning and agenda setting in areas of common concern: the partnership has been that of the CoE as an implementing partner. It is also clear that there is unease within the CoE of 'relying' on only one budget line with the European Commission.³⁷ The same document points to the need for an enlarged partial agreement between the EC and the CoE, providing both institutions with policy advice and management of joint activities (CoE 2002).

During the second half of the 1990s various projects aimed particularly at minority protection emerged in cooperation between the European Commission, the Secretariat of the Framework Convention and the Office of the OSCE High Commissioner on National Minorities. Joint Programs between the European Commission and the Secretariat of the FCNM developed such as the "Minorities in Central European Countries" between 1996 and 1998, and the project "National Minorities in Europe" between 1999 and 2000, which focused on the cooperation between government offices for national minorities in the participating countries and included subregional and thematic seminars.³⁸ At the time of writing, a number of ongoing joint programs with minority elements were running throughout 2003 regarding Armenia, Azerbaijan, Georgia, and Ukraine, and were renewed to run until August 2004. Various projects have also developed in the framework of the Stability Pact for South East Europe, also involving other parts of the Council of Europe Secretariat, notably the Directorate of Social Cohesion with a major CoE/OSCE/Commission program on the

³⁷ The vast majority of the Joint Programs are concluded with the European Initiative for Democracy and Human Rights, EIDHR. See Council of Europe DSP 2000.

³⁸ For descriptions and project documents and list of activities under these FCNM Secretariat projects, see <http://www.coe.int/minorities>.

situation of Roma.³⁹ The question could be raised whether, in principle, the different parts of the Council of Europe Secretariat are best suited to implement EU-funded projects? The Secretariat of the FCNM has proven its added value also in this 'non-monitoring' context, by providing coordination of various projects covering a wide range of CoE member states, in projects such as an anti-discrimination review and supporting training programs. There are clear benefits of the FCNM Secretariat having the capacity to link projects aimed at enhancing minority protection with the challenges faced by minorities in CoE member states as identified by the FCNM monitoring mechanism. This adds to the follow-up activities of the ACs work, facilitating a continued dialogue. It would, however, be preferable if project funding could be granted with fewer earmarks, so that activities could be increasingly designed also to the Western European states.

Many joint initiatives between the European Commission and the Council of Europe Secretariats have originated from informal contacts taken place at the technical level between staff members. This has included annual meetings between staff members from the Secretariat of the FCNM and the European Commission General Directorate of Enlargement, to provide input to the drafting process of the *Regular Reports*. Staff members from the CoE Secretariat were in these instances invited to Brussels in order to provide and share information of the situation of minority protection in accession states. Such contacts also took place when the European Commission in the fall of 2003 was preparing revised accession partnership agreements. When discussing the necessity of formal linkages to enable action, it is, however, striking that most of the projects that developed in the past between the European Commission, the Secretariat of the FCNM and the Office of the OSCE High Commissioner on National Minorities, were achieved on the basis of informal contacts between professional staff members, not on the basis of formal inter-institutional agreements.

Closer legal ties between the two institutions should be promoted to increase cooperation in planning, programming activities, and policy advice. One future scenario could be that of extensive and continuous cooperation with the EU on equal terms, based on joint planning, programming, and advice, to be complemented, when feasible, with joint action, whereas today the emphasis is the reverse (CoE 2002: 11). One organizational suggestion is to consider involving all relevant branches of the European Commission (country desk officers, DG Relex multilateral department, and EuropeAid) in future planning. A more formalized character of inter-institutional relations, including regular dialogues, would facilitate joint planning and programming of activities, and also counter the risk of the diminishing of such contacts once the current enlargement process is completed.

³⁹ The Council of Europe and the OSCE-ODIHR, together with the financial support of the European Commission, decided to jointly address various issues of Roma in the framework of the Stability Pact through a Project entitled "Roma under the Stability Pact." For an update on the activities undertaken by the CoE with regard to the Roma, see http://www.coe.int/T/E/social_cohesion/Roma_Gypsies.

5. Conclusion

Accepting the Common Market within the EU, the disappearance of borders and a common currency does not mean the acceptance of a common cultural standard. The lessons from the war and fragmentation in Balkans in the 1990s should not be hastily forgotten. Also, the enlarged EU will have to tackle issues of minority protection ahead. If for no other reason, it remains in the interest of EU member states to avoid the potential spillover effects of potential influxes of refugees from interethnic conflicts which can originate in the enlarged EU's new neighboring states.

Minority protection is yet to find its way into explicit EU internal policy. The standards of protection of persons belonging to national minorities as developed by the CoE should be regarded as part of the legal order of the EU, by building on the constitutional traditions of EU+25 member states, which are, in addition, CoE member states. By way of analogy, the possible entry point for minority rights to develop into a common principle of EU law could occur as it took place within EC/EU with its step-by-step acknowledgment that human rights were an unwritten general principle of EC law before being inserted explicitly into the treaties. Only with Article 6 TEU, introduced by the Maastricht Treaty, was "human rights" entrenched in EU—and, thus, also in EC—primary law. While it can be argued that the FCNM standards should be read into Article 6 of the TEU, a similar development could occur with 'minority rights,' as with 'human rights': first, developing into an unwritten general principle of EC/EU law, by building on the constitutional traditions of its member states, and then later finding its way into the future EU Constitution itself. This *lega ferenda* assessment could be promoted by the constitutional and legal standards in many of the acceding countries, which could tip the balance in favor of stronger minority rights provisions in the internal and external policies of the EU. It can be argued that minority rights standards, as developed in the Council of Europe, are more likely to develop silently in the EU under the headings of cultural and linguistic diversity rather than through legislative developments. This is hardly giving minority protection the attention deserved and required.

With the possible decline of political leverage from the European Commission towards supporting acceding states' compliance with minority protection after May 1, 2004, it becomes even more important to maintain cooperation between EU institutions and the pertinent expertise within the various bodies and organs within the Council of Europe. It is likely that the CoE will retain its, in comparison, significantly more developed and multifaceted mechanisms directed at the protection of persons belonging to national minorities in Europe. The complementary nature of building on the existing FCNM expert monitoring mechanism within the CoE framework and the EU experiences of extensive programming would be a valuable inter-institutional division of labor, with respective expertise and funding supporting a coherent system of minority protection within Europe. The EU and the CoE, as well as governments, should give serious consideration to using Advisory Committee opinions and Committee of Ministers resolutions under the FCNM to guide the funding of these coordinated programs. Regarding the further accession negotiations with Bulgaria, Romania,

and in particular Turkey, Croatia, and Macedonia (should formal accession negotiations emerge with these states) the Commission is likely to continue to lack the capacity to conduct systematic assessments of minority protection and continue to be ill-equipped to effectively monitor and follow up on the crucial aspect of implementation. Why would this not be taken as an incentive for maintaining and developing the existing relationship of relying on the expertise of the Council of Europe bodies, and the FCNM Advisory Committee in particular?

In light of the continued ambivalence within the EU to providing a solid foundation for a minority rights regime, it appears all the more important to maintain and develop what already exists. Considering the time it takes to elaborate and develop a well-functioning minority-related mechanism (cf. the FCNM) it would be highly unfortunate if EU member states would undermine the established mechanisms of minority protection existing under the CoE. Although the text and the monitoring mechanism of the FCNM were widely criticized when it entered into force, the monitoring has become highly valued as facilitating a continuous dialogue between the relevant groups in different states. It is crucial that the CoE and the EU (as well as the OSCE) show a continued determination to focus on the FCNM. The aim must be to ensure that all states respect common minimal norms of minority protection. The ratification of the FCNM by all EU member states would, for the time being, probably constitute the best guarantee against the existence of double standards in Europe in the field of minority rights. With the continued non-ratification of the FCNM by current EU member states (Belgium, France, Greece, Luxembourg, and the Netherlands), it is possible that certain accession states in EU+25 may increasingly wonder why double standards in minority protection should exist among EU members. Activities should be directed towards addressing the “French and Greek exceptions” (Hughes and Sasse 2003: 13). It is intriguing that despite an emphasis within EU accession monitoring on the implementation of minority rights by Central and East European countries, these criteria are not yet applied within the EU. In countering these double standards, some new member states may stand up and require action, including Hungary. These acceding countries may convince the remaining states to realize and accept that that it is in the overall interest of Europe that the EU as well as CoE member states ensure common minimum standards of minority protection. The new EU member states could tilt the balance towards pushing for minority related components to enter into the legal texts of the EU, underpinning both its internal and external policies—what Sasse in this volume calls “reversed conditionality”—as opposed to the other scenario of a “new tacit policy consensus on inaction.” The EU should be encouraged to adopt and include existing standards on minority protection, to be included in its ongoing work on drafting a constitution. If, however, opposition to such steps prevails due to political pressure from some member states, this will be all the more reason to maintain and develop the existing monitoring mechanisms as provided for by the CoE. Duplication of efforts should be avoided, and the EU and the European Commission would do well to continue relying on the far more elaborated and functioning organs within the Council of Europe in this regard.

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‘NEW’ MINORITIES:
WHAT STATUS FOR THIRD-COUNTRY NATIONALS
IN THE EU SYSTEM?

Steve Peers

Abstract

In November 2003 the Council of the European Union adopted a directive on the status of long-term resident third-country nationals within the EU. This status may be denied for several reasons, notable on grounds of failure to meet ‘integration requirements.’

The Long-Term Residents’ Directive requires member states to provide equal protection for long-term residents but permits member states to impose integration requirements on immigrants who wish to gain that status; meaning the interplay between these two elements and the question of the correct interpretation of the directive will have a significant impact on national law and policy as regards this issue.

It is striking that the focus on equality and the potential to require integration as a condition of obtaining equality in the Long-Term Residents’ Directive contradicts the broad thrust of Council of Europe and UN measures addressing minority rights, which set out rights but do not require prior integration to acquire those rights, and which also contain a second stream of obligations requiring member states to ensure that the distinctness of minorities is retained. The EC approach potentially conflicts with obligations under the International Covenant on Civil and Political Rights, given significant overlaps in the coverage of the Long-Term Residents Directive and the Covenant.

‘NEW’ MINORITIES: WHAT STATUS FOR THIRD-COUNTRY NATIONALS IN THE EU SYSTEM?

Steve Peers

1. Introduction

In November 2003 the Council of the European Union finally adopted a directive on the status of long-term resident third-country nationals within the EU.¹ There are further plans to develop a broader EU integration policy relating to immigrants. Given the EU's general disinclination to become involved in the issue of the rights of 'old' minorities (at least within EU borders), this increasing focus on the position of 'new' minorities could be significant. How does the EC's treatment of new minorities compare to international rules on minority rights, and to what extent can we see the EU's developing integration policy as regards third-country nationals as a sort of minority policy?

First of all, this paper examines the text of recent EU legislation on long-term residents. Next, it compares that legislation to international rules on minority rights. Third, it briefly examines the other main components of the developing EU 'integration policy.' Finally, it draws a few conclusions on these matters.

2. The Long-Term Residents Directive

2.1 Overview

Chapter I of the directive (Articles 1–3) sets out its purpose, definitions, and scope.² It applies to all lawful residents of a member state except for diplomats; persons who are seeking or who have received refugee status, temporary protection, or subsidiary protection; students;

¹ OJ 2004 L 16/44.

² The summary of the directive is adapted from Peers and Rogers' *EU Immigration and Asylum Law: Text and Commentary* (forthcoming).

and temporary residents such as *au pairs*, seasonal workers, cross-border service providers, workers posted by a cross-border service providers, or persons whose “residence permit has been formally limited” (Article 3, par. 2). A later separate proposal suggested extending the directive to persons with subsidiary protection status, but this was rejected for now.³ Instead, the European Commission has announced an intention to propose a further directive in spring 2004 that would extend this directive to persons with both refugee and subsidiary protection status. The directive is without prejudice to more favorable provisions of existing EC or mixed agreements with third states, pre-existing treaties of member states, and certain Council of Europe migration treaties (Article 3, par. 3).

Chapter II (Articles 4–13) sets out rules concerning long-term resident status in one member state. The basic rule is that third-country nationals are entitled to such status after residing “legally and continuously for five years in the territory of the member state concerned” before their application for status (Article 4). Absences of up to six months at a time, totaling no more than ten months during the five-year period, must be taken into account in calculating that period. Member states may permit longer periods of absence for “specific or exceptional reasons of a temporary nature and in accordance with their national law,” but such absences will not count toward the qualifying period (in other words, the clock will be stopped). But member states may allow the clock to keep ticking if a person is detached for employment purposes. Prior residence as a diplomat or on a temporary permit will not count at all, while prior residence as a student will be discounted 50 percent.

Status may be denied on grounds of insufficient resources, failure to meet ‘integration requirements’ or public policy, or public security (Articles 5 and 6). The directive also sets out detailed rules on the procedure for acquisition and withdrawal of status (Articles 7–10). Substantively, the status entitles long-term residents to equal treatment with nationals in a number of areas and enhanced, although not absolute, protection against expulsion (Articles 11 and 12). Member states may create or maintain national systems that are more favorable than the rules in Chapter II, but acquisition of status under such more favorable rules will not confer the right of residence in other member states pursuant to Chapter III (Article 13).

Chapter III (Articles 14–22) concerns the exercise of the right of residence for periods above three months in other member states, other than as a posted worker or provider of services (Article 14). Member states can impose labor market tests limiting movement on economic grounds, or an overall quota on third-country nationals, along with special rules restricting movement of seasonal workers or cross-border workers. The right of residence can be exercised if the long-term resident is pursuing an economic activity or a non-economic activity, but the ‘second’ member state can insist that the long-term resident has sufficient resources and insurance and is compliant with integration measures, provided that such measures were not already complied with in the first member state (Article 15). Long-term residents can bring with them their ‘core’ family members as defined by the EC directive on

³ COM (2001) 510, proposed directive on definition and content of refugee and subsidiary protection status.

family reunion,⁴ but the second member state retains the option to decide whether to admit other family members (Article 16). Again, requirements for health insurance and sufficient resources can apply. Admission of long-term residents and their family members can also be refused not just on grounds of public policy and public security (Article 17), but also public health (Article 18).

The potential 'second' member state must process the application within four months, with a potential three-month extension. If the various conditions are met, the second member state must issue the long-term resident and his/her family members a renewable residence permit (Article 19). Reasons must be given if the application is rejected, and there is a "right to mount a legal challenge" where an application is rejected or a permit is withdrawn or not renewed (Article 20). Once they have received their residence permit, long-term residents have the right to equal treatment (as defined in Article 11) in the second member state, "with the exception of social assistance and study grants," and subject to a possible one-year delay in full labor market access (Article 21). Family members have the same status as family members under the Family Reunion Directive as regards access to employment and education, once they have received their long-term residence permit.

Before the long-term resident gains long-term resident status in the second member state, that member state can remove or withdraw his or her residence permit and expel the long-term resident and family in accordance with national procedures on grounds of public policy or public security, where the conditions for admission are no longer met and where the third-country national "is not lawfully residing" there (Article 22). The first member state must readmit such persons although if there are "serious grounds of public policy or public security" the person concerned can be expelled outside the EU. Once the conditions for obtaining long-term resident status are satisfied in the second member state, the long-term resident can apply for long-term resident status there, subject to the same procedural rules that apply to initial applications for long-term resident status (Article 23).

Finally, Chapter IV (Articles 24–28) sets out final provisions, including a 'rendezvous clause,' which requires the European Commission to propose amendments in the future concerning the calculation periods for status, the conditions of resources and health insurance, withdrawal or loss of status, and movement to additional member states. Member states (including the new member states of the EU) must implement the directive by January 2006. It should be kept in mind that the UK and Ireland have opted out of the directive in accordance with special rules applicable to those member states, and Denmark is entirely excluded from most aspects of EU immigration and asylum law. On the other hand, the new member states of the EU will be covered entirely by the directive, and will have to implement it by the same date as the first fifteen member states.

The directive crosses over with other provisions of EC law concerning certain groups of third-country nationals. In particular, it crosses over with two groups. First, the directive intersects with EC free movement law, which covers the status of third-country national

⁴ OJ 2003 L 251/12.

family members of EU citizens who move within the EC. Since such persons are not excluded from the directive or subjected to special rules, they must be covered by it just like any other third-country nationals within its scope. This means that they will get an independent right to long-term residence status once they meet the conditions set out in the directive. Such a right would particularly benefit those who become divorced from their EU citizen sponsor, although recent case law of the Court of Justice protects such persons to some extent already,⁵ and planned legislation would protect them further.⁶ However, since neither the case law nor the planned legislation gives such family members a right to free movement within the EU independent of their sponsors, the directive would clearly break new ground.

The second category of persons also covered by other provisions of EC law are Turkish workers and their family members, who have rights of access to employment and corresponding rights of residence after specified periods of employment or residence in the host member state. This group of persons, which is the biggest group of non-EU nationals within the EU, will continue to have access to enhanced residence status after shorter periods of employment or residence, in accordance with Decision 1/80 of the EC-Turkey Association Council.⁷ Furthermore, they can obtain this status by fulfilling the requirements of the Decision, which are not the same requirements as those set out in the directive. On the other hand, the directive will confer rights of free movement within the EU on Turkish workers and their family members, and will also give them rights to equal treatment above and beyond those conferred by the Decision (or the parallel Decision 3/80 on social security rights),⁸ although in certain respects Decisions 1/80 and 3/80 confer fuller equal treatment.⁹

⁵ See Case C-413/99, *Baumbast and R*, [2002] ECR I-7091.

⁶ See proposal in COM (2001) 257 of May 23, 2001 for a directive on the right of EU citizens to move and reside freely. The Council formally adopted a “Common Position” on this proposal in December 2003 and the European Parliament’s second reading vote was due at the time of writing.

⁷ See Cases C-192/89, *Sevince*, [1990] ECR I-3461; C-237/91, *Kus*, [1992] ECR I-6781; C-355/93, *Eroglu*, [1994] ECR I-5113; C-434/93, *Bozkurt*, [1995] ECR I-1475; C-171/95, *Tetik*, [1997] ECR I-329; C-351/95, *Kadiman*, [1997] ECR I-2133; C-386/95, *Eker*, [1997] ECR I-2697; C-285/95, *Kol*, [1997] ECR I-3095; C-36/96, *Günaydin*, [1997] ECR I-5143; C-98/96, *Ertanir*, [1997] ECR I-5179; C-210/97, *Akman*, [1998] ECR I-7519; C-1/97, *Birden*, [1998] ECR I-7747; C-340/97, *Nazli*, [2000] ECR I-957; C-329/97, *Ergat*, [2000] ECR I-1487; C-65/98, *Eyup*, [2000] ECR I-4747; C-188/00 *Kurz*, [2002] ECR I-10691; C-171/01 *Birkilite*, judgment of May 8, 2003; and C-317/01 and C-369/01 *Abatay and others*, judgment of October 21, 2003.

⁸ See Cases C-277/94, *Taflan-Met*, [1996] ECR I-4085; C-262/96, *Sürül*, [1999] ECR I-2685; C-102/98, *Kocak* and C-211/98, *Ors*, [2000] ECR I-1287; and Opinion of Feb. 12, 2004 in C-373/02 *Ozturk*, pending.

⁹ For example, Decision 1/80 grants an unqualified right to equal access to employment for Turkish workers and family members once certain conditions are satisfied (see particularly *Tetik* and *Ergat*, *ibid.*), while the directive allows member states to apply some restrictions upon equal access (see below). But conversely, the directive gives a right to equal access to goods and services, an issue not addressed by Decision 1/80.

2.2 *The Long-Term Residents Directive and Minority Rights*

The directive does not expressly state that it seeks to protect minority rights as they are usually defined.¹⁰ However, it will have the effect of protecting such rights to the extent that some or all of the minority population in any particular member state has the nationality of a non-EU country. It will therefore be particularly relevant in cases where a member state maintains relatively high barriers to obtaining the citizenship of that country (for example, in Latvia) and alternatively, or additionally, in cases where the country of origin of migrants (or their parents) places restrictions upon its nationals obtaining the citizenship of another state. By definition, it will only apply to that proportion of the migrant population who have become relatively settled in the host state, and who would otherwise likely consider obtaining citizenship of that state if the option were open to them. This may mean that where a 'minority group' consists of both citizens and non-citizens of the relevant state (for example, the situation of Russians in the Baltic states), it should be kept in mind that the directive will only apply to the non-citizen members of that group. Of course, it should not be forgotten that the directive will not automatically apply to all of those non-citizens, as some of them may not meet the criteria for long-term residence status set out in the directive.

The conditions concerning resources and health insurance will distinguish between long-term residents (in effect) on the basis of class, with those in settled employment or self-employment able to meet the financial requirements and those facing difficulties on the labor market excluded from the chance to obtain status unless or until their situation stabilizes. So in cases where a large proportion of a group of non-citizens faces great economic difficulty in a host state, it follows that a large proportion of that group will be unable to obtain long-term resident status. A crucial (although optional) condition for the acquisition of status is set out in Article 5, par. 2 of the directive, which provides that "member states may require third-country nationals to comply with integration conditions, in accordance with national law." Such an option, if taken up by a member state, *prima facie* appears in opposition to the central tenets of the international law of minority rights, which seeks to protect the ability of minorities to maintain their distinctness. Although this provision refers to national law, the possibility of developing an EU 'integration policy' has been recently mooted; this prospect is considered further below.

However, it should be noted that the directive implicitly rules out the possibility to expel a long-term resident for a subsequent failure to integrate, as the test for expulsion of long-term residents (member states must show that they are "an actual and sufficiently serious threat to public policy or public security") does not appear to provide for expulsion on grounds of failure to integrate alone.¹¹ Although the factors to take into account when

¹⁰ See below.

¹¹ Art. 12, par. 1.

deciding upon expulsion include consideration of the long-term resident's "links with the country of residence or the absence of links with the country of origin,"¹² which could arguably entail some consideration of the extent of the long-term resident's conformity to the 'norms' of the host member state, the factors to consider are surely, by a *contrario* reasoning, distinct from the substantive grounds of public policy or public security which would justify a decision to deport. The factors come into play only after a *prima facie* case for expulsion exists, and so the grounds for expulsion must logically not include the ground that a person has failed to integrate sufficiently. Moreover, the extent of links is only one of four factors to consider. Furthermore, the concept of "public policy and public security" appears to be based on the criteria for expulsion for persons with established family and private life set out in the jurisprudence of the European Court of Human Rights concerning Article 8 ECHR,¹³ and this case law does not indicate any possibility of expulsion of a person merely for failure to integrate. Rather, as in the directive, the extent of links with the host state is simply one factor to consider once a *prima facie* case for expulsion is made out. It might further be argued that the established principles limiting expulsion of EU citizens from another member state could also be useful in interpreting the directive; if so, then it should be observed that these principles do not contain any possibility for expelling a person on ground of limited integration either.

For that matter, it does not follow that failure to obtain long-term resident status due to failure to fulfill an integration requirement (or any other requirement) should lead to expulsion from the host state. The directive does not prescribe this result and so the status of such persons would continue to be regulated by the relevant national, EU, and international rules.¹⁴

Also, a link is made between the rules on expulsion and the loss of long-term resident status. Since only expulsion, acquisition of status by fraud, lengthy absence from the EU, and commission of offences falling short of the expulsion threshold can justify loss of status,¹⁵ it follows that failure to integrate cannot lead to loss of status either.

¹² Art. 12, par. 3(d).

¹³ See particularly recital 16, which expressly states that "[l]ong-term residents should enjoy reinforced protection against expulsion... based on the criteria determined by the decisions of the European Court of Human Rights."

¹⁴ The EU rules applicable could include the EC free movement law (for third-country national family members of EU citizens who have exercised free movement rights), EC association agreements (particularly the EC-Turkey agreement) and directive 2003/86 on family reunion (OJ 2003 L 251/12). The relevant international rules could include Article 8 ECHR, which could still potentially govern the status of a person even if that person does not meet the criteria for long-term residence status under the directive. In particular, it should be kept in mind that there is no integration criterion for application of Article 8 ECHR; the extent of integration is rather only one factor to consider when examining whether limitation of Article 8 rights is justified.

¹⁵ Art. 10, par. 1 and par. 3.

The equal treatment provisions in Article 11 of the directive can be considered equivalent to the equal treatment rules in minority rights treaties. Equal treatment as compared to nationals must be granted in principle in eight areas: access to employment and self-employment, including working conditions; education and vocational training, including study grants; recognition of diplomas, certificates, and qualifications; social security, social assistance, and social protection; tax benefits; access to goods and services, including “procedures for obtaining housing;” freedom of association; and access to the national territory.¹⁶ However, equality as regards education, recognition of qualifications, and social security, etc. applies as defined by national laws or procedures; in five cases, equality can be limited to those who reside usually in the territory of the member state concerned;¹⁷ member states can restrict access to jobs or self-employment where existing national or EC law reserves it, and can impose language or educational requirements on access to education;¹⁸ and equal treatment in social assistance and social protection can be limited to ‘core benefits.’¹⁹ The wording of these restrictions bears close examination; for example, the reference to “national laws and procedures” in EC legislation does not usually mean that member states have full discretion to limit the right to equal treatment,²⁰ although the preamble to the directive does make more detailed reference to the definition of study grants and the content of potential limitations.²¹ Also, the concept of ‘core benefits’ is further defined in the preamble,²² and there is no possibility to limit equal treatment in social security to core benefits. Finally, the possibility of imposing language or educational requirements on access to education does not mean that restrictions based directly on nationality would be permissible.

Because of their potential overlap, it is important to distinguish between the Long-Term Residents Directive and the Race Discrimination Directive adopted in July 2000,²³ which the first fifteen member states were obliged to implement by July 2003 and which new member

¹⁶ Art. 11, par. 1.

¹⁷ Art. 11, par. 2.

¹⁸ Art. 11, par. 3.

¹⁹ Art. 11, par. 4.

²⁰ See particularly Case C-162/00 *Beata Pokrzeptowicz-Meyer* (2002) ECR I-1049.

²¹ See paragraph 15 of the preamble: “[t]he notion of study grants in the field of vocational training does not cover measures which are financed under social assistance schemes. Moreover, access to study grants may be dependent on the fact that the person who applies for such grants fulfils on his/her own the conditions for acquiring long-term resident status. As regards the issuing of study grants, member states may take into account the fact that Union citizens may benefit from this same advantage in the country of origin.”

²² See paragraph 13 of the preamble: “this notion covers at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care.”

²³ Directive 2000/43, OJ 2000 L 180/22.

states must implement upon accession. This directive bans discrimination on grounds of race or ethnic origin, and thus is capable of protecting at least some minorities (old and new alike) within the EU, although it is principally focused on ensuring equality, not on ensuring different treatment for the relevant minorities in accordance with minority rights rules (see below). However, the crucial distinction between the two directives is that while the Long-Term Residents' Directive bans discrimination based on nationality between long-term residents and nationals of the host member state, the Race Discrimination Directive states expressly that it "does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of the member states, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned."²⁴ Third-country nationals *are* covered by the ban on discrimination on grounds of race and ethnic origin if they can show that the discrimination they face as regards the issues listed in the 2000 directive is based on their racial or ethnic origin, as distinct from their nationality or immigration status.²⁵ Logically, where discrimination is based on *both* nationality *and* racial or ethnic origin, a third-country national should be able to rely on either or both directives in the way most favorable to his or her case, since the two directives do not rule such an approach out and in the absence of express provisions to the contrary, an alternative interpretation would clearly violate the objectives of both directives.²⁶

The choice between relying on one directive or the other is important, since the 2000 directive applies not only to EU citizens but to *all* third-country nationals, regardless of their immigration status. Moreover, it applies to all member states, and all national courts or tribunals may or must refer questions on its interpretation to the Court of Justice. Furthermore, the material issues subject to the non-discrimination rules cross over to some extent, but not fully, and in any event there are a number of differences in wording which arguably suggest different meanings. For example, the Race Directive bans discrimination in 'social advantages,' while the Long-Term Residents' Directive bans discrimination in social security, social assistance, and social protection. On top of this, the rules on exclusions from the equal treatment principle are quite different, with the 2000 directive permitting discrimination on grounds of a genuine requirement connected to an occupational activity (where this discrimination is legitimate and proportionate), or where a member state is applying positive action to prevent or compensate for "disadvantages linked to racial or ethnic origin."²⁷ This is

²⁴ Art. 3, par. 2 of directive (*ibid.*).

²⁵ See particularly point 13 of the preamble to the directive.

²⁶ At the very least, it certainly could not be the case that a person facing both types of discrimination could be precluded from relying on *both* of the two directives. The Race Directive appears to presume that it would also apply in the analogous case of 'multiple discrimination' on grounds of race/ethnic origin and sex (see point 14 of the preamble to the directive).

²⁷ Arts. 4 and 5.

quite a different approach from the rules in the Long-Term Residents' Directive concerning references to national laws or procedures, potential residence requirements, permitted inequality in access to jobs or self-employment wherever existing national or EC law reserves it, and potential restriction of equal treatment in social assistance and social protection to 'core benefits.'

3. Comparison with International Rules

The personal scope of the directive arguably contrasts with Council of Europe treaties on minority rights, which focus only on 'national minorities': groups of persons who are expressly citizens of the relevant state for a long period,²⁸ or who are arguably required to meet a citizenship criterion.²⁹ Given that the directive can only apply to non-EU citizens, there can be no overlap between it and the Council of Europe measures if the latter only apply to citizens of the relevant state. The situation is different as regards Article 27 of the International Covenant on Civil and Political Rights (ICCPR), which provides that "in those states in which ethnic, religious, or linguistic minorities exist, persons belonging to these 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." The ICCPR right does not refer to 'national' minorities or suggest that the rights in Article 27 can be limited to citizens only, still less long-standing groups of citizens. In fact, the Human Rights Committee's General Comment on Article 27 specifies that the Article can apply to non-citizens, even those merely visiting a state.³⁰ So there is a clear potential for overlap here; most or all persons covered by the directive are also covered by the Covenant, although only a modest number of persons covered by the Covenant within the EU member states will also be covered by the directive.³¹

²⁸ See the definition of "regional or minority languages" in Art. 1(a)(i) of the Charter on Regional or Minority Languages.

²⁹ The Framework Convention for the Protection of National Minorities does not define a 'national minority,' so some contracting parties have taken the view that *inter alia*, in light of the word 'national,' the concept is presumed to cover only citizens of the relevant state. On the lack of precision in all international law measures referring to minority rights and the decision of one state to impose a nationality requirement when applying the Framework Convention, see the Grand Chamber judgment of the European Court of Human Rights in *Gorzelik v. Poland*, February 17, 2004 (not yet reported), particularly paragraphs 64–71. On the practice of the Framework Convention's monitoring bodies on this issue, see Hoffman in this volume.

³⁰ See points 5.1 and 5.2 in General Comment 23 on the Covenant.

³¹ This discrepancy arises, of course, because Article 27 of the Covenant also covers EU citizens and those non-EU citizens who fall outside the scope of the directive.

The most telling comparison is between the substantive rights in the directive and in the international measures. Put simply, the Council of Europe measures and Article 27 of the ICCPR require states to preserve *differences*, while the directive permits (but does not require) member states to insist on assimilation. So the Language Charter requires states to assist in the continuation of minority languages; the Framework Convention for the Protection of National Minorities requires states to take a number of general and specific measures to protection the continuation of national minorities, while expressly forbidding assimilation,³² and Article 27 of the ICCPR is purely about preserving distinct languages, cultures, and religions. On the other hand, as we have seen, the directive permits states to impose integration requirements as a condition for acquiring long-term resident status in the first place and to impose language requirements as a condition for access to education and training. There is nothing in the directive that aims to preserve difference.

By way of comparison, the directive does overlap with the international measures to the extent that it seeks to ensure equality. The Language Charter requires abolition of unjustified discrimination limiting use of minority languages,³³ the Framework Convention for the Protection of National Minorities requires equality before the law, equal educational opportunity and equal access to other areas of economic, social, political, and cultural life;³⁴ and Articles 2 and 26 of the ICCPR require respectively equality as regards the rights set out in the Covenant and equality as regards rights generally, whether or not they are set out in the Covenant, on grounds of “national or social origin.”³⁵ Of course, the material rights to which the guarantee of non-discrimination applies are to some extent different in the directive as well as each of the international measures.

From this overview, it can be seen that there is a potential conflict, at least in principle, between the ‘assimilation’ provisions in the directive and the guarantees in Article 27 ICCPR for those persons who are covered by both instruments. If a member state invokes the provisions of the directive providing for an ‘integration’ condition for acquisition of long-term resident status, there is a risk that it will restrict particularly the cultural and linguistic rights set out in Article 27 of the ICCPR. For persons who have acquired the right to long-term residence status, a linguistic requirement as regards access to education could also arguably violate Article 27. Moreover, either condition could arguably violate the non-discrimination right in Article 26 of the ICCPR.³⁶

³² See particularly Art. 5, par. 2.

³³ Art. 7, par. 2.

³⁴ Arts. 4 and 12, par. 3.

³⁵ The listed grounds are non-exhaustive.

³⁶ Note that “language” is also a prohibited ground of discrimination under Article 26.

4. An EU Integration Policy?

In June 2003 the European Commission released a detailed communication on immigration, employment, and integration, attempting *inter alia* to set out the parameters for an EU integration policy.³⁷ In the Commission's view, an EU integration policy should aim to set out a balanced set of rights and obligations for immigrants, evolving over time and involving both participation by the immigrant in economic, social, cultural, and civil life and respect by the immigrant for the host state's norms. Immigrants should participate in an integration process without giving up their own identity. The policy should address in particular workforce participation, access to education, acquisition of the language of the host state, housing and urban issues, health and social services, the social and cultural environment, and nationality and 'civic citizenship.'

The Commission therefore proposed to address these issues through: adoption of proposed migration directives, including the Long-Term Residents' Directive; cooperation and exchange of information on such issues as introduction programs, language training, and participation of immigrants in national life; development of the concept of 'civic citizenship' and research into nationality laws; addressing migration issues in EU employment strategies, social inclusion strategies, and economic and social cohesion strategies; combating discrimination; education policy; cooperation with non-EU countries; EU financial support for national integration policies (as pilot projects); and improving information on immigration.

5. Conclusions

The Commission's recent communication does not, for the time being, indicate an intention to develop standard rules or even guidelines on member states' national integration policies. However, the process is at an early stage and is likely to affect the development of national approaches to integration. The Long-Term Residents' Directive requires member states to provide equal protection for long-term residents but permits member states to impose integration requirements on immigrants who wish to gain that status; meaning the interplay between these two elements and the question of the correct interpretation of the directive will have a significant impact on national law and policy as regards this issue.

It is striking that the focus on equality and the potential to require integration as a condition of obtaining equality in the Long-Term Residents' Directive contradicts the broad thrust of Council of Europe and UN measures addressing minority rights, which set out rights but do not require prior integration to acquire those rights, and which moreover contain a second stream of obligations requiring member states to ensure that the distinctness of minorities is retained. The EC approach does not contradict the Council of Europe approach

³⁷ COM (2003) 336, June 3, 2003.

if we assume that different groups of persons are addressed, but this interpretation is disputed. In any event, there is a stronger case that the EC approach potentially conflicts with obligations under the ICCPR, given significant overlaps in the coverage of the Long-Term Residents Directive and the Covenant.

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THE BOLZANO/BOZEN DECLARATION ON THE PROTECTION OF MINORITES IN THE ENLARGED EUROPEAN UNION

Introduction

“Respect for and protection of minorities” comprises one of the prominent Copenhagen criteria which candidate countries to the European Union have had to fulfill in the past decade. Various pre-accession instruments have served to streamline candidates’ attitude *vis-à-vis* their minorities. In the EU’s internal sphere, however, this topic has remained very much a non-topic. Will minority protection vanish from the EU ‘scene’ once the candidate states acquire full EU membership?

In response to this question, the Local Government and Public Service Reform Initiative (LGI) of the Open Society Institute (OSI) and the European Academy Bolzano (EURAC) organized “Minority Protection and the EU: The Way Forward.” This conference was hosted by EURAC in Bolzano/Bozen/Bulsan, Italy, January 30–31, 2004, and co-sponsored by LGI and the European Commission. The conference joined a range of experts, policymakers, and NGO representatives to address how the importance of the integration and protection of minorities (which are acknowledged at the political level) could be transformed into concrete legal instruments inside the framework of the newly-enlarged and re-designed European Union.

This declaration is an additional outcome of the conference and forms an integral part of the conference proceedings. It comprises a package of policy proposals for an enlarging EU in the area of minority protection. The declaration builds on a rising policy consensus that the Union—in addition to the member states, the Council of Europe, and the OSCE—has to play a certain role when it comes to the protection of European minorities. Nevertheless, the declaration takes account of the special nature of the EU, the principle of subsidiarity, the danger of possible duplications, and the existing diversity of approaches regarding minorities. Though neutral in its opinion, the declaration highlights what is politically and legally possible within existing policy and demonstrates how the protection of minorities can be strengthened in a consistent manner. It reflects the issues and views raised and discussed at the conference in Bolzano/Bozen/Bulsan.

Preamble

Today, May 1, 2004, the expanding European Union (EU) welcomes 75 million new citizens. With this expansion, the number of minority groups within the EU will more than double. The population of the enlarged European Union will become considerably more diverse in terms of culture, ethnicity, and language. Before enlargement, the European Union was actively engaged in enhancing the situation of minorities living in candidate states and undertook initiatives to ensure political stability during the accession process. When it came to the rights and treatment of minorities within the old member states, however, the political discourse and the legal provisions within the EU framework remained largely silent. Now that the candidate states have become fully fledged EU members, this glaring double standard must come to an end. It remains an open question whether the new and old member states will opt to retreat into a tacit consensus and disregard the problems faced by the minorities in their midst or whether the enlargement experience will stimulate a constructive effort to improve minority protection.

At the beginning of 2004, some ninety NGO representatives, experts, and political figures convened at the European Academy in Bolzano/Bozen to discuss the EU's engagement in the area of minority protection after enlargement. The signatories of this Bolzano/Bozen Declaration were all speakers and respondents who presented papers at that event.

On May 1, 2004, the 16 undersigned respectfully submit the following proposals to the European Union and its member states, old and new, for urgent consideration.

- 1. Improve monitoring of candidate states.**
- 2. Integrate minority protection into EU monitoring of human rights within member states.**
- 3. Strengthen the EU as a community of values.**
- 4. Improve the cooperation among the European Union (EU), Council of Europe (CoE), and Organization for Security and Cooperation in Europe (OSCE).**
- 5. Bring to life the new constitutional motto "united in diversity."**

The enlarged European Union should take the following actions to enhance protections for persons belonging to minorities:

1. IMPROVE MONITORING OF CANDIDATE STATES

- In the framework of the accession negotiations with Bulgaria, Romania, and, eventually, Turkey and any other future candidate states, the European Union should improve the consistency, credibility, and thereby the potential impact of its assessments of national policies regarding minorities.
- The European Union should intensify its institutional dialogue with the Council of Europe. When assessing the performance of candidate states in the area of minority protection, the Union should use the standards the Council of Europe has developed. The Union should continue, for example, to rely and draw upon the findings produced through instruments such as the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM).
- The European Union should considerably improve its in-house expertise in the area of minority protection, but avoid duplicating efforts that the Council of Europe has already undertaken. The Union should increase the number of European Commission personnel who monitor minority situations in candidate states.
- The European Union's future monitoring effort should be transparent. Its reporting should draw explicit links between its sources of information, its findings, and any recommendations that may flow from them. The monitoring effort should also be made consistent by focusing not only on a candidate state's formal compliance with international standards but on the process by which it complies in practice at the national, regional, and local level.

Explanatory note:

Overall, the European Union's monitoring of candidate states' policies in the area of minority protection sparked considerable activity and some positive changes.

As a result, minority-group representatives and advocates in the new member states now have tools they lacked 10 years ago. These tools include more relevant minority legislation, more public policies to which the governments can be held accountable, an increase in the amount of reporting and information on the situation of minority communities, and greater experience in utilizing the relevant international instruments and mechanisms to draw attention to domestic concerns.

The European Commission tended to focus primarily on the existence or absence of formal measures. The Commission itself and many other observers, however, have noted a serious and persistent lack of implementation of these formal measures. The Commission has been less than effective in addressing this problem for two reasons.

First, the EU has insufficiently developed standards on minority protection, which the Commission itself acknowledged, in a vague manner, when it referred to external standards, mainly from the Council of Europe.

Second, the Commission lacks monitoring capacity.

Although the Commission's *Regular Reports* on candidate countries followed a uniform general structure, these reports suffered internal inconsistencies that weakened their potential impact. The reports also based their findings upon numerous sources that were of varying reliability and quality; and the Commission itself was not in a position to conduct its own research to address important gaps in available data. In short, the Commission proved to be hardly capable of offering a systematic assessment of the institutional frameworks and policies dealing with minority groups.

The lack of an effective monitoring capability is all the more worrying because the Copenhagen criteria for minority protection are still crucially important. These criteria will require additional EU attention after May 1, 2004, for assessing the situation of minorities in Turkey and in a number of Balkan states currently involved in the EU's stabilization and association process.

Recent events in the region only underscore this point.

2. INTEGRATE MINORITY PROTECTION INTO EU MONITORING OF HUMAN RIGHTS WITHIN MEMBER STATES

- The European Parliament should introduce a separate subheading on minority rights into its regular reports on human rights.
- If the European Commission submits a proposal to expand the mandate of the current European Monitoring Center on Racism and Xenophobia (EUMC) in Vienna, this proposal should pay requisite attention to the protection of minorities.
- If the European Union establishes a human rights agency or monitoring mechanism, member states should be required to submit annual reports containing a separate subheading on minority rights. If the EU extends its activities into the area of human rights, it should take into account the Council of Europe's experience and seek close inter-institutional cooperation.

Explanatory note:

There is a discrepancy between the law and reality when it comes to the treatment of minority groups in the new EU member states. Several old EU member states have also failed to collect sufficient data on the situation of their own vulnerable minority populations and have not adopted specific legislation and policies to ensure comprehensive minority protection.

Independent reporting on the situation of minority groups does not fill the gap left by the lack of EU oversight and critique and the lack of government-generated data. For this reason, it would be highly undesirable if the new and old member states would now relax and become inactive in the area of minority protection.

Such a development would, in the words of the OSCE High Commissioner on National Minorities, “raise serious doubts about the normative foundations of the EU itself,”¹ and have especially serious repercussions in current and future EU candidate states. Hence, it is of the utmost importance to maintain the “minority momentum” developed during the enlargement process.

The goal in both new and old member states should be to achieve and maintain inclusive societies that offer sufficient space to minorities and their cultures. Achieving this goal will require raising awareness of the fact that the European reality is a reality of substantial diversity and that this diversity includes numerous minorities.

Raising this awareness will require the collection of information, analysis, and the generation of findings and recommendations. To carry out these tasks, the EU must be able to monitor minority protection in the member states themselves.

For several years, the European Parliament has completed human rights reports on member states. In 2002, the European Commission created a network of independent experts, one from each member state, who annually assess implementation of the rights set out in the European Union’s Charter of Fundamental Rights, including Articles 21 and 22. However, neither the reports drafted by Parliament itself nor the ‘out-sourced’ reporting system of the network of experts guarantee an ongoing review and the necessary input from member states. They do not even guarantee adequate engagement of EU institutions and member states. As a counterweight, the internal monitoring procedures in the enlarged EU must be enhanced.

Representatives of the EU member states stressed in December 2003 the “importance of human rights data collection and analysis with a view to defining Union policy in this field” and agreed “to build upon the existing European Monitoring Center on Racism and Xenophobia and extend its mandate to become a human rights agency.”² It would be appropriate in this context to introduce a provision into the new EU constitution that clarifies that the Union has the authority to monitor the human rights performance of member states even when these states are acting in areas of their own competence.

The Union should not duplicate efforts undertaken in the framework of the Council of Europe, but it should seek close cooperation with the latter in the area of human rights. The EU’s accession to Council of Europe instruments in the first line of the European Convention of Human Rights is an important step.

¹ R. Ekeus, *From the Copenhagen Criteria to the Copenhagen Summit: The Protection of National Minorities in an Enlarging Europe*. Available online at <http://www.osce.org/hcnm/documents/speeches/2002/>.

² Paragraph 3 of *Conclusions of the Representatives of Member States*, December 13, 2003. Available online at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/misc/78398.pdf.

3. STRENGTHEN THE EU AS A COMMUNITY OF VALUES

- The next IGC should draw on the proposal of the Italian EU Presidency, delivered at the end of 2003, to expand the founding values of the EU currently listed in Article 6 TEU by amending Article 2 of the draft Constitution to include the following passage: respect for human rights, "including the rights of persons belonging to minorities as developed within the Council of Europe."

Explanatory note:

Article 6 TEU (Treaty establishing the European Union) lists the basic values upon which the "Union is founded," and which are, at the same time, "common to the member states."

This internal dimension is complemented by a clear external dimension, as Article 49 TEU refers to these principles in prescribing that only those European States "which respect the principles as set out in Article 6(1)" may apply for EU membership. These founding principles contain all of the political criteria of Copenhagen except the protection of minorities.

The European Commission is of the opinion that "the political criteria defined at Copenhagen have been essentially enshrined as a constitutional principle" and that Article 6 TEU also comprises the protection of minorities.³ Indeed the practice of the Commission and the Council *vis-à-vis* candidate states confirms this view; nevertheless, a corresponding practice regarding member states is missing.

The fact that the member states' constitutional traditions with regard to minority protection differ significantly does not exclude the possibility that minority protection may be considered a common principle of European law. Neither does the fact that one-fourth of the member states have not yet ratified the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM).

The Court of Justice has never considered itself limited to establishing common principles of law only at the lowest common denominator amongst the member states. Thus far, the Court has not taken a clear-cut position on the status of minority protection under EU law; it has, however, recognized the protection of minorities as a 'legitimate aim' of national policies.⁴

It is crucially important to enshrine the protection of minorities as one of the EU's basic values in order to give substantive meaning and concrete effect to the 'EU-speak' about inclusion, tolerance, and diversity.

³ See footnote 3 of the Commission's *Regular Reports* from October 9, 2002. Available online at <http://europa.eu.int/comm/enlargement/report2002/index.htm#report2002>. Compare also various replies to written questions in Parliament such as *Reply to Question E-2583/01* (Vittorino), OJ 2002 C 147E: 28 or *Reply to Question P-0395/02* (Reding), OJ 2002 C 160: 214.

⁴ Case 274/96, *Bickel and Franz*, [1998] ECR 7637, par. 29. Available online at http://curia.eu.int/en/content/juris/index_form.htm

Article 2 of the constitutional treaty as drafted by the European Convention in 2003 lists the values of the current Article 6 TEU and describes them as being “common to the member states in a society of pluralism, tolerance, justice, solidarity and non-discrimination.”⁵

During the IGC at the end of 2003, the Italian Presidency went even further, proposing the amendment of Article 2 to include the following provision: “respect for human rights, including the rights of persons belonging to minority groups.”⁶

Including minority protection among the EU’s constitutional values with such explicit language would be of considerable symbolic importance and would help to augment legal certainty. Even so, it would still leave the Union without a legislative competence in the area of minority protection. Neither would it extend the *de facto* scope of the sanctioning procedure as laid out in Article 7 TEU. The thresholds of this procedure are very high, and a material and persistent violation of basic minority rights already could trigger a sanctioning procedure under the existing circumstances.

4. IMPROVE EU-CoE-OSCE COOPERATION

- The European Commission’s Directorate General for Justice and Home Affairs as well as the Directorate General for Culture should enter into regular and institutionalized dialogue with the two independent and expert committees supervising the implementation of the Council of Europe’s Framework Convention as well as its Language Charter. The same goes for Parliament’s Committees for Human Rights and Culture. This will enable EU institutions to identify problem areas needing special attention, and these areas must be considered when determining aims, financial guidelines, and priorities under relevant EU policies.
- The European Commission should make more active use of the Framework Convention when monitoring candidate states’ performance in the field of minority rights. For example, the Commission should take part regularly and actively in monitoring debates in the Committee of Ministers or make use of the Union’s political weight in order to leverage the Committee of Ministers to ask a state to submit a timely report on relevant issues.⁷

⁵ Draft treaty establishing a constitution for Europe, July 18, 2003, CONV 850/03:5. Available online at <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>

⁶ The French version reads: “respect des droits de l’Homme, y inclus des droits des personnes appartenant à des minorités.” See CIG 60/03 ADD 1, December 9, 2003. Available online at http://ue.eu.int/cms3_applications/Applications/igc/doc_register.asp?lan.

⁷ Resolution (97) 10: rules adopted by the Committee of Ministers on the monitoring arrangements under articles 24 to 26 of the FCNM. Available online at <http://cm.coe.int/ta/res/1197/97x10.html>.

- Joint program planning between the Union and the Council of Europe should be intensified in both quantity and quality. Emphasis should be placed upon cooperation on equal terms, based not only on joint action but also on joint planning and programming.
- As regards the evolving common foreign and security policy of the EU—tasked to “safeguard common values”—the OSCE High Commissioner on National Minorities (HCNM) should be invited to assist in developing approaches to and policies toward third countries, including: the conditionality of aid and trade, support for EU conflict prevention and preventive diplomacy, and developing EU and EC expertise within the offices or at the disposal of the prospective new EU foreign minister.
- The EU foreign minister and representatives of the Political and Security Committees should convene once a year in order to exchange information and observations with the HCNM.

Explanatory note:

During the enlargement process, the European Union drew extensively upon the experience of the OSCE and the Council of Europe, particularly in the area of monitoring. It became evident that effective cooperation between these three organizations is essential in order to obtain effective performance in the area of minority protection.

While the Council of Europe and the OSCE High Commissioner on National Minorities (HCNM) could offer valuable insights and advice on applicable standards, the EU had the additional incentive of membership at its disposal, combined with financial aid that could be concentrated on specific minority-related projects.

With the addition of the 10 new member states and the potential decline of the Commission’s leverage, further cooperation between the EU and OSCE has become essential. Only if these organizations take cooperation seriously will they avoid duplication of effort and enhance their efficiency and effectiveness. In particular, the European Commission should take into account the findings and developments in the framework of the two principal Council of Europe instruments—the European Charter for Regional or Minority Languages and the FCNM.

Having developed a significant ‘soft-law jurisprudence’ through Committee of Ministers’ resolutions and Advisory Committee opinions, the FCNM is the most comprehensive legally-binding multilateral instrument in the field and should be a major reference for the Union. The Union should exercise its political weight whenever possible in order to improve adherence to this instrument and the standards developed therein.

These inter-institutional links should be formalized and joint planning and programming of activities should be enhanced. This would also serve to counter the risk that useful contacts between institutions of the Council of Europe, the OSCE, and the European Union will diminish now that the first wave of enlargement is completed.

The Union should bear in mind the useful cooperation with the OSCE during enlargement and make greater use of the HCNM's accumulated expertise in examining situations within EU territory. This is especially true with regard to the problems of statelessness; divided societies, such as in the Baltic states; and areas of persistent tensions, such as Corsica and the Basque country. The HCNM could provide friendly assistance, just as it has in Greece and Northern Ireland, and share expertise, as it has in Sweden (with ratification of the FCNM) and Finland (with reform of language legislation).

New areas for useful cooperation between the HCNM and the EU also should be considered. These might include cooperation in forming EU foreign policy and in easing new tensions that may arise within the enlarged Union's increasingly diverse societies.

5. BRING TO LIFE THE NEW CONSTITUTIONAL MOTTO "UNITED IN DIVERSITY"

- The Commission should report annually on compliance with the horizontal integration clause (Article 151, par. 4 TEC). This report should examine the effects of EU secondary legislation and the extent to which it takes into account linguistic diversity, specific national and regional features, and the cultural heritage of member states and regions under EU policy. This "diversity impact report" should be delivered to national parliaments and the Committee of Regions.
- The Commission should propose a multi-year program for linguistic diversity with funds earmarked for regional and minority languages. Moreover, the IGC could introduce an article on linguistic diversity, as was recently proposed by the European Parliament in the Ebner report. In addition, EU anti-discrimination provisions should be amended to include the word "language" in Article III-8 and Article III-3 of the Draft Constitutional Treaty (currently Article 13 TEC). This would give the Union the competency to take measures against linguistic discrimination, a form of discrimination which is *expressis verbis* forbidden according to Article II-21.
- The constitutional treaty should explicitly provide room for affirmative action also in areas beyond gender discrimination. Accordingly, Article III-8 of the Draft Constitutional Treaty should be amended to include a third paragraph which reads as follows: "With a view to ensuring full equality in practice, the principle of equality shall not prevent the maintenance or adoption of Union or member states' measures to prevent or compensate for disadvantages linked to discrimination on the basis of the grounds listed in par. 1."
- In order to underline the important sub-national dimension of diversity, the next IGC should amend Article 3 of the Draft Constitutional Treaty (the Union's objective) by adding the following specification (indicated in italics): "The Union shall respect its rich cultural and linguistic diversity *at the national and sub-national level*, and shall ensure that Europe's cultural heritage is safeguarded and enhanced."

Explanatory note:

The Draft Constitutional Treaty promotes “united in diversity” as a motto of the European Union (Article IV–1). In this respect the proposed treaty could build on a considerable “diversity *acquis*” in existing treaties. The Charter of Fundamental Rights obliges the Union to respect “cultural, religious and linguistic diversity.”

It remains unclear, however, to what degree the notion of “diversity” extends beyond diversity *between* member states to cover the crucial levels of cultural, religious, and linguistic diversity *within* member states. To conclude that “diversity” refers only to national cultures would considerably reduce the significance of this concept for tens of millions of European citizens. Some parties—such as the EU network of experts—read Article 22 as a minority protection clause.

In any case, a clear minority dimension is found in the Union’s anti-discrimination *acquis*. Article 21 of the charter expressly forbids any discrimination based on “membership to a national minority.” Still, the most efficient minority protection tool under the EU regime appears to be the legally binding Council of the European Union directive “implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.” This directive establishes a broad protective shield against various forms of ethnic discrimination and is of crucial importance especially for third-country nationals, that is, “new” minorities.

In order to meet its internal constitutional commitment to diversity and maintain the minority consciousness developed in its external relations over the past years, however, the Union will have to do more than simply forbid discrimination.

One hopeful development is found in the Maastricht treaty, where the “horizontal integration clause” obliges the European Community to “take cultural aspects into account in its action under other provisions of this treaty”—that is, outside the field of culture—“particularly in order to respect and promote the diversity of its cultures” (currently Article 151, par. 4 TEC).

Thus, the promotion of minority cultures can be—and, if one defines culture more broadly—should be an integral part of all European legislation. Unfortunately, it seems the European Union still has not taken seriously its mandate to protect the various forms of European diversity.

The EU Lingua program is a good example: while it aims to foster less widely-taught languages, it excludes regional and minority languages. Another example, the current action plan on language learning and linguistic diversity, addresses regional and minority languages but fails to earmark specific funds for such fields—a fact that seriously dilutes the minority component of the EU’s language policy.

Within the Common Market—which seeks to create economic unity while preserving cultural diversity—special weight must be placed upon the subsidiarity principle, the observance of which has been entrusted to the Committee of Regions and national parliaments by the Draft Constitutional Treaty.

According to the proposed protocol on the application of the principles of subsidiarity and proportionality (attached to the constitutional treaty), any national parliament may, within six weeks from the date of transmission of the Commission's legislative proposal, send a reasoned opinion stating that the proposal does not comply with the principle of subsidiarity. When more than one third of the parliaments oppose the measure for this reason, the Commission will have to review its proposal. Moreover, if a legislative act is found to infringe on the subsidiarity principle, the Committee of the Regions may initiate proceedings before the European Court of Justice.

Making use of the EU's "diversity *acquis*" in the founding treaties and EU legislation can make "diversity" a living practice.

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