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Respect for minority rights as a condition for EU membership

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Summary

The European Union's one boundary is democracy and human rights. The Union is open only to countries which uphold basic values such as free elections, respect for minorities and respect for the rule of law.¹

The role of minority protection within the European Union (EU) constitutes a paradox. On the one hand, it has played an important role in the EU's external relations ever since the end of the Cold War, especially in the enlargement process. On the other hand, minority rights have hardly affected the internal development of the *acquis communautaire*. Although the Maastricht Treaty introduced the concept of cultural diversity and the Amsterdam Treaty provided for a new non-discrimination provision on the basis of ethnic origin, such approaches are not sufficient in order to achieve a comprehensive minority protection. There is still no clear position of minority rights in the treaty provisions. The European Court of Justice (ECJ) has developed case law on human rights which could reach out towards minority rights, but since the ECJ is not a human rights court, there is always a risk that a general Community rule or objective will prevail against claims of violations of fundamental rights. This problem could be solved if the EU acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms and thereby accepted the competence of the European Court of Human Rights to control the ECJ in the human rights area.

Furthermore, a common European standard of minority rights, that is binding commitments shared by all EU member states either in their respective constitutional traditions or in an international treaty signed and ratified by all of them, does not exist. The only strong basis is the ECHR, but this only contains a non-discrimination clause. Even article 27 of the ICCPR is not adhered to by all member states.

According to the Copenhagen criteria candidate states are required to demonstrate that they ensure respect for and protection of minorities in order to become members of the EU. This condition does not however entail clearly established, objective evaluation criteria and is an ill-defined requirement for membership. The candidate states have in most cases been considered to fulfil the Copenhagen criteria even though a lack of minority protection consistently has been pointed out. Since the conditionality of minority protection has been largely rhetorical on the part of the EU it adds no real value to the enlargement process and the protection of minorities. Imposing compliance with minority protection standards while the member states do not fully abide by the same standards themselves is not only double standard but seems to violate the principle of non-discrimination.

¹ The Future of the European Union – Laeken Declaration, available at: http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm

The candidate countries are required to meet “European standards” of human rights and minority rights protection. There is however no consensus as to whether recognition of the existence of minorities is a requirement for membership, nor any clear and coherent, let alone binding, standards of minority protection to be found in the EU. Therefore, no in depth minority rights scrutiny of the applicant states should take place in the accession process. Instead, international standards entailed in the UN, the OSCE and the Council of Europe systems should provide the same minority rights protection in candidate states that applies to the member states.

Abbreviations

CEECs	Central and Eastern European Countries
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EC Treaty	Treaty establishing the European Community as amended by the Treaty of Amsterdam and later by the Treaty of Nice
EEC Treaty	Treaty establishing the European Economic Community of 25 March 1957
ETS	European Treaty Series
EU	European Union
HCNM	High Commissioner for National Minorities
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
OJ	Official Journal
OSCE	Organisation for Security and Co-operation in Europe
TEU	Treaty establishing the European Union. Often referred to as the Maastricht Treaty, the TEU amended the Treaty of Rome (1957). It was signed in 1992, but did not enter into force until November 1993.
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNTS	United Nations Treaty Series

1 Introduction

Minority rights and the protection of minorities have gained much attention in the 1990s with the adoption of several legal instruments. A number of recent conflicts and tensions have underlined the importance of adequate minority protection for purposes of stability, security and peace in Europe. International organisations such as the United Nations, Council of Europe and Organisation for Security and Co-operation in Europe (OSCE) have all dealt with minority issues to a large extent. Unsettled relations have repeatedly been recognised as a constant threat to international peace and security in Europe, an example being former Yugoslavia. In addition to conflict prevention purposes, protection of minorities is also important for reasons of respect for human dignity and cultural diversity.

Minority rights issues have recently gained increasing interest also in the EU. A parallel enlargement in the understanding of what the Union represents has accompanied the geographical enlargement of the EU; from being an essentially economic arrangement, the Union has evolved towards a political alliance based on common values. In the founding treaties there was little attention paid to fundamental rights and freedoms. However, over time the EU has increasingly emphasised its aspiration to represent not only stability and prosperity, but also democratic values, culminating with the adoption of the Copenhagen political criteria including respect for and protection of minorities.²

1.1 Subject and aim

The aim of the thesis is not to assess whether the candidate countries fulfil the Copenhagen criteria as regards the protection of minorities or not, but rather to clarify to what extent respect for minorities really is a requirement for membership of the European Union, as it is set out to be in the Copenhagen political criteria. Commission opinions on candidate states and progress reports will be analysed. The question as to whether an internal minority rights standard has developed in the EU treaties and case law of the European Court of Justice, that would justify an external promotion and demands on new member states as regards the protection of minorities, will also be examined.

² Open Society Institute EU Accession Monitoring Program, *Monitoring the EU Accession Process: Minority protection Volume 1, An Assessment of Selected Policies in Candidate States*, 2002, p. 17.

1.2 Limitations

International treaties for the protection of minorities will be examined to the extent they appear in the Commission opinions and progress reports on the candidate states and to the degree that they entail rights that are present in those opinions and reports. A few legal instruments that are not explicitly mentioned in the reports have been added due to their important contributions as regards the protection of minorities. Unfortunately, the scope of the thesis only allows for a few candidate states to be examined under chapter 4. The aim has been to select states that are geographically as well as culturally different so as to achieve diversity in the existence of minorities within their territories. Three of the candidate states are set to join the EU next year whereas one country hopes to accede by the year 2007. The focus of the thesis will be on EU promotion of minority rights in the enlargement process and the EU's endeavours to promote minority rights externally in other areas will not be dealt with. The thesis does not entail a definition of "minority". As former OSCE High Commissioner for National Minorities Max van der Stoep put it: I know it when I see it.³

1.3 Method and materials

The thesis is structured as a combined descriptive and analytical study of the different legal instruments of relevance to minorities, EU treaty provisions and European Court of Justice case law that deal with minority protection and finally minority rights considerations in Commission opinions and progress reports on a few selected candidate states. I have attempted to clarify whether an internal development towards a minority rights standard has taken place within the EU and I have tried to identify the various problems regarding EU demands on candidate countries in the area of minority protection. The sources used are international and regional legal instruments for the protection of minorities, articles found in various legal periodicals, case law of the European Court of Justice and European Court of Human Rights and reports by the Commission on candidate states.

³ If the reader has an interest in the question as how to define a minority the following literature can be recommended: Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary*, 1993, pp. 487-491, Shaw, "The Definition of Minorities in International Law", Dinstein and Tabory (eds.), *The Protection of Minorities and Human Rights*, 1992, pp. 23-28, G. Gilbert, "The legal protection accorded to minority groups in Europe", *Netherlands Yearbook of International Law*, 1992, pp. 69-74, G. Alfredsson, "Minority Rights: International Standards and Monitoring Procedures", *Minority Rights Handbook, Latvian Human Rights Quarterly*, Issue 5/6 1998, pp. 12-13, K. Henrard, "The impact of the Enlargement process on the Development of a Minority Protection Policy within the EU: Another aspect of Responsibility/Burden-Sharing?", *Maastricht Journal of European and Comparative Law*, 2002, Volume 9, Issue 4, pp. 367-370.

1.4 Outline

I have divided the thesis into three parts. The first one presents the various legal instruments available for the protection of minorities. The second part gives an overview of the potential legal basis for minority rights protection within the EU and is intended to answer the question as to whether there is any movement towards a EU standard for minority protection. The final part of the thesis will examine what kind of requirements that are put on EU candidate states as regards protection of the rights of minorities and to what extent such requirements are justified.

2 Legal framework for minority rights

The legal situation of minorities depends to a large extent upon norms of the respective domestic legal systems due to the fact that European states have generally preferred to keep the minority issue within the domestic domain. However, since states to a large extent tend to lack comprehensive minority protection, it is relevant to give an overview of international legal frameworks and their role in the protection of European minorities. Measures taken within states to promote minority rights, such as the recognition of autonomous legislative powers to institutions representing minority interests or the organisation of minority group participation in the decision making process at state level will not be examined.⁴

It could be argued that a system of minority protection includes two basic principles; on the one hand the prohibition of discrimination and on the other hand measures designed to protect and promote the separate identities of the minority groups.⁵ Anti-discrimination measures are designed to ensure that individuals are not treated differently from others for unjustifiable reasons whereas minority rights protection aim to allow individuals and communities to preserve their differences so as to avoid forced assimilation into the majority culture. These different approaches are complementary responses to the problems facing minorities, who confront risks of both exclusion and assimilation.⁶

In this presentation, attention will be given to legal instruments and minority rights that are considered in those Commission opinions on candidate states

⁴ Currently there is no clear obligation for states, in general international law, to establish regimes of autonomy for minority groups. B. de Witte, "Politics versus law in the EU's approach to ethnic minorities", J. Zielonka (ed.), *Europe Unbound. Enlarging and reshaping the boundaries of the European Union*, 2002, p. 147. See however Lund Recommendations on the Effective Participation of National Minorities in Public Life paragraph 14 and Explanatory Note. For further reading see G. Alfredsson, "Minority Rights: International Standards and Monitoring Procedures", *Minority Rights Handbook, Latvian Human Rights Quarterly*, Issue 5/6 1998, pp. 20-21.

⁵ These do not constitute separate rights or privileges under human rights law since their purpose is merely to effectively guarantee the equal enjoyment of all human rights and to eliminate discrimination in both law and practise. G. Alfredsson, "A Frame an Incomplete Painting: Comparison of the Framework Convention for the protection of National Minorities with International Standards and Monitoring Procedures", *International Journal on Minority and Group Rights*, Volume 7, No. 4, p. 293.

⁶ Open Society Institute/EU Accession Monitoring Programme, *Monitoring the EU Accession Process: Minority Protection Volume 1, An Assessment of Selected Policies in Candidate States*, 2001, p. 16. It should be noted there is still no international consensus regarding the grant of special rights to minorities. K. Henrard, "The impact of the Enlargement process on the Development of a Minority Protection Policy within the EU: Another aspect of Responsibility/Burden-Sharing?", *Maastricht Journal of European and Comparative Law*, 2002, Volume 9, Issue 4, p. 358.

and progress reports dealt with in chapter 4. These rights include representation in public life, education, non-discrimination and language rights. The purpose of this chapter is to introduce the reader to the various legal instruments that are available as regards these rights. It is intended to be an overview and is not all encompassing. Some UN and OSCE instruments that are not explicitly mentioned in the Commission reports will also be presented due to their important contributions to the protection of minorities.

2.1 Minority protection under the United Nations

2.1.1 Article 27 of the International Covenant on Civil and Political Rights

Since the Universal Declaration of Human Rights lacks a specific measure in favour of minorities, article 27 of the International Covenant on Civil and Political Rights (ICCPR) is the most basic international provision on minority rights.⁷ Although it is formulated in an individualistic way, “persons belonging to such minorities”, article 27 goes beyond individual rights and recognises the necessity of a group element by using the phrase “in community with the other members of their group”.⁸

Although article 27 at first seems to lack political or economical implications, it should be mentioned that the Human Rights Committee (HRC) has interpreted the provision rather broadly.⁹ For example, the HRC states in its general comment No. 23 that the rights under article 27 may not be restricted to state citizens or residents alone.¹⁰ Further, the HRC observes that traditional economic activities of minorities can be considered as an

⁷ The ICCPR was adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966 and entered into force on 23 March 1976. Article 27 reads: *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

⁸ G. Alfredsson, “Minority Rights: International Standards and Monitoring Procedures”, *Minority Rights Handbook, Latvian Human Rights Quarterly*, Issue 5/6 1998, p. 17.

⁹ K. Henrard, “The impact of the enlargement process on the development of a minority protection policy within the EU: Another aspect of responsibility/burden-sharing?” *Maastricht Journal of European and Comparative Law*, 2002, Volume 9, No. 4, pp. 372-373.

¹⁰ Human Rights Committee general comment No. 23 of 1994, paragraphs 5.1 and 5.2. [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CCPR+General+comment+23.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CCPR+General+comment+23.En?OpenDocument) last visited 2003-12-20.

essential element of their culture and are thus protected by article 27.¹¹ In its jurisprudence in individual cases, the HRC has applied article 27 primarily to indigenous peoples, such as the Indians in Canada,¹² and the Sami in Sweden and Finland.¹³ Indigenous peoples usually fulfil the ethnic and linguistic criteria; sometimes this also includes religious minorities.¹⁴ Other cases relate to linguistic minorities, such as the francophone minority in Canada.¹⁵

Article 27 does not call for special measures to be adopted by states, but those states that have ratified the Covenant are obligated to ensure that all individuals under their jurisdiction enjoy their rights.¹⁶ Thus, this may require specific action to correct inequalities to which minorities are subjected.¹⁷ Furthermore the HRC has stated that although article 27 is formulated in a negative way as freedom from interference, positive measures by states may also be necessary to protect the identity of a minority and the rights of its members.¹⁸ This could include appropriate steps to protect a minority's right to use its language. The use of the term positive measures might also imply direct support from the state such as public education in a minority language, or even financial assistance for private minority schools.¹⁹

The reluctance of some of the member states of the EU to recognise minority rights is reflected in the states' attitudes towards article 27. France has made a reservation to the provision and does not recognise the existence of groups whose particular features are based on racial, linguistic and religious criteria. It should however be observed that, although article 27

¹¹ Ibid, paragraph 7. See *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, HRC communication No. 167/1984, views adopted on 26 March 1990 and *Kitok v. Sweden*, HRC communication No. 197/1985, views adopted on 27 July 1988.

¹² *Lovelace v. Canada*, HRC communication No. 24/1977 and *Lubicon Lake Band v. Canada*, HRC communication No. 167/1984.

¹³ *Kitok v. Sweden*, HRC communication No. 197/1985, *Sara et al. v. Finland*, HRC communication No. 431/1990, *Ilmari Länsman et al. v Finland*, HRC communication No. 511/1992, *Jouni E. Länsman v. Finland*, HRC communication No. 671/1995, *Äärelä v. Finland*, HRC communication No. 779/1997.

¹⁴ On the question whether indigenous peoples can be considered as minorities, see Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary*, 1993, pp. 492-494, paras. 26-30.

¹⁵ *Ballantyne, Davidson and McIntyre v. Canada*, communication Nos. 359 and 385/1989.

¹⁶ ICCPR, article 2(1).

¹⁷ C. Thompson, "The protection of minorities within the United Nations" in S. Trifunovska (ed.), *Minority rights in Europe – European minorities and languages*, 2001, p. 120.

¹⁸ Human Rights Committee general comment No. 23 of 1994, paragraph 6.1.

¹⁹ F. de Varennes, *Language, Minorities and Human Rights*, 1996, p. 156. The HRC acknowledges that article 27 relates to rights whose protection imposes specific obligations on states parties and that the protection of these rights is directed to ensure the survival and continued development of cultural, religious and social identity of the minorities concerned. Human Rights Committee general comment No. 23, para. 9. Favourable measures must be in accordance with the principle of non-discrimination in articles 2(1) and 26 ICCPR.

refers to the rights of minorities in those states in which they exist, its applicability is not subject to official recognition of a minority by a state.²⁰

The ICCPR is a legally binding instrument with a complaint mechanism attached to it in an optional protocol. State to state complaints can be provided for under article 41 if the state at hand has recognised the competence of the HRC to receive and consider such complaints. This procedure is applicable to article 27, but is hardly a valuable tool since it has rarely been invoked.²¹ More useful is the individual petition procedure provided for under the Optional Protocol to the ICCPR.²² This mechanism can be used if the state concerned has ratified the protocol. The United Kingdom is the only EU member state that has not, as yet, ratified it.

2.1.2 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

The 1992 UN Declaration²³ provides for a comprehensive framework of minority protection and encompasses minorities' collective right to exist and to see their identity protected as well as the encouragement of the conditions for its promotion.²⁴ The Declaration points to states' duties to

²⁰ Office of the High Commissioner for Human Rights Fact sheet No. 18 (rev.1), p. 3, <http://www.unhchr.ch/html/menu6/2/fs18.htm> last visited 2003-12-12.

²¹ One could also hold that it is not a valuable tool since there is a risk that the procedure could be too politicised.

²² Other complaints procedures relevant to minorities are article 14 of the International Convention on the Elimination of all Forms of Racial Discrimination (applicable to both individuals and groups), the 1503 procedure under the UN Economic and Social Council (concerns both individuals and groups as regards a consistent pattern of gross rights violations and is universally applicable, i.e. it does not require separate ratification or acceptance of the instrument at hand). Gudmundur Alfredsson has referred to the fact that it has been stated in the Sub-Commission on Prevention of Discrimination and Protection of Minorities that a large portion of the complaints received under the confidential "1503 procedure" focuses on alleged violations of minority rights. G. Alfredsson, "Minority Rights: A Summary of Existing Practise", Phillips and Rosas (eds.), *Universal Minority Rights*, 1995, p. 79.

²³ Adopted by General Assembly resolution 47/135 of 18 December 1992.

UN Doc. A/RES/47/135. The declaration was adopted with consensus and the EU member states participated actively in its drafting.

²⁴ UN Declaration, article 1(1). The Declaration is based on the consideration that forced assimilation is unacceptable. The protection of the existence of minorities includes their physical existence, their continued existence on the territories on which they live and their continued access to the material resources required to continue their existence on those territories. It also requires respect for and protection of their religious and cultural heritage, essential to their group identity, including buildings and sites such as libraries, churches, mosques, temples and synagogues. Minority group identity calls for not only tolerance, but also a positive attitude towards cultural pluralism including the possibility for minorities to learn their own language and to receive instruction in that language. It also includes transmission of knowledge about their culture, history, tradition and language. A. Eide, "Final text of the Commentary to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities", paras. 21-24, 28. E/CN.4/Sub.2/AC.5/2001/2.

adopt appropriate legislation and allows for other measures to achieve those ends, thus offering a very broad framework for state action and allowing a wide discretion as to the type of measures to be adopted.²⁵

The Declaration holds that persons belonging to minorities have the right to enjoy their own culture, to profess and practise their own religion and to use their own language, in private and in public without discrimination.²⁶ Furthermore, the right to participate effectively in cultural, religious, social, and economic and public life²⁷, the right to participate effectively in certain decisions on the national and regional levels²⁸ and the right to full participation in economic progress and development²⁹ are all protected.³⁰ In addition, the Declaration entails non-discrimination provisions³¹ and obliges states to take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, tradition and customs, except where specific practises are in violation of national law or contrary to international standards.³² Finally, the Declaration holds that states should take measures to ensure that minorities have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.³³

²⁵ UN Declaration, article 1(2).

²⁶ Ibid, article 2(1). The Declaration makes it clear that these rights often require action, including protective measures and encouragement of conditions for the promotion of their identity and specified, active measures by the state. A. Eide, "Final text of the Commentary to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities", para. 33.

²⁷ Ibid, article 2(2). Included in public life are rights relating to election and to being elected, the holding of public office and other political and administrative domains. A. Eide, "Final text of the Commentary to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities", para. 36.

²⁸ Ibid, article 2(3). Minorities must as a minimum have the right to have their opinions heard and fully taken into account before decisions that concern them are taken. Effective participation requires representation in legislative, administrative and advisory bodies and more generally in public life. Minorities are entitled not only to set up and make use of ethnic, cultural and religious associations and societies, but also to establish political parties. A. Eide, "Final text of the Commentary to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities", paras. 42, 44.

²⁹ Ibid, article 4(5).

³⁰ G. Alfredsson holds that with dynamic interpretation, these three articles may open the doors to autonomy or self-government. G. Alfredsson, "Minority Rights: A Summary of Existing Practise", Phillips and Rosas (eds.), *Universal Minority Rights*, 1995, p. 81.

³¹ UN Declaration, articles 3 and 4(1).

³² Ibid, article 4(2).

³³ Ibid, article 4(3). In cases where the language of the minority is a territorial language traditionally spoken and used by many in a region of the country, states should ensure that the linguistic identity is preserved. Pre-school and primary education should be in the child's own language, i.e. the minority language spoken at home. In regard to non-territorial languages spoken traditionally by a minority within a country, but not associated with a particular region of that country, persons belonging to such a minority have a right, like others, to establish their private institutions, where the minority language is the main language of instruction. However, the state is allowed to require that the state language also be taught. It would be a requirement that the state ensures the existence of and fund some institutions that can ensure the teaching of that minority language. A. Eide, "Final text of

The Declaration does not contain a definition of what constitutes a national minority.³⁴ Furthermore, it is not a binding instrument and does not have a complaint mechanism or a monitoring system.³⁵ In 1995 a UN Working Group on Minorities was established and one of its tasks is to review compliance with the Declaration. Minorities and their representatives have free access to the Working Group and can freely speak and submit documents at its meetings.³⁶

2.2 Minority protection under the Council of Europe

2.2.1 European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)³⁷ is of relevance to minority protection although it lacks a provision directly guaranteeing minority rights. It entails universally applicable individual rights that can be claimed, individually or collectively, by minorities. Relevant provisions include the protection of private life (article 8), freedom of thought, conscience and religion (article 9), freedom of expression (article 10), freedom of assembly and association (article 11) and the right to education (article 2 of Protocol 1). The only provision expressly referring to national minorities is article 14, the non-

the Commentary to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities”, paras. 61-63.

³⁴ It is however not that important for the 1992 UN Declaration to define “national minority” as even if a group is held not to constitute a national minority, it can still be an ethnic, religious or linguistic minority and therefore be covered by the Declaration. As the Declaration is inspired by article 27 ICCPR it can be assumed that its scope is at least as wide as that article and the concept of minority would therefore cover also non-citizens. A. Eide, “Final text of the Commentary to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities”, paras. 8-9.

³⁵ M. Estébanez, “The protection of national or ethnic, religious and linguistic minorities” in Neuwahl and Rosas (eds.), *The European Union and Human Rights*, 1995, p. 160. For a good discussion on the pros and cons of the UN Declaration see G. Alfredsson, “Minority Rights: A Summary of Existing Practice”, Phillips and Rosas (eds.), *Universal Minority Rights*, 1995, pp. 80-83.

³⁶ G. Alfredsson, “Minority Rights: International Standards and Monitoring Procedures”, *Minority Rights Handbook, Latvian Human Rights Quarterly*, Issue 5/6 1998, p. 24. It should be noted, that apart from the two UN instruments mentioned above, specific minority provisions are also featured in the Convention on the Prevention and Punishment of the Crime of Genocide (article II), the Convention on the Elimination of all forms of Racial Discrimination (articles 2 and 4), the International Covenant on Economic, Social and Cultural Rights (article 13), the Convention on the Rights of the Child (article 30), the UNESCO Convention on the Elimination of Discrimination in Education (article 5) and the UNESCO Declaration on Race and Racial Prejudice (article 5).

³⁷ European Treaty Series No. 005 (as amended by protocol 11, ETS No. 155). Adopted 4 November 1950.

discrimination clause.³⁸ In *Thlimmenos v. Greece* the European Court of Human Rights argued that the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention also are violated when states, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different. The Court thereby held that the ECHR imposes positive obligations on the basis of the prohibition in article 14.³⁹ The use of article 14 is limited since it only prohibits discrimination in the enjoyment of one of the other rights guaranteed by the Convention.⁴⁰ However, Protocol No. 12 to the Convention, which opened for signature in November 2000, removes this limitation and guarantees that no one shall be discriminated against on any ground by any public authority.⁴¹

Since the ECHR is directed towards protecting individual rights, protection for minority groups would only be incidental, although individual representatives of a group would be able to bring an application to uphold the rights of the group under article 34.

Although the European Court of Human Rights has repeatedly stressed that the ECHR contains no specific minority rights provision, it has addressed minority issues in a number of cases dealing with issues such as expulsion, inhuman and degrading treatment, freedom of expression, language and religion, family and private life, representation rights and registration and recognition of minority organisations, including political parties and religious institutions.⁴² Some cases have concerned educational rights. There is generally no right to mother-tongue education under the ECHR.

³⁸ The article reads as follows: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, religion, political or other opinion, national or social origin, *association with a national minority*, property, birth or other status (emphasis added).

³⁹ Case *Thlimmenos v. Greece*, Application No. 34369/97, judgement of 6 April 2000, para. 44.

⁴⁰ In *Thlimmenos v. Greece* the Court explained that the application of article 14 does not presuppose a *breach* of one or more of the Convention provisions. It suffices that the facts of a case fall within the ambit of one or more substantive provisions of the Convention or its Protocols (emphasis added). Case *Thlimmenos v. Greece*, Application No. 34369/97, judgement of 6 April 2000, para. 40. The standard definition of discrimination is found in the Belgian Linguistics Case, *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, Judgement of 23 July 1968, paragraph A (4).

⁴¹ European Treaty Series No. 177. Opened for signature 4 November 2000. This instrument has however to date only been ratified by five states and has therefore not yet entered into force. Bosnia and Herzegovina, Croatia, Cyprus, Georgia and San Marino are so far the only Council of Europe member states that have ratified the protocol. 10 EU member states have signed it. Denmark, France, Spain, Sweden and United Kingdom have not signed as of yet.

⁴² For a thorough discussion on minority rights jurisprudence in the European Court on Human Rights see G. Gilbert, "The legal protection accorded to minority groups in Europe", *Netherlands Yearbook of International Law*, 1992, pp. 81-93, G. Gilbert, "The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights", *Human Rights Quarterly*, 2002, Volume 24, Issue 3 and finally G. Gilbert, "Jurisprudence of the European Court and Commissions of Human Rights in 1999 and Minority Groups", UN Doc. E/CN.4/Sub.2/AC.5/2000/CRP.1/ of 10 April 2000.

However, in *Cyprus v. Turkey* the Court held that denial of mother-tongue education at the secondary level did not meet the legitimate wish of Greek Cypriots living in Northern Cyprus to have their children educated in accordance with their ethno-cultural tradition, and in fact amounted to a denial of the substance of the right to education under article 2 of the First Protocol.⁴³ The right to free elections (article 3 of Protocol No. 1) has also been dealt with. In *Podkolzina v. Latvia* the applicant (belonging to a Russian speaking minority) held the valid language certificate required to stand as a candidate for election to the Latvian Parliament. Although the Latvian authorities had not contested the validity of that document, the applicant had nonetheless been required to sit a further language examination with the result that the applicant was taken off the list of candidates, on ground of insufficient knowledge of Latvian. The assessment had been left to the sole discretion of a single official, whose discretionary powers the Court considered to be excessive. The Court held that, in the absence of any objective guarantees, the procedure followed in the applicant's case was incompatible with the procedural requirements of fairness and legal certainty for determining eligibility for election. There had thus been a violation of article 3 of Protocol No. 1.⁴⁴ Important to note is that in the *Podkolzina v. Latvia case* the Court did not examine separately whether there had been a violation of article 14, but only looked into the complaint under article 3 of Protocol No. 1. Article 14 is frequently not considered where a breach of the substantive provision has been determined.

2.2.2 European Charter for Regional and Minority Languages

The 1992 European Charter for Regional and Minority Languages⁴⁵ (hereafter the Charter) has as its main objective to protect and promote regional or minority languages as a threatened aspect of Europe's cultural heritage.⁴⁶ However, the Charter does not specify what languages correspond to the concept of regional or minority languages.⁴⁷ The Charter contains a non-discrimination provision and allows for special measures, but

⁴³ *Cyprus v. Turkey*, application No. 25781/94, judgment of 10 May 2001.

⁴⁴ *Podkolzina v. Latvia*, application No. 46726/99, judgement of 9 April 2002.

⁴⁵ European Treaty Series No. 148. Adopted 25 June 1992 and entered into force 1 March 1998.

⁴⁶ European Charter for Regional or Minority Languages, explanatory report, para. 10. <http://conventions.coe.int/Treaty/EN/cadreprincipal.htm> last visited 2003-12-20.

⁴⁷ Explanatory report, para. 21. The value of such a list would be limited since at any rate, with respect to the specific measures in Part III, it is left largely up to the parties to determine which provisions shall apply to what language. The Charter provides for measures of support to two types of languages: regional or minority languages (defined in article 1(a) and para. 31 of the explanatory report) and certain non-territorial languages (defined in article 1(c) and para. 36 of the explanatory report). Only the regional or minority languages are entitled to the benefit of part III of the Charter (para. 37 explanatory report).

it does not provide for the granting of either individual or collective rights for the speakers of regional or minority languages.⁴⁸ Its aim is not to stipulate the rights of ethnic and/or cultural minorities, but to protect and promote regional or minority languages as such.⁴⁹ The Charter only provides for minimum standards that the contracting parties have to abide by.⁵⁰ A general core of principles, as well as a series of specific provisions concerning the place of regional or minority languages in the various sectors of community life, are established (part III of the Charter). The states are free to determine which of these provisions will apply to each of the languages spoken within their frontier thus allowing for extensive state discretion.⁵¹ For example, article 8 addresses education through a lengthy list of measures regarding pre-school, primary, secondary, technical and vocational, university and higher education and finally adult and continuing education. There is no strict obligation to secure these types of education in the languages protected and states may limit themselves to providing teaching of these languages at primary, secondary and/or technical and vocational education level to those people who so request or wish in a number “considered sufficient”.

To ensure that the application of the Charter is correctly implemented, provision is made for a monitoring and reporting mechanism.⁵² The reports are examined by a committee of experts, which, after consulting with the state party concerned, prepares a report to the Committee of Ministers of the Council of Europe. The outcome is merely a recommendation to the relevant state party and it is up to the Committee whether the reports are to be made public. In addition, the Secretary-General of the Council of Europe is responsible for presenting a detailed report to the Parliamentary Assembly every two years on the application of the Charter.⁵³

The Charter has been slow in obtaining acceptance. To date 11 EU member states have signed it and 8 have ratified it. Belgium, Greece, Ireland and Portugal have neither signed, nor ratified.

⁴⁸ The Charter, article 7(2). Explanatory report, para. 11. By avoiding an approach based on individual or group rights the authors of the Charter have missed an opportunity to advance the notion that minority language rights are fundamental human rights under international law. The Charter thus does not go as far in this regard as the Framework Convention in its article 1. R. Dunbar, “Minority Language Rights in International Law”, *International and Comparative Law Quarterly*, 2001, Volume 50, p. 100.

⁴⁹ Explanatory report to the Charter, paras. 11,17.

⁵⁰ The Charter, article 4(2).

⁵¹ Explanatory report to the Charter, paras. 22-23, 43-45. States undertake to apply a minimum of 35 of these provision, including at least three provisions chosen from among those included in articles 8 (education) and 12 (cultural activities and facilities) respectively and one from among those included in articles 9 (judicial authorities), 10 (administrative authorities and public services), 11 (media) and 13 (economic and social life) respectively. See the Charter article 2(2).

⁵² The Charter, articles 15-16. According to article 15(1), the first report shall be presented within the year following the entry into force of the Charter with respect to the party concerned, the other reports at three-yearly intervals after the first report.

⁵³ The Charter, article 16.

2.2.3 Framework Convention for the Protection of National Minorities

Several of the general fundamental rights recognised in the Framework Convention⁵⁴ can already be found in the ECHR.⁵⁵ However, particular implications for members of minorities are emphasised. On a positive note, the Framework Convention makes clear that protection of persons belonging to national minorities is an integral part of the international protection of human rights.⁵⁶ In addition, the Framework Convention recognises the non-discrimination principle.⁵⁷ It also introduces the principle of full and effective equality and clearly establishes a duty for states to take adequate measures to achieve such equality.⁵⁸ Article 10(1) states that persons belonging to a national minority have a right to use his or her minority language in private as well as in public and in relations with administrative authorities.⁵⁹ Article 10(3) gives the right of persons belonging to minorities to be informed promptly, in a language which he or she understands, of the reasons for his or her arrest and to defend him- or herself in that language, if necessary with the assistance of a free interpreter.⁶⁰ According to article 11(3) states are required to display traditional local names, street names and topographical indications intended for the public in both the minority language and the majority or official language.⁶¹ Article 13 refers to the right of minorities to establish and manage their own educational

⁵⁴ European Treaty Series No. 157. Adopted 10 November 1994. Entered into force 1 February 1998.

⁵⁵ See for example Framework Convention, article 7. In connection to this see also article 23.

⁵⁶ Framework Convention, article 1.

⁵⁷ Ibid, article 4(1).

⁵⁸ Ibid, article 4(2). In respect of persons belonging to national minorities it goes further than the non-discrimination provision contained in article 1 of Protocol 12 to the ECHR. Nonetheless, the latter instrument may be highly relevant to persons belonging to national minorities because of the possibility to appeal to the European Court of Human Rights. F. Steketeer, "The Framework Convention: A Piece of Art or A Tool for Action?", *International Journal of Minority and Group Rights*, 2001, Volume 8, No. 1, p. 5.

⁵⁹ Para. 63 of the explanatory report makes clear that the reference to the use of the minority language in "public life" is restricted to its use in public places or in the presence of others. It is not concerned with communications with public authorities or, presumably, the use of the minority language in official contexts. The expression "administrative authorities" is very flexible and leaves the states a wide measure of discretion (explanatory report, para. 64).

⁶⁰ The protection afforded only applies where the individual does not understand the language being employed and does not require the use of the victim's language unless he/she understands no other. It does not permit a member of a minority to choose the language to be used. R. Dunbar, "Minority Language Rights in International Law", *International and Comparative Law Quarterly*, 2001, Volume 50, p. 105.

⁶¹ This obligation is limited geographically to those areas "traditionally inhabited by substantial numbers" of minority language speakers, is conditional on there being "sufficient demand" and is aspirational as it requires only that states "endeavour" to meet the obligation.

institutions, although the state has no obligation to fund these institutions.⁶² The right of every person belonging to a national minority to learn his or her minority language is recognised in article 14(1). The article does not imply positive action, notably of a financial nature, on the part of the state.⁶³ Finally, the Framework Convention holds that the state parties shall create the conditions necessary for the effective participation of persons belonging to minorities in cultural, social and economic life and in public affairs.⁶⁴ On a more critical note⁶⁵, it is noteworthy that the Framework Convention recognises rights of individuals rather than rights of minority groups.⁶⁶ Furthermore, implementation of the principles of the Framework Convention is to be achieved through national legislation and appropriate governmental policies.⁶⁷ The focus is on state action rather than the rights of persons belonging to minorities. The provisions, which are not directly applicable, leave the states concerned a measure of discretion in the implementation of the objectives they have undertaken to achieve.⁶⁸ Because there is no organ to which the individuals can petition, it is only between states that legally binding obligations arise. State parties are bound to uphold the treaty provisions under international law, but everything is at

⁶² The right to set up schools without any guarantee of state support is a hollow right at best, particularly in the context of minority language communities that are often economically as well as linguistically weak and vulnerable.

⁶³ Explanatory report, para. 74. One might ask oneself how the right is to be realised if no support is given.

⁶⁴ Framework Convention, article 15. For examples of measures to be taken see Explanatory report, para. 80. The emphasis on individual rights over collective rights means that the minority, as a group, has no means of access to the decision making process of the state. The measures provided for in the Explanatory report are however predicted largely upon the collective right of the group for inclusion and consequently contrary to the individualistic approach adopted by the Framework Convention as a whole. There is, unlike under the OSCE High Commissioner for National Minorities, no structure for effective dialogue between the majority and the minority provided for under the Framework Convention. S. Wheatley, "Current Topic: The Framework Convention for the Protection of National Minorities", *European Human Rights Law Review*, 1996, Volume 1, p. 590. For the importance of political participation for national minorities see S. Wheatley, "Minority rights and Political Accommodation in the "New" Europe", *European Law Review*, 1997, Volume 22, No. 5 (Human Rights Survey), pp. 63-81.

⁶⁵ For a critical assessment of the Framework Convention, see G. Alfredsson, "A Frame an Incomplete Painting: Comparison of the Framework Convention for the protection of National Minorities with International Standards and Monitoring Procedures", *International Journal on Minority and Group Rights*, Volume 7, No. 4, pp. 291-304. Alfredsson even goes as far as to note "it is as if the "frame" in the Framework Convention title is an admission of the fact that the painting is incomplete". See p. 294.

⁶⁶ Framework Convention's explanatory report, para. 13.
<http://conventions.coe.int/Treaty/en/Reports/Html/157.htm> last visited 2003-12-10.

⁶⁷ Framework Convention, preamble, para. 13.

⁶⁸ See Explanatory report to the Framework Convention, paragraph 11 and 29. One example of an programmatic provision in the Framework Convention is article 6(2) which refers to *appropriate measures* to be taken by state parties to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity (emphasis added). See G. Alfredsson, "A Frame an Incomplete Painting: Comparison of the Framework Convention for the protection of National Minorities with International Standards and Monitoring Procedures", *International Journal on Minority and Group Rights*, Volume 7, No. 4, p. 294.

the discretion of the state with regard to its own particular circumstances and nothing is directly applicable.⁶⁹ However, in its defence, it is argued that the notion of a framework makes clear that the instrument does not contain a blueprint or unique solutions for settling minority issues. Rather it underlines the need for filling in, most notably through the adoption of legislation, policies and programmes at a national level.⁷⁰

The Framework Convention provides for follow-up monitoring missions in state parties, but does not have a supranational enforcement mechanism. Monitoring is based on a periodical state reporting mechanism. The final say on monitoring by the Advisory Committee rests with the Committee of Ministers that is a political body.⁷¹ The UN Commission on Human Rights and other UN forums have no such say over the treaty bodies.⁷² In my opinion, this is one of the main weaknesses of the Convention. Monitoring should not be politicised. However, any international monitoring cannot substitute the action that needs to be taken at domestic level, as it is there that the real results must be achieved through implementation of the Framework Convention's standards.

The Framework Convention refers only to "national minorities" and does not contain a definition of what is meant by the phrase.⁷³ It was decided to

⁶⁹ G. Gilbert, "The Council of Europe and minority rights", *Human Rights Quarterly* 18, 1996, p. 174. Article 21 of the Framework Convention states that: "nothing in the present framework convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of a state.

⁷⁰ F. Steketee, "The Framework Convention: A Piece of Art or A Tool for Action?", *International Journal of Minority and Group Rights*, 2001, Volume 8, No. 1, p. 4.

⁷¹ Framework Convention, articles 24-26. For full details see Committee of Ministers Resolution (97)10 at

<http://www.humanrights.coe.int/Minorities/Eng/FrameworkConvention/Monitoring%20by%20the%20CM/Rules.htm> (last visited 2003-12-20). It thus has a weaker monitoring system than international instruments such as the International Covenant on Civil and Political Rights and International Convention on the Elimination of all forms of Racial Discrimination, which both provide for national remedies and individual complaints.

⁷² G. Alfredsson, "A Frame an Incomplete Painting: Comparison of the Framework Convention for the protection of National Minorities with International Standards and Monitoring Procedures", *International Journal on Minority and Group Rights*, Volume 7, No. 4, pp. 295-296. As the Council of Europe Parliamentary Assembly observed: "The Convention is weakly worded. It formulates a number of vaguely defined objectives and principles, the observation of which will be an obligation of the Contracting States but not a right which individuals may invoke. Its implementation machinery is feeble and there is a danger that, in fact, the monitoring procedures may be left entirely to governments". Council of Europe Parliamentary Assembly Recommendation 1255 (1995) para. 7. <http://www.meh.hu/nekh/Angol/7/coe/rec1255.htm> last visited 2003-12-20.

⁷³ The preamble states that a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity. There is a potential contradiction in article 1 which refers to the protection of national minorities as opposed to persons belonging to them. The ambiguity in the text has led to many signatories adding their reservations and declarations in which they provide their own definitions of a national minority. Hughes and

adopt a pragmatic approach, based on the recognition that it was impossible at the time to arrive at a definition capable of gaining general support of all Council of Europe member states.⁷⁴ All this said, the Framework Convention remains, for the time being, one of the very few legally binding standards specifically on the subject of minority protection.⁷⁵

2.3 OSCE measures

2.3.1 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE

The Copenhagen Document constitutes an important step towards an adequate international system for the protection of minorities.⁷⁶ It was adopted unanimously by the participating states and is the most far-reaching international instrument regarding minority issues.⁷⁷

Its main positive aspect is that it goes further than both the Framework Convention and the 1992 UN Declaration in its protection of the identity of minorities. Furthermore, it has elaborated more on the possibility to learn a mother tongue language and to receive instruction in that language than the Council of Europe's Framework Convention.⁷⁸ Article 30 underlines the necessity for national minorities to participate in the decision-making process, especially in cases where the issues being considered affect them directly. The principle of non-discrimination is recognised in article 31 that also allows for special measures to be adopted. The right of establishment of educational institutions is provided for in article 32(2), but no obligation to fund these institutions is imposed upon states. However, it is stipulated that these institutions may seek public assistance from the state in conformity with national legislation. Article 33 stresses the importance of the state not only to protect the identity of the minorities but promoting it as well. Of great practical interest, contained in article 40 of the Copenhagen

Sasse, "Monitoring the Monitors: EU Enlargement Conditionality and Minority protection in the CEECs", *Journal on Ethnopolitics and Minority Issues in Europe*, Issue 1/2003, p. 6.

⁷⁴ Explanatory report to the Framework Convention, para. 12.

⁷⁵ The Framework Convention has, to date, been signed by 14 EU member states and ratified by 10. Only France has neither signed nor ratified. Out of the candidate states only Latvia has not ratified, but only signed it. According to article 29(1) the Framework convention is also open for signature by states that are not members of the Council of Europe.

⁷⁶ K. Henrard, "The impact of the enlargement process on the development of a minority protection policy within the EU: Another aspect of responsibility/burden-sharing?" *Maastricht Journal of European and Comparative Law*, 2002, Volume 9, No. 4, pp. 374. Access the document at <http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm> last visited 2003-12-12.

⁷⁷ A. Bloed, "The OSCE and the issue of national minorities" in Phillips and Rosas (eds.), *Universal minority rights*, 1995, p. 114.

⁷⁸ See Copenhagen Document articles 32(1)-32(5) and 34.

Document, is also the recognition of the particular problems of the Roma. Finally, in the context of the facilitation of effective minority participation in public affairs, paragraph 35 of the Copenhagen Document refers to the establishment of “appropriate local autonomous administrations” as one of the possible means to “protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities”. There is no analogous reference in the Framework Convention or the UN Declaration.⁷⁹ The Copenhagen Document is however considered to be politically binding rather than legally binding. Furthermore, it contains no definition of what constitutes a national minority. It also does not solve the dilemma of the individual or collective nature of the rights of national minorities.⁸⁰

2.3.2 The 1996 Hague Recommendations Regarding the Education Rights of National Minorities

In 1995 the High Commissioner for National Minorities (HCNM) requested the Foundation on Inter-Ethnic Relations to consult a small group of internationally recognized experts with a view to receiving their recommendations on an appropriate and coherent application of education rights of minorities in the OSCE region.⁸¹ Similar requests were then made as regards minorities’ linguistic rights and participation rights in public life. The latter two will be dealt with below.

The Hague recommendations⁸² attempt to clarify in relatively straightforward language the content of minority education rights generally applicable in the situations in which the HCNM is involved.⁸³ The document encompasses a number of important standards and recognises that the right of persons belonging to national minorities to maintain their identity can only be fully realised if they acquire a proper knowledge of their mother tongue during the educational process. It further states that minorities also have an obligation to learn the state language.⁸⁴ Furthermore,

⁷⁹ M. Estébanez, “Minority protection and the OSCE”, Cumper and Wheatley (eds.), *Minority rights in the “new” Europe*, 1999, pp. 34-35.

⁸⁰ A. Bloed, “The OSCE and the issue of National Minorities”, Phillips and Rosas (eds.), *Universal Minority Rights*, 1995, p. 115.

⁸¹ J. Packer, “The protection of minority language rights through the work of OSCE institutions”, S. Trifunovska (ed.), *Minority rights in Europe: European minorities and languages*, 2001, p. 279. The Office of the High Commissioner for National Minorities was set up to be an instrument of conflict prevention at the earliest possible stage. The HCNM has proven to be an important tool in that it mediates and reports on minority issues. A. Bloed, “The OSCE and the issue of National Minorities”, Phillips and Rosas (eds.), *Universal Minority Rights*, 1995, p. 114.

⁸² The Hague recommendations, <http://www.osce.org/hcnm/documents/recommendations/hague/index.php3> last visited 2003-12-10.

⁸³ The Hague recommendations, introduction, para. 7.

⁸⁴ The Hague recommendations, para. 1.

it holds that when states apply international instruments that may benefit national minorities they should consistently adhere to the fundamental principles of equality and non-discrimination.⁸⁵ The recommendations acknowledge that special measures are sometimes required for the implementation of minority language education rights⁸⁶ and emphasise the importance of minority participation in the development and implementation of policies and programmes related to minority education.⁸⁷ Moreover, the right for minorities to establish and manage their own private educational institutions in conformity with domestic law is recognised.⁸⁸ The importance for states to offer minorities the possibility of being taught in their own language is emphasised.⁸⁹

2.3.3 The 1998 Oslo Recommendations Regarding the Linguistic Rights of National Minorities

The Oslo recommendations attempt to clarify the content of minority language rights generally applicable in the situations in which the HCNM is involved.⁹⁰ These recommendations recognise that on the one hand, language is a personal matter closely connected with identity, but on the other hand, language is an essential tool of social organisation that in many situations becomes a matter of public interest. At the adoption of the recommendations it was hoped that they would provide a useful reference for the development of states' policies and laws that would contribute to an effective implementation of the language rights of persons belonging to national minorities, especially in the public sphere.⁹¹

The Oslo recommendations include the right of minorities to use personal names in their own language and that these shall be given official recognition (para. 1). In areas inhabited by a significant number of persons belonging to a national minority and when there is sufficient demand, public authorities shall make local names, street names and other topographical indications intended for the public available also in minority languages.⁹² Moreover, the recommendations encompass the right to appropriate judicial resources, including independent national institutions, in cases where linguistic rights have been violated (para. 16). Finally, the right to be

⁸⁵ Ibid, para. 2.

⁸⁶ Ibid, para. 4.

⁸⁷ Ibid, para. 5.

⁸⁸ Ibid, para. 8. Although there is no formal obligation for states to fund these private establishments, these institutions should not be prevented from seeking resources from all domestic and international sources. Explanatory note to the Hague Recommendations, p. 7 of the Hague Recommendations.

⁸⁹ Ibid, paras. 11-13.

⁹⁰ The Oslo recommendations, p. 2,

<http://www.osce.org/hcnm/documents/recommendations/oslo/index.php3> last visited 2003-12-10.

⁹¹ Ibid, p. 3.

⁹² Ibid, para. 3.

informed promptly, in a language understood by a minority, of the reasons for arrest and/or detention and of the nature and cause of any accusation against them, and to defend themselves in that language is guaranteed under paragraph 17. In places where persons belonging to a national minority live in significant numbers and where it is desired, these persons should have the right to express themselves in their own language in judicial proceedings.⁹³

2.3.4 The 1999 Lund Recommendations on the Effective Participation of National Minorities in Public Life

The purpose of the Lund recommendations is to encourage and facilitate the adoption of specific measures to alleviate tensions related to national minorities and thus serve the ultimate conflict prevention goal of the HCNM.⁹⁴ The recommendations relate to participation in decision-making, self-governance and ways of guaranteeing such effective participation in public life. The basic conceptual division within the recommendations is between participation in governance of the state as a whole and self-governance over certain local or internal affairs.⁹⁵

General principle 1 of the recommendations states that the aim is to “facilitate the inclusion of minorities within the state and enable minorities to maintain their own identity and characteristics, thereby promoting the good governance and integrity of the state”. The recommendations entail a request upon states to ensure that opportunities exist for minorities to have an effective voice at the level of central government.⁹⁶ Furthermore, states shall guarantee the right of persons belonging to national minorities to take part in the conduct of public affairs, including the rights to vote and stand for office without discrimination. The freedom to establish political parties is also guaranteed.⁹⁷ Moreover, the recommendations call upon states to promote participation of national minorities at the regional and local levels.⁹⁸ A very important aspect of the recommendations is the recognition that effective participation of minorities in public life may call for non-

⁹³ Ibid, para. 18. It is reasonable to expect that states should, as far as possible, ensure the rights of persons belonging to national minorities to express themselves in their language in all stages of judicial proceedings (whether criminal, civil or administrative) including through instances of appeal. Explanatory report, para. 18.

⁹⁴ The Lund recommendations, p. 4, <http://www.osce.org/hcnm/documents/recommendations/lund/index.php3> last visited 2003-12-10.

⁹⁵ Ibid, pp. 4-5.

⁹⁶ Ibid, part II, para. A (6).

⁹⁷ Ibid, part II, paras. B (7-8). While states have considerable latitude in choosing the specific manner in which to comply with these obligations, they must do so without discrimination and should aim for as much representativeness as possible. Explanatory report, part II, para. B (7).

⁹⁸ Ibid, part II, para. C (11).

territorial or territorial arrangements of self-governance or a combination thereof.⁹⁹

The Hague, Oslo and Lund recommendations are not legally binding, but have served as references for policy- and lawmakers in a number of states.

2.4 Conclusion

The body of international law that can be applied to minorities has developed enormously over the past twenty or so years. Non-discrimination provisions are well covered in international and regional instruments, but special rights have also gained increased interest. The importance of minority protection has surfaced in a European environment that has seen lack of such protection turn into civil war.

A large majority of European states have ratified the international treaties that contain rights for persons belonging to minorities and have thereby, at least in most cases, accepted the accompanying monitoring and individual complaint procedures. Most European states are bound by article 27 of the ICCPR and have accepted its complaint mechanism. As has been previously shown, rights under article 27 may not be restricted to state citizens or residents alone. Moreover, its applicability is not limited to official recognition of a minority by a state. The ECHR also entails binding international obligations enforceable through a system of individual petition. However, it only contains one article directly mentioning minorities, article 14. This provision is limited since it only prohibits discrimination in the enjoyment of one of the other rights guaranteed by the Convention. Even though the jurisprudence of the European Court of Human Rights suggests that minority rights can be protected under the ECHR, it is up to the states to provide remedies beyond damages, such as a change in legislation. Also, compliance with a decision of the Court is a matter for the Committee of Ministers and not the Court.

The Council of Europe's Framework Convention and the European Charter on Regional and Minority Languages create binding international obligations but their provisions are not enforceable by way of individual petition. The provisions are subject only to a system of state reporting and national enforcement. The Framework Convention's preference for state action rather than rights for minorities makes its standards weaker than those protected under the UN. Moreover, not all EU member states have signed and ratified it. The European Charter on Regional and Minority Languages is a "pick and choose"-instrument and this approach may reduce its legal importance and ultimately lessen its credibility.

The measures available under the OSCE are more extensive in scope than those provided for under the Council of Europe. The Lund

⁹⁹ Ibid, part III, para. 14.

recommendations are very far-reaching as regards political participation by individual members of the national minority group, an issue of major importance if the protection rendered is to be regarded as effective. The instruments provided for under the OSCE have gained a lot of support, as shown by the extensive and detailed 1990 Copenhagen Document that was adopted by all EU member states. The OSCE instruments are not legally binding, but rather of a politically binding nature. Even though they are not legally binding, they are still influential and significant in guiding state action when it comes to minority protection. Since all EU member states and candidate states are members of the OSCE, the organisation's framework should be respected and followed.

It is important to keep in mind that it does not really matter how many legal instruments states oblige themselves to adhere to: unless they are implemented effectively in the respective states, no real gain has been made.

In the foregoing chapter the international legal framework for minority protection has been dealt with. The next chapter will focus on the European Court of Justice as a potential protector of human rights and specific minority provisions within the legal framework of the European Union.

3 The European Union and Minority Rights – Legal basis

As can be seen in the foregoing chapter, minority rights are to a large extent internationalised. The Council of Europe and the OSCE have taken an increasing interest in setting norms and in intervening in minority-related conflicts and the UN has developed a few legal instruments applicable to minorities. Whereas this norm setting has taken place internationally, the notions of ethnic minority and the European Union have for a long time belonged to two different worlds. While an external policy on minority rights has been prevalent within the Union for a number of years, an internal policy on ethnic minorities has been lacking. The concept of minority rights has not had a specific place in Community law, which may relate to the fact that some EU member states have emphasised the unity of the state rather than special minority arrangements.¹⁰⁰ France has made a reservation to article 27 of the ICCPR and even goes as far as not to recognise any minorities on its territory.¹⁰¹ Moreover, Germany is unwilling to grant minority status to groups of non-citizens legally resident within its territory.¹⁰² Another explanation might be that the integration process has primarily been an economic project. Minority rights have long occupied a very marginal place, but have recently been recognised as a matter of concern as can be seen from the many instruments examined under chapter 1.¹⁰³

In the following a brief overview of the different legal sources for minority rights protection within the EU will be given. The chapter will try to answer the question as to whether there is any movement towards a EU standard for minority protection. It will cover only the internal minority rights provisions. The EU's endeavours to promote minority rights externally will therefore not be dealt with.

¹⁰⁰ M. Estébanez, "The protection of national or ethnic, religious and linguistic minorities", in Neuwahl and Rosas (eds.), *The European Union and Human Rights*, 1995, p. 133.

¹⁰¹ Article 2 of the French Constitution provides for the unity of the French people and nation and prohibits the recognition of national minorities.

¹⁰² M. Estébanez, *International Organizations and Minority Protection in Europe*, 1996, pp. 149-150.

¹⁰³ For further reading on the subject see G. Von Toggenburg, "A rough orientation through a delicate relationship: The European Union's endeavours for its minorities", Trifunovska (ed.), *Minority rights in Europe – European minorities and languages*, 2001, pp. 205-206.

3.1 Case law of the European Court of Justice

3.1.1 Developing a human rights case law

The founding treaties made no explicit reference to human rights, but were of a relatively narrow (economic) scope. In compensating for the lack of Community legislation protecting basic rights the Court developed case law in which human rights were considered an integral part of the general principles common to the legal systems of all member states. That, in turn, provided the basis for Community law of which the Court is a guardian.¹⁰⁴

The question of fundamental rights first faced the European Court of Justice, (hereinafter referred to as the ECJ), in 1959. In two judgements of 1959 and 1960 the ECJ held that it was not competent to examine the legality of acts of the Community institutions according to the yardstick of national fundamental rights.¹⁰⁵ There was nothing in the Community Treaties on which the ECJ could draw.¹⁰⁶

However, the case law of the ECJ soon went in another direction. One of the first references to human rights can be found in the *Stauder* case where the Court referred to: “[...] *fundamental human rights enshrined in the general principles*¹⁰⁷ *of Community law and protected by the Court*”.¹⁰⁸

In *Internationale Handelsgesellschaft* the ECJ reaffirmed the *Stauder* case and further specified: “*the protection of such rights, whilst inspired by the constitutional traditions common to member states, must be ensured within the framework of the structure and objectives of the Community.*”¹⁰⁹

In the *Nold* case the Court went one step further and summarized its position on human rights: “[...] *In safeguarding these rights, the Court is bound to draw inspiration from the constitutional traditions common to the member states, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those states.*”¹¹⁰

¹⁰⁴ The external dimension of the EU’s human rights policy: From Rome to Maastricht and beyond, Commission communication COM (95) 567 of 22 November 1995, p. 2.

¹⁰⁵ C-1/58, *Stork v. High Authority*, judgement of 4 February 1959 and C-40/59, *Ruhrkohlenverkaufsgesellschaft v. High Authority*, judgement of 15 July 1960, para. 4.

¹⁰⁶ F. Jacobs, “Human Rights in the European Union: the role of the Court of Justice”, *European Law Review*, 26 (2001), p. 332.

¹⁰⁷ For a presentation of the ECJ’s “general principle doctrine” see C-299/95, *Friedrich Kremzow v. Austrian state*, judgement of 29 May 1997, paras. 14-15.

¹⁰⁸ C-29/69, *Stauder v. City of Ulm*, judgement of 12 November 1969, para. 7.

¹⁰⁹ C-11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, judgement of 17 December 1970, para. 4.

¹¹⁰ C-4/73, *Nold v. Commission*, judgement of 14 May 1974, para. 13.

If *Stauder* confirmed the existence of fundamental rights in Community law and *Internationale Handelsgesellschaft* identified their primary source as constitutional traditions of the member states it can be said that the *Nold* case introduced a secondary source in that it stated that: “[...] *international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.*”¹¹¹

Since the *Nold* case the ECJ has repeatedly referred explicitly to the ECHR.¹¹² Even though the Court decided in 1996 that the Community could not accede to the Convention, it has stated that the Convention has special significance.¹¹³ Also, as can be concluded from the *Nold* case, the use of sources of fundamental rights in international law alongside the ECHR is not excluded.

The ECJ did not only rule on protection of fundamental rights where it was Community institutions that were alleged to have infringed these rights. In the *Wachauf* case it was shown that member states are also, as a matter of Community law, required to observe fundamental rights when implementing Community law.¹¹⁴ Furthermore, according to the *ERT* case, as soon as rules of national legislation “*fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights*”.¹¹⁵ The ECJ is thereby not only guarantor of the coherence of Community legislation with international legal standards on minority protection, but also of national legislation as long as it falls within the Community’s field of action. This may have consequences for minority protection in those states that refuse to provide for such protection, even if such refusal is based on their own national legal texts.¹¹⁶ In *Cinéthèque* it was however held that the ECJ has no power to examine the compatibility with the ECHR of national legislation that

¹¹¹ Ibid.

¹¹² See for example C-44/79, *Hauser v. Land Rheinland-Pfalz*, judgement of 13 December 1979, paras. 4, 5, 17, 19, C-136/79, *National Panasonic v. Commission*, judgement of 26 June 1980, paras. 17, 19, C-36/75, *Rutili v. Minister for the Interior*, judgement of 28 October 1975, para. 32. For more recent judgements see C-260/89, *Ellinki Radiophonia Tileorassi* (ERT), judgement of 18 June 1991, paras. 42,44 and C-299/95, *Kremzow v. Austria*, judgement of 29 May 1997, para. 14.

¹¹³ Opinion 2/94 of 28 March 1996 entitled “Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms”, Opinion of the Court, para. 33. See text surrounding note 140.

¹¹⁴ C-5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, judgement of 13 July 1989, para. 19.

¹¹⁵ C-260/89, *Ellinki Radiophonia Tileorassi* (ERT), judgement of 18 June 1991, para. 42.

¹¹⁶ M. Estébanez, *International Organizations and Minority Protection in Europe*, 1996, p. 177.

concerns an area that falls within the jurisdiction of the national legislator.¹¹⁷

Arguably, this jurisprudence may reach out towards minority rights considerations. However, it can also be argued that the ECJ gave fundamental rights a prominent place in Community law at a time (early 1970's) when there was no concern for minority protection within the European Community.¹¹⁸ On the other hand, since the case law of the ECJ is referring to "international treaties for the protection of human rights on which the member states have collaborated or which they are signatories", some minority rights could be included in the *acquis*.¹¹⁹ Minority rights are clearly considered to be part of human rights.¹²⁰ However, even though there is room for references to other international treaties besides the ECHR, this Convention is the most common source of reference for fundamental rights made by the ECJ and it lacks a specific minority provision.¹²¹

3.1.2 The ECJ's role in protecting human rights

The ECJ's role in protecting fundamental rights should not be overestimated. The question is whether the ECJ can, or even should, deal with human rights questions. In terms of number of cases, its role in the field is more limited than that of national constitutional courts. Compared to the thousands of cases of alleged breaches of fundamental rights dealt with every year by national courts, there is only a handful before the ECJ. The cases in which an actual violation is found are rare.¹²² Furthermore, access to the Courts is severely hindered by the requirements set out in article 230(4) EC Treaty.¹²³ The article states that individuals seeking to challenge a Community act must bring the action before the Court of First Instance within two months after publication or notification of the act, and only if the act was addressed to the applicant and is of "*direct and individual concern*

¹¹⁷ C-60 and 61/84, *Cinéthèque SA and others v. Fédération nationale des cinémas français*, judgement of 11 July 1985, para. 26.

¹¹⁸ G. Pentassuglia, "The EU and the Protection of Minorities: The Case of Eastern Europe", *European Journal of International Law*, 2001, Volume 12, No. 1, p. 6.

¹¹⁹ B. Brandtner and A. Rosas, "Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practise", *European Journal of International Law*, 1998, Volume 9, Issue 3, p. 487. No concern seems to be taken as to whether a country has made any reservations.

¹²⁰ See for example article 1 of the Framework Convention for the Protection of National Minorities. The principle of indivisibility and interdependence of all human rights further strengthens the placing of minority rights within the context of fundamental rights.

¹²¹ For some recent judgements see C-260/89, *Ellinki Radiophonia Tileorassi (ERT)*, judgement of 18 June 1991, paras. 42, 44 and C-101/01, *Lindquist*, judgement of 6 November 2003, para. 90 (the Court took into account article 10, freedom of expression, of the ECHR). For references to other treaties see note 174.

¹²² B. de Witte, "The Past and Future Role of the European Court of Justice in the Protection of Human Rights", P. Alston (ed.), *The EU and Human Rights*, 1999, p. 869.

¹²³ All references to the EC Treaty are made to the Treaty provisions as amended by the Treaty of Nice.

to him". The preliminary reference procedure, available under article 234 EC Treaty, is not a suitable alternative for a non-available direct action under article 230. Individual litigants cannot themselves decide that a preliminary reference about the validity of Community law is to be made. Instead they depend on the willingness of national courts to find that there is enough doubt about that validity that warrants an interruption in the national proceedings during which the ECJ prepares its preliminary ruling.¹²⁴ Moreover, despite the elevation of fundamental rights to the level of general principles of Community law, it has often been the general rule or objective that has prevailed against claims of violations of such rights.¹²⁵ In the *Nold* case the ECJ admitted the possibility of justifying restrictions on fundamental rights where necessary for pursuing overall Community objectives.¹²⁶ Due to the fact that the ECJ is not a human rights court it has every right to take this approach. The Union can only concern itself with fundamental rights when it is in a better position to do so than the member states (principle of subsidiarity). Therefore, the jurisdiction of the ECJ ends where EC law ends. A violation of fundamental rights by a member state when EC law is not at issue cannot be examined by the ECJ.¹²⁷

3.1.3 Recent case law

In some recent judgements, concerning linguistic rights of persons belonging to minorities, the ECJ has been faced with weighing minority rights considerations against Community interests. The *Bickel and Franz* case concerned the right of two German speakers of Austrian and German nationalities to have criminal proceedings in Italy conducted in German as was allowed for the German speaking minority in the area. The Italian Government's argument against allowing for such a proceeding was that the domestic rules were designed to recognise the ethnic and cultural identity of persons belonging to the protected minority living in the province.¹²⁸ The ECJ decided that a rule which makes the right, in a defined area, to have proceedings conducted in the language of the person concerned conditional on residency, runs counter to the principle of non-discrimination as laid down in article 6 (now 12) of the EC Treaty.¹²⁹ However, for the first time in its jurisprudence, the Court observed that the protection of a minority

¹²⁴ B. de Witte, "The Past and Future Role of the European Court of Justice in the Protection of Human Rights", P. Alston (ed.), *The EU and Human Rights*, 1999, p. 877.

¹²⁵ Ibid, p. 878. See however C-60/00, *Carpenter case*, judgement of 11 July 2002, where article 49 of the EC Treaty was read in the light of the fundamental right to respect for family life within the meaning of article 8 ECHR.

¹²⁶ C-4/73, *Nold v. Commission*, judgement of 14 May 1974, para. 14. See also C-5/88, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, judgement of 13 July 1989, para. 18.

¹²⁷ P. Drzemczewski, "The Council of Europe's Position with Respect to the EU Charter of Fundamental Rights", *Human Rights Law Journal*, Volume 22, 2001, p. 26.

¹²⁸ For an earlier rejection of this argument by the ECJ see C-137/84, *Mutsch case*, judgement of 11 July 1985.

¹²⁹ C-274/96, *Bickel and Franz case*, judgement of 24 November 1998, para. 26.

may constitute a legitimate aim, but then went on to state that this aim would not be undermined if the rules were extended to cover German speaking nationals of other member states exercising their right to freedom of movement.¹³⁰ An additional important argument held by the ECJ in favour of the defendants was that the courts concerned were in a position to conduct proceedings in German without additional complication or costs.¹³¹

The *Angonese* case concerned an application for a competition for a post at a bank that required possession of a certificate of bilingualism. This certificate was issued only after an examination that was held in a certain province in Italy. Mr Angonese, who was perfectly bilingual but lacked this certificate, contested the requirement. The ECJ ruled that the requirement of a certain level of linguistic knowledge may be legitimate, but the fact that it is impossible to submit proof of the required linguistic knowledge by any other means, in particular by equivalent qualifications obtained in other member states, must be considered disproportionate in relation to the aim in view and constituting discrimination on grounds of nationality contrary to article 48 of the EC Treaty.¹³² Important to note is that the ECJ did not rule on the question as to whether language requirements provided for by domestic law in order to protect and promote the distinct identity of national minorities which, in Europe, are usually linguistically defined and, therefore, depending to a large extent upon measures preserving their languages, are as such compatible with Community law.¹³³

It can be concluded from these two recent cases that the member states must also take into account the principles of European law when drafting and interpreting the legal provisions concerning their minorities. When there is a clash between national rules and Community law the Court has a duty to enforce principles of Community law. Furthermore, minority protection involves (positive) discrimination based on the principle of equality, and this may imply a violation of the principle of non-discrimination, no matter that the ECJ recognised in *Bickel and Franz* that the protection of an ethnic-cultural minority may constitute a legitimate aim of domestic legislation as concerns the proportionality test under Community law. Finally, because no European standard concerning protection of minorities exists¹³⁴, as long as

¹³⁰ Ibid, para. 29.

¹³¹ Ibid, para. 30.

¹³² C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano SpA* case, judgement of 6 June 2000, paras. 44-45.

¹³³ R. Hofmann, "National Minorities and European Community Law", *Baltic Yearbook of International Law*, Volume 2, 2002, p. 172.

¹³⁴ In *Chapman v. the United Kingdom* the European Court of Human Rights observed that there could be said to be an emerging international consensus amongst the contracting states of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, in particular in the Framework Convention, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community. However, the Court further held that it was not persuaded that the consensus was sufficiently concrete for it to derive any guidance as to the conduct of or standards which contracting states

the mere economic dimension of EC law prevails, the ECJ is likely to give preference to economic orientated principles aimed at granting the same conditions to all European citizens without any discrimination based on grounds of nationality. On the contrary, only if some general standards for minority protection become part of EC law will the ECJ be able to balance principles like legitimate minority protection with equal conditions for all European citizens.¹³⁵

Another, and in my opinion better, approach would be to let the ECJ deal with the *acquis* as it now stands and leave it to the European Court of Human Rights (from now on referred to as ECtHR) to control the ECJ in the human rights area. This would entail a check by an outsider of the human rights performance of EU institutions. In *Matthews v. the United Kingdom* the ECtHR examined whether the denial of the right to vote in elections to the European Parliament by citizens of Gibraltar violated article 3 of Protocol 1 of the ECHR. The Court ruled that the responsibilities of parties to the Convention remained intact, even when sovereign powers had been transferred to the European Union.¹³⁶ In *Cantoni v. France* the ECtHR held that legislation has to fulfil the criteria of accessibility and foreseeability and the fact that a domestic provision is based almost word for word on a Community directive does not remove it from the ambit of article 7 of the ECHR.¹³⁷ Finally, to let the ECtHR deal with human rights aspects would prevent conflict as to the case law of the two Courts.¹³⁸ The ECHR must be the essential reference point for the protection of human rights in Europe in terms of both guaranteed rights and judicial control in respect of these rights.¹³⁹ The best way to ensure supervision of the EU in the human rights area by the ECtHR would be for the EU to accede to the ECHR. The Draft Treaty establishing a Constitution for Europe states that the Union shall

consider desirable in any particular situation. Case of *Chapman v. the United Kingdom*, Application No. 27238/95, judgement of 18 January 2001, paras. 93-94.

¹³⁵ F. Palermo, "The use of Minority Languages: Recent developments in EC law and Judgements of the ECJ", *Maastricht Journal of European and Comparative Law*, Volume 8, Issue 3, 2001, pp. 315-316.

¹³⁶ *Matthews v. the United Kingdom*, application No. 24833/94, judgement of 18 February 1999, at 32.

¹³⁷ *Cantoni v. France*, Application number 00017862/91, judgement of 15 November 1996, at 30. The Court held that a law might still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences that a given action may entail. No violation of article 7 was found.

¹³⁸ Conflicts in interpretation of the Convention have mostly concerned articles 6, 8 and 11. See D. Spielmann, "Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities", Alston (ed.), *The EU and Human Rights*, 1999, pp. 766-770. For an examination of the question as to whether the ECtHR effectively protects the rights of minorities through article 14 see Spiliopoulou Åkermark, "The Limits of Pluralism – Recent Jurisprudence of the European Court of Human Rights with Regard to Minorities: Does the Prohibition of Discrimination Add Anything?", *Journal on Ethnopolitics and Minority Issues in Europe*, Issue 3/2002.

¹³⁹ P. Drzemczewski, "The Council of Europe's Position with Respect to the EU Charter of Fundamental Rights", *Human Rights Law Journal*, Volume 22, 2001, p. 31.

seek accession to the ECHR and that such accession shall not affect the competences as defined in the Constitution.¹⁴⁰

3.2 Minority Rights provisions in EU Treaties

With the exception of various activities of the European Parliament in support of minority languages and cultures, the protection of minorities was virtually absent on the EC agenda in the pre-Maastricht era.¹⁴¹ Instead, the Community activities were of an essentially economic nature. Many non-legally binding measures were however approved in the area, in particular through the European Parliament.¹⁴² Furthermore, financial support for action programmes and projects were given and various measures for the promotion of minorities and minority languages took place such as the creation of the Committee of the Regions and Local Authorities,¹⁴³ the European Regional Development Fund¹⁴⁴ and the European Bureau for Lesser Used Languages.¹⁴⁵

The European Community can only act within the fields and for the purposes that are defined in its founding treaties.¹⁴⁶ Although the minority

¹⁴⁰ Between February 2002 and July 2003, the European Convention drew up a Draft Treaty establishing a Constitution for Europe. The full text of the Draft was submitted to the Italian Presidency of the Council of the European Union on 18 July 2003. This Draft Constitution is currently being discussed by the representatives of the Governments of the Member States at the Intergovernmental Conference (IGC). The final version, which will be adopted by the IGC, will then have to be ratified by the 15 current and 10 future Member States of the European Union.

<http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> last visited 2003-11-27.

¹⁴¹ For a comprehensive approach to European Parliament measures taken in the field of minority rights see M. Estébanez, *International Organizations and Minority Protection in Europe*, 1996, pp. 154-156.

¹⁴² The European Parliament has adopted the following resolutions of concerns for minority rights: Resolution on a Community Charter of Regional Languages and on a Charter of Rights of Ethnic Minorities, adopted on 16 October 1981 (O.J. C287/106); Resolution on Measures in Favour of Linguistic and Cultural Minorities, adopted on 11 February 1983 (O.J. C68/103); Resolution on the Languages and Cultures of Regional and Ethnic Minorities in the European Community, adopted on 30 October 1987 (O.J. C318/160); Resolution on Linguistic Minorities in the European Community, adopted in 1994 (O.J. C61/110) and Resolution on discrimination on Roma (OJ 1995 C249/156). The resolutions are non-binding and therefore lack real practical effect. G. Von Toggenburg, "A Rough Orientation through a Delicate Relationship: The European Union's Endeavours for its Minorities", Trifunovska (ed.), *Minority rights in Europe: European Minorities and Languages*, 2001, pp. 208-213.

¹⁴³ Created by the TEU, the Committee of Regions and Local Authorities is a consultative body composed of 222 representatives of local and regional authorities that must be consulted on regional policy issues.

¹⁴⁴ Article 10 of the European Regional Development Fund provides scope for funding projects that are linked to the promotion of regional cultural diversity.

¹⁴⁵ The European Bureau for Lesser Used Languages, established in 1982, seeks to preserve and promote Europe's native languages and the linguistic rights of their speakers. For further reading see A. Biscoe, "The European Union and Minority Nations", Cumper and Wheatley (eds.), *Minority Rights in the "New" Europe*, 1999, pp. 89-96.

¹⁴⁶ Article 5 EC Treaty, former 3 (b).

issue is not directly addressed in the TEU,¹⁴⁷ several of its provisions have a direct impact on minorities.¹⁴⁸ These provisions shall be dealt with in the following.

3.2.1 Cultural diversity

The TEU states in its article 1 that it marks “*a new stage in the process of creating an ever closer Union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen*”. It further holds that the Union’s task is to “*organise, in a matter demonstrating consistency and solidarity, relations between the Member States and between their peoples*”.

The EC Treaty also encompasses provisions of relevance to minorities. Article 149(1) EC Treaty establishes that the Community shall contribute to the development of quality education “*while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity*”.

Moreover, article 151 EC Treaty commits the Community to “*contribute to the flowering of the cultures of the member states, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore*” (paragraph 1). At the same time the Community is required to take cultural aspects into account in its actions under other provisions of the EC Treaty, “*in particular in order to respect and to promote the diversity of its cultures*” (paragraph 4). This article recognises that EU member states are not culturally homogenous and that regional diversity exists. In turn, it could mean that minorities, with a different culture than the dominant state culture, have a right to recognition of their identity. It further emphasises that Community actions should contribute to the survival and flowering of regional cultural diversity, and should not undermine it.¹⁴⁹ The impact of article 151 has been restricted. It has however contributed to the adoption of Community programmes in the field of minority rights such as the Committee of the Regions and Local Authorities, the European Regional Development Fund and the European Bureau for Lesser Used Languages mentioned above.¹⁵⁰

¹⁴⁷ All references to articles of the TEU are made to the Treaty provisions as amended by the Treaty of Nice.

¹⁴⁸ The TEU encompasses several provisions relating to minorities, particularly in the field of culture. The Community has initiated many activities in this field. However, only the legal provisions will be dealt with in the presentation. For further reading see M. Estébanez, *International Organizations and Minority Protection in Europe*, 1996, pp. 159-168.

¹⁴⁹ A. Biscoe, “The European Union and Minority Nations”, Cumper and Wheatley (eds.), *Minority Rights in the “New” Europe*, 1999, pp. 93-94.

¹⁵⁰ See *supra* notes 143-145. See also F. Palermo, “The Use of Minority Languages: Recent Developments in EC Law and Judgements of the ECJ”, *Maastricht Journal of European and Comparative Law*, 2001, Volume 8, No. 3, p. 300.

Attention should also be drawn to article 87(3) d that allows, to a certain extent, financial assistance (state aid) to promote culture and heritage conservation to be compatible with the internal market. According to this provision, states may no longer use the competition rules of the EC Treaty to justify a restrictive attitude regarding the support of minority cultures within their territory.¹⁵¹

3.2.2 Non-discrimination

Finally, the EC Treaty has introduced a new article 13 that enables the Council, under certain conditions, to take appropriate action to combat discrimination based on, among other grounds, racial or ethnic origin and religion.¹⁵² Progress has thus been made in comparison with article 12, which limits non-discrimination to nationality grounds.¹⁵³ However article 13 does not contain a directly effective prohibition that the ECJ may use as a standard for reviewing Community or member states measures, but needs appropriate measures for implementation.¹⁵⁴ Article 12 does however have such direct effect. Also, article 12 provides for the Council to adopt “*further measures*” designed to prohibit discrimination. Article 13 refers only to “*appropriate action*” to combat discrimination.¹⁵⁵ However, the word *combat* seems to have a broader meaning than the expression to *prohibit* discrimination, as stated in article 12, and thereby allows actions directed against discrimination.¹⁵⁶

Article 13 is not in itself a prohibition of discrimination, but rather it enables the Community to take measures to combat discrimination on the grounds listed. Moreover, the wording of article 13 makes it clear that it can be adopted only within the limits of the powers already conferred on the Community by the Treaty. Important to note is also that, although disadvantaged groups benefit from anti-discrimination measures, this means

¹⁵¹ M. Estébanez, *International Organizations and Minority Protection in Europe*, 1996, p. 165.

¹⁵² Article 13 was amended by the Nice Treaty, which added a power for the Council to adopt non-harmonising incentive measures under the co-decision legislative procedure. Craig and de Burca, *EU Law. Text, Cases and Materials*, Third edition, 2003, p. 357.

¹⁵³ B. de Witte, “Politics versus law in the EU’s approach to ethnic minorities”, J. Zielonka (ed.), *Europe unbound. Enlarging and reshaping the boundaries of the European Union*, 2002, p. 138.

¹⁵⁴ Direct effect means that a provision can bring about individual rights and responsibilities that can be invoked by individuals before national courts and authorities. U. Bernitz and A. Kjellgren, *Europarättens grunder*, second edition, 2002, p. 87. Author’s own translation.

¹⁵⁵ B. De Witte, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights”, P. Alston (ed.), *The EU and Human Rights*, 1999, p. 884.

¹⁵⁶ Von Toggenburg does not regard article 13 as allowing for positive discrimination. See G. Von Toggenburg, “A Rough Orientation through a Delicate Relationship: The European Union’s Endeavours for its Minorities”, Trifunovska (ed.), *Minority rights in Europe: European Minorities and Languages*, 2001, p. 230.

of protection cannot be seen as a substitute for a policy focused on minority rights. Simple non-discrimination is not a true guarantor of minority rights.¹⁵⁷

In 2000 the Council of the EU adopted an implementing measure of article 13 entitled “Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin”(here after referred to as the Race Directive).¹⁵⁸ While the jurisdictional limitation in article 13 EC Treaty specifies that the EC can act only within the limits of the Community’s powers, article 3 of the Race Directive gives it a wider scope, including prohibition of discrimination as regards social protection, health care, housing and education.¹⁵⁹ Its scope is also wider in the sense that it applies a vast concept of discrimination and covers also harassment.¹⁶⁰ Furthermore, the Race Directive applies to *all persons*, including legal persons and third country nationals, and refers not only to national law regulations or administrative practise, but also to any provision contained in individual or collective contracts, agreements and internal rules of undertakings or non-profit organisations.¹⁶¹ Despite its title, the Race Directive does not affect “[...] *the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin* [...]”.¹⁶² On the contrary, it is perceived as a set of minimum requirements.¹⁶³ The Directive mandates liberal standards of proof and effective redress for violation.¹⁶⁴ As part of the *acquis communautaire*, candidate states must modify their own laws and institutions in accordance with its terms.¹⁶⁵ Notably, the Directive does not prohibit discrimination on the grounds of language or religion, both of utmost importance to minority protection.¹⁶⁶ The Race Directive is already in force and had to be complied with by 19 July 2003.¹⁶⁷

¹⁵⁷ G. Pentassuglia, “The EU and the Protection of Minorities: The Case of Eastern Europe”, *European Journal of International Law*, 2001, Vol. 12, No. 1, p. 35.

¹⁵⁸ Council directive 2000/43/EC of 29 June 2000 (OJ (2000) L180/22).

¹⁵⁹ Craig and de Burca, *EU Law. Text, Cases and Materials*, Third edition, 2003, p. 357.

¹⁶⁰ Race Directive, article 2(3). See also G. Von Toggenburg, “A Rough Orientation through a Delicate Relationship: The European Union’s Endeavours for its Minorities”, Trifunovska (ed.), *Minority rights in Europe: European Minorities and Languages*, 2001, p. 232.

¹⁶¹ Race Directive, articles 3(1) and 14(b) respectively.

¹⁶² Ibid, preambular para. 17. See also its article 5.

¹⁶³ Ibid, article 6.

¹⁶⁴ Ibid, paras. 21-22 and article 15.

¹⁶⁵ Ibid, article 14(a).

¹⁶⁶ Article 14 of the ECHR and article 26 of the ICCPR both expressly prohibit discrimination on grounds of language. Open Society Institute/EU Accession Monitoring Programme, *Monitoring the EU Accession Process: Minority Protection Volume 1, An Assessment of Selected Policies in Candidate States*, 2001, pp. 19, 30. Greece and the UK are the only EU member states not to have made a declaration under article 14 ICERD to permit individual complaints. Out of the accession states Estonia, Latvia, Lithuania and Cyprus likewise have made no such declaration.

¹⁶⁷ G. von Toggenburg, “A Rough Orientation through a Delicate Relationship: The European Union’s Endeavours for its Minorities”, Trifunovska (ed.), *Minority Rights in Europe: European Minorities and languages*, 2001, p. 233.

An action programme to combat discrimination based on grounds in article 13 has also been initiated by the Commission. The action programme is designed to assist measures financially in the promotion of racial equality.¹⁶⁸

There is however no monitoring attached with a view to enforcing or encouraging member states to instigate programmes of their own.¹⁶⁹

3.2.3 General human rights provisions

A more general human rights provision is entailed in article 6(1) of the TEU which states that the Union is: “*founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States*”.¹⁷⁰

According to Article 6(2) the Union is bound to respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to Member States, as general principles of Community law.¹⁷¹ A constitutional basis for protection of fundamental rights was thereby introduced but as has been shown earlier in this chapter, the ECJ had in fact offered the same protection in its earlier case law. However, the common constitutional traditions of the member states have never been assessed by the ECJ with regard to the protection of minorities.¹⁷² Unlike article 6(1), article 6(2) is subject to the jurisdiction of the Court with regard to actions of the institutions, in so far as the Court has jurisdiction under the Community treaties and under the treaty of Amsterdam.¹⁷³ Even though the only reference to an international catalogue of fundamental rights in article 6(2) is made to the ECHR, it seems that this provision does not intend to interfere with the practise of the Court also to draw inspiration from other international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories.¹⁷⁴

¹⁶⁸ Council Decision 2000/750 (2000), OJ L303/23.

¹⁶⁹ A. Williams, “Enlargement of the Union and Human Rights Conditionality: A Policy of Distinction”, 25 *European Law Review*, 2000, p. 613.

¹⁷⁰ As previously stated, minority rights are clearly part of human rights. See *supra* note 120.

¹⁷¹ Article 6 (2) of the TEU has an explicit reference to the European Convention on Human Rights: “*The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law*”.

¹⁷² G. Pentassuglia, “The EU and the Protection of Minorities: The Case of Eastern Europe”, *European Journal of International Law*, Volume 12, Issue 1, 2001, p. 33.

¹⁷³ Article 46(d). As has been shown this had in fact taken place in the jurisprudence of the ECJ even before the introduction of the article in the Amsterdam Treaty.

¹⁷⁴ See the Nold case, *supra* note 116. In Cases C-374/87, *Orkem v Commission*, judgement of 18 October 1989, paragraph 31, and C-249/96, *Grant v South-West Trains Ltd*, judgement of 17 February 1998, paragraph 43, the ECJ referred to the ICCPR.

Article 7 enables the Council to take measures against member states that have infringed the principles laid down in article 6(1). The article is intended to have general application, thus involving all the current and future member states.¹⁷⁵ The crucial determinations to be made in this article are not subjected to judicial control, but are in the hands of political bodies.¹⁷⁶ This article has never been used against any member state of the EU. The Community took no official measures when a party, that clearly was associated with racist and xenophobic views, was elected part of the government in Austria.¹⁷⁷ The Portuguese presidency issued a statement on behalf of the fourteen member states restricting bilateral relations with the Austrian government but this was not an act of the Council. The EU Parliament simply passed a resolution that put the Council and Commission on the alert to act under article 7 “in the event of a serious and persistent breach by whatever member state” of the principles set out in article 6(1) TEU.¹⁷⁸

3.3 Charter of Fundamental Rights of the European Union

The European Union Charter of Fundamental Rights (here after the Charter) was adopted by proclamation of the Commission, the Council and the Parliament at the Nice European Council in December 2000. The purpose of the Charter was to consolidate existing fundamental rights acceptable at European level and make their overriding importance and relevance more evident and visible to the Union’s citizens.¹⁷⁹ It is a very broad Charter, encompassing both fundamental human, civil, political, economic and social

K. Lenaerts and E. de Smijter, “A “Bill of Rights” for the European Union”, *Common Market Law Review*, 2001, Volume 38, Issue 2, p. 277.

¹⁷⁵ G. Pentassuglia, “The EU and the Protection of Minorities: The Case of Eastern Europe”, *European Journal of International Law*, 2001, Vol. 12, No. 1, p. 37.

¹⁷⁶ The Nice Treaty amended article 7 as follows: *The Council [...] may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in article 6(1) and address appropriate recommendations to that State [...] The Council shall regularly verify that the grounds on which such a determination was made continue to apply.* With regard to possible infringement procedures under article 230 of the EC Treaty, Manfred Nowak excludes judicial review on the decision of the Council determining whether a serious and persistent breach of human rights has been committed. M. Nowak, “Human Rights “Conditionality” in Relation to Entry to, and Full Participation in, the EU”, P. Alston (ed.), *The EU and Human Rights*, 1999, p. 697.

¹⁷⁷ The situation referred to is when the right wing, populist Austrian Freedom Party formed a coalition government with the Austrian People’s Party in 2000.

¹⁷⁸ A. Williams, “Enlargement of the Union and Human Rights Conditionality: A Policy of Distinction”, *European Law Review*, Issue 25, 2000, pp. 615-616.

¹⁷⁹ Lord Goldsmith, “A Charter of Rights, Freedoms and Principles”, *Common market Law Review*, 2001, Volume 38, Issue 5, p. 1204. See also Preamble paragraph 4 of the Charter and Conclusions of the Presidency at the occasion of the European Council of Cologne on the drawing up of a Charter of Fundamental Rights of the European Union, *EU Bulletin*, 6/1999, at 35 point I.64.

rights. Its principle addressees are the European Union institutions and EU member states, the latter only when implementing Union law.¹⁸⁰ The Charter will thus not impose any obligation on member states when they are acting within their areas of national competence. Furthermore, it will not enable the ECJ to rule on acts taken by member states within their purely national competence.¹⁸¹

A single paragraph proposed to address minority rights was dropped from the initial draft of the Charter and it does not contain any specific minority rights provision that could be enforced by the ECJ.¹⁸² Yet a few provisions are relevant to minorities such as equality before the law (article 20), prohibition of discrimination based on membership of a national minority (article 21(1))¹⁸³ and respect for cultural, religious and linguistic diversity (preambular paragraph 3 and article 22). There is however a bit confusion of norms as the Charter includes membership of a national minority in its non-discrimination clause, but also prohibits any discrimination on grounds of nationality and affirms that the Union shall respect cultural, religious and linguistic diversity.¹⁸⁴ The preamble is also 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*.¹⁸⁵

The Charter does not bring about many new rights, but rather increases the visibility of existing rights.¹⁸⁶ In short, the Charter does not extend the competence of the European Union in the field of fundamental rights (or minority rights for that matter).¹⁸⁷ All rights enumerated in the Charter are listed in the EC Treaty or belong to the member state's common

¹⁸⁰ The Charter, article 51(1).

¹⁸¹ Lord Goldsmith, "A Charter of Rights, Freedoms and Principles", *Common market Law Review*, 2001, Volume 38, Issue 5, p. 1205.

¹⁸² A. Abdikeeva, "Meeting EU standards for Accession", <http://www.eumap.org/articles/content/10/103/index.html> last visited 2003-11-27.

¹⁸³ Article 21(1) is broader in scope than article 13 of the EC Treaty in that it prohibits discrimination directly on the basis of the article itself, whereas article 13 only authorizes the Council to take appropriate action to fight the types of discrimination mentioned. Furthermore, whereas the measures taken by the Council on the basis of article 13 have to remain within the limits of the powers conferred upon the Community by the EC Treaty, the prohibition of discrimination in article 21(1) of the Charter relates also to actions of the institutions taken within the framework of the second and third pillars of the EU and to actions of the member states implementing Union law. Finally, the grounds on which discrimination is prohibited by article 21(1) of the Charter are a combination of the grounds listed in article 13 of the EC Treaty, article 14 of the ECHR and article 11 of the Convention on human rights and biomedicine. See K. Lenaerts and E. de Smijter, "A "bill of rights" for the European Union", *Common Market Law Review*, 2001, Volume 38, Issue 2, p. 283. The provision might allow for differential treatment. See G. Pentassuglia, *Minorities in international law: an introductory study*, 2002, p. 150.

¹⁸⁴ Articles 21(1) and (2) and 22.

¹⁸⁵ Preamble, para. 3. Hughes and Sasse, "Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs", *Journal on Ethnopolitics and Minority Issues in Europe*, Issue 1, 2003, p. 11.

¹⁸⁶ One example of an extension of a right is article 47(2) that is wider in scope than article 6 ECHR and includes also administrative acts.

¹⁸⁷ Article 51(2).

constitutional traditions or international catalogues of fundamental rights concluded by the member states.¹⁸⁸

It is evident that the Charter was not intended to create a parallel system to the European Convention on Human Rights. Although many of the Charter's provisions are to be found in the ECHR and although they are not worded exactly the same, the meaning and scope of the Charter rights shall be the same as those laid down in the ECHR.¹⁸⁹ The Charter thus mostly contains new descriptions of existing fundamental rights.¹⁹⁰ The EU is however not prevented from developing more extensive protection than is provided for under the ECHR.¹⁹¹ Furthermore, article 52(2) intends to avoid any potential differences in the interpretation of similarly worded provisions of the Charter and the EU/EC Treaties.¹⁹² Article 53 is a more general clause, and refers not only to the ECHR and Union law, but also to national constitutions and international law.

The status of the Charter has been a controversial issue and there has been uncertainty as to whether it should be legally binding and justiciable or simply a political non-binding declaration.¹⁹³ Although it was drafted as if it were to have full legal effect, the question of its legal status and its possible integration into the Treaties was postponed and will be decided by the Inter-Governmental Conference in 2004.¹⁹⁴

The ECJ has referred to the Charter in some recent judgements.¹⁹⁵ Moreover, the Court of First Instance has stated: “[..] *Although this document does not have legally binding force, it does show the importance of the rights it sets out in the Community legal order*”.¹⁹⁶ The Charter is

¹⁸⁸ K. Lenaerts and E. de Smijter, “A “bill of rights” for the European Union”, *Common Market Law Review*, 2001, Volume 38, Issue 2, pp. 280-281.

¹⁸⁹ The Charter refers not only to the ECHR, but also to the case law of the ECtHR. See the Preamble, para. 5, and explanatory report to articles 47 and 52(3).

¹⁹⁰ K. Lenaerts and E. de Smijter, “A “bill of rights” for the European Union”, *Common Market Law Review*, 2001, Volume 38, Issue 2, p. 281.

¹⁹¹ Article 52(3). The preamble states that the Charter reaffirms the rights as they result, amongst other, from the case law of the European Court of Human Rights.

¹⁹² The Charter does not alter the system of rights conferred by the Treaties. Craig and de Burca, *EU Law. Text, Cases and Materials*, Third edition, 2003, p. 360.

¹⁹³ G. De Búrca, “The drafting of the European Union Charter of fundamental rights”, *European Law Review*, 26 (2001), pp. 126-131. See also J. Weiler, “Editorial: Does the European Union Truly Need a Charter of Rights?”, *European Law Journal*, 2000, Volume 6, No. 2, p 95 and C. McCrudden, “The Future of the EU Charter of Fundamental Rights”, *Jean Monnet Working Paper No. 10/01*, p. 12, <http://www.jeanmonnetprogram.org/papers/01/013001.rtf> last visited 2003-11-27.

¹⁹⁴ *Ibid.*, p.10. See also Craig and de Burca, *EU Law. Text, Cases and Materials*, Third edition, 2003, p. 358.

¹⁹⁵ See *Lindquist*, C-101/01, judgement of 6 November 2003, para. 35 and *RTL Television*, C-245/01, judgement of 23 October 2003, para. 38.

¹⁹⁶ Case T-377/00, *Philip Morris International v. Commission*, Judgement of 15 January 2003, para. 122. The case concerned the right to an effective remedy, article 47 of the Charter.

included in the Draft Treaty establishing a Constitution for Europe, part II.¹⁹⁷

Another problem concerning the Charter is that it might be difficult to draw a line between acts of member states, as sovereign states, and acts of member states in implementing Union law. The ECHR is applicable to each of its parties, whilst the Charter only concerns EU member states when implementing Union law.¹⁹⁸

3.4 Conclusion

The protection of minorities was virtually absent on the EC agenda in the pre-Maastricht era. However, the ECJ has progressively developed a case law on human rights despite the absence of specific human rights provisions in the founding treaties. Judicial control has been established in relation to both Community measures and member states measures falling within the scope of Community law. The ECJ's reasoning in the *Nold* case may reach out towards minority issues as regards basic international treaty standards so as to encompass treaties of relevance to minorities. On the other hand, the international instrument that is most often referred to in ECJ case law is the ECHR and this Convention lacks a specific minority provision. Moreover, despite the inclusion of fundamental rights into general principles of Community law there is always a risk that a general Community rule or objective will prevail against claims of violations of fundamental rights. Furthermore, the widely diverging approaches on minority issues adopted by the member states in their national legislation make it difficult to establish general principles of law from their common traditions. Also, the common constitutional traditions of the member states have never been assessed by the ECJ with regard to the protection of minorities. As long as the EU's main interest continues to be of an economic nature, there is a risk that the ECJ will give preference to economic orientated principles aimed at granting the same rights to all EU citizens without discrimination. It is doubtful whether it is to the benefit of the Union, the member states and human rights if the EU massively expands into the field of progressive human rights policy. A better approach would be to leave it to the ECtHR to control the ECJ in the human rights area.

If there is thought to be any movement towards EU standards for minorities, such development is only recent and based on non-discrimination legislation such as article 13 EC Treaty, the Race Directive and article 21 of the Charter of Fundamental Rights and a cultural diversity approach entailed in the Maastricht Treaty and article 22 of the Charter of Fundamental Rights.

¹⁹⁷ Article 7(1) of the Draft Treaty holds that the Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights.

¹⁹⁸ P. Drzemczewski, "The Council of Europe's Position with Respect to the EU Charter of Fundamental Rights", *Human Rights Law Journal*, Volume 22, 2001, p. 24.

However, although the Maastricht Treaty introduced the concept of cultural diversity and the Amsterdam Treaty provided for a new non-discrimination provision on the basis of ethnic origin, there is still no clear position of minority rights in ECJ case law and treaty provisions. The Charter of Fundamental Rights of the European Union lacks a minority rights provision and does not extend the Community's competence in the field of minority rights. Its non-discrimination provision in article 21 together with the non-discrimination references in article 13 and the Race Directive can hardly compensate for legal lapses in primary law as regards minority protection. A general notion of non-discrimination sees minorities as one group among others to be protected rather than entitled to special measures. A common European standard of minority rights, that is binding commitments shared by all EU member states either in their respective constitutional traditions or in an international treaty signed and ratified by all of them, does not exist. The only strong basis is the ECHR, but this only contains a non-discrimination clause. Even article 27 of the ICCPR is not adhered to by all member states.

Finally, most EU treaty provisions that are of concern to minorities are directed towards member states instead of EU institutions. It should not be a question of the EU exercising control over minority protection in member states, but the institutions should themselves follow existing minority rights standards. Instead of creating a European standard as regards minority protection, existing international standards should be followed within the Community legal order as regards action by both the Community institutions and by the member states under Community competence.

The next chapter will discuss what kind of requirements that are put on EU candidate states as regards protection of the rights of minorities. The Commission's annual Regular Reports will be analysed as regards a few selected candidate states.

4 Minority rights considerations in Commission opinions and progress reports

After the outburst of violence in the Balkans the EU sharply accentuated the role of minority protection in the enlargement process hoping that by doing so it would be able to maintain political stability throughout the future territory of the Union.¹⁹⁹ The Copenhagen Council in April 1993 confirmed that membership was open to the associated states but that such membership required each applicant to achieve, among other things, respect for and protection of minorities.²⁰⁰ The formulation of the Copenhagen criteria has been the benchmark in association negotiations ever since. The European Council at Copenhagen instituted procedures by which scrutiny and limited intervention as regards the human rights situation, and thereby the situation for minorities, in the candidate states could take place. These came to pass as dialogues with an emphasis on meetings of an advisory nature. Co-operation and assistance was preferred to forceful interference. In 1995, at the Madrid European Council, it was decided that negotiations with potential candidate states should start within six months of the 1996 Inter-Governmental Conference. At the Florence European Council in 1996 a timetable for negotiations was established. The Council also emphasised that the Commission should compile opinions and periodic reports on each of the applicant countries, paying particular attention to progress made towards complying with the Copenhagen criteria. Although negotiations for entry would proceed through dialogue the EU would only carry on once in-depth and on-going scrutiny of the political criteria had been carried out.²⁰¹ Moreover, the Council stated that if progress towards fulfilling the Copenhagen criteria was insufficient, it could take appropriate steps as regards any pre-accession assistance granted to an applicant state.²⁰² Thus, Phare assistance to those states was conditioned on respect for human rights, with a special emphasis on minority rights.²⁰³

¹⁹⁹ P. Vermeersch, "EU Enlargement and Minority Rights Policies in Central Europe: Explaining Policy Shifts in the Czech Republic, Hungary and Poland", *Journal on Ethnopolitics and Minority Issues in Europe*, Issue 1/2003, p. 8.

²⁰⁰ The European Council decided in June 1993 in Copenhagen on a number of political criteria for accession to be met by the candidate states. These countries must have achieved "stability of institutions guaranteeing democracy, the rule of law, human rights and *respect for and protection of minorities* (emphasis added). Conclusions of the Presidency at the Copenhagen Council 1993, *EC Bulletin*, 6/1993, p. 13.

²⁰¹ A. Williams, "Enlargement of the Union and Human Rights Conditionality: A Policy of Distinction", 25 *European Law Review*, 2000, pp. 606-607.

²⁰² Council Regulation 622/98 of 16 March 1998 on assistance to the applicant states in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships, OJ L085, pp. 1-2, article 4.

²⁰³ The Phare Programme for Democracy is the main instrument for Community assistance to applicant states decided by the Luxembourg European Council of 12-13 December 1997.

In the summer of 1997 the Council enacted the Agenda 2000 for a stronger and wider Union. Council of Europe texts as regards the protection of minorities such as Recommendation 1201²⁰⁴ and the Framework Convention were referred to. Emphasis was put on participation of minorities in the public sphere, educational measures to guarantee the development of their language and traditions and the issue of citizenship. The Commission concluded that the integration of minorities in general was satisfactory with the exception of the situation of the Roma population in a number of applicant countries. Only one candidate country, Slovakia, was considered not to have fulfilled the Copenhagen political criteria.²⁰⁵

After the adoption of Agenda 2000 the Commission began to annually evaluate the progress achieved by each candidate country. In the Agenda 2000 Enlargement Composite Paper of 1998, the Commission further emphasised citizenship issues in the Baltic States. It also held that the situation of the Roma continued to be problematic and that little progress had been made in addressing the issue. Concerns were also raised over the situation for the Hungarian minority in Romania and Slovakia. It was concluded that, overall, the problem of minorities continued to raise concerns in the perspective of enlargement.²⁰⁶

The 1999 Composite Paper entailed remarks of positive improvements in Slovakia, notably through its adoption of minority language legislation and the inclusion of representatives of the Hungarian minority in the Government, and Slovakia was considered to meet the Copenhagen criteria. Concerns continued to be expressed over some countries' citizenship laws and protection of minority language rights. Discrimination against the Roma was also held out to be a problem and it was the opinion of the Commission that concerted efforts were still needed to ensure that specific programmes, aimed at improving the situation of the Roma, were implemented. In conclusion the Commission stated that the treatment of minorities and the Roma continued to give rise to concern.²⁰⁷

In the report of 2000 positive developments as regards citizenship laws were recognised. Concerns were again raised over the treatment of the Roma and the fact that specific programmes still had not been implemented properly. It

²⁰⁴ Recommendation 1201(1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights. The text included a definition of the expression national minority, a non-discrimination clause and comprehensive language and education rights. Furthermore the protocol promoted positive discrimination. The Committee of Ministers never adopted the protocol.
<http://assembly.coe.int/Documents/AdoptedText/TA93/EREC1201.HTM> last visited 2003-12-20.

²⁰⁵ Agenda 2000 En förstärkt och utvidgad union, Europeiska Unionens Bulletin, Tillägg 5/1997, pp. 41-42, author's translation.

²⁰⁶ Agenda 2000 Enlargement Composite Paper 1998, Progress made by the candidate countries towards accession, Bulletin of the European Union, Supplement 4/1998.

²⁰⁷ Agenda 2000 Enlargement Composite Paper 1999, Reports on progress towards accession by each of the candidate countries, Bulletin of the European Union, Supplement 2/1999, pp. 13-14.

was held that sustained efforts were required to improve the situation of the Roma.²⁰⁸

The Commission's annual Regular Reports have been the EU's key instrument to monitor and evaluate the candidate countries' progress towards accession. In the following these instruments will be analysed as regards a few selected candidate states. The intention is not to assess as to what extent the candidate countries fulfil the Copenhagen criteria as regards the protection of minorities, but rather to examine what minority rights and instruments the Commission refers to in its evaluations. Three of the selected states: Latvia, The Czech Republic and Slovakia are set to join the EU on 1 May 2004 whereas Romania hope to do so by 2007.

4.1 Latvia

In the 1997 Agenda 2000 Report the Commission noted that Latvia had signed but not ratified the Framework Convention.²⁰⁹ It criticised the Latvian citizenship laws and made a number of recommendations as to how these laws could be improved.²¹⁰ The Commission went on to comment on the fact that minorities had no special parliamentary representation and that Latvia had not yet introduced legislation on education for its minorities. It concluded that there were no major problems over respect for fundamental rights, but that Latvia must take measures to increase the rate of naturalisation and improve the integration of Russian speaking non-citizens into Latvian society. Latvia was also required to ensure general equality of treatment for non-citizens and minorities, in particular for access to professions and participation the democratic process.²¹¹ The difference in treatment between citizens and non-citizens continued to be criticised in the 1998 Regular Report as well as the slowness of the naturalisation process. The importance of language training and language programmes was emphasised.²¹²

²⁰⁸ Agenda 2000 Enlargement Strategy Paper, Report on progress towards accession by each of the candidate countries, Bulletin of the European Union, Supplement 3/2000, pp. 20-21.

²⁰⁹ This fact was also pointed out in the 1998, 1999, 2000, 2001 and 2002 Regular Reports.

²¹⁰ In Latvia, minorities, including non-citizens, account for about 44 per cent of the population. Latvia hosts the largest percentage of ethnic Russians living within its borders of any of the Baltic countries. They constitute 37.2 per cent of the population of Latvia but only 17.8 per cent of the citizens. Agenda 2000 Enlargement Strategy Paper, Report on progress towards accession by each of the candidate countries, Bulletin of the European Union, Supplement 3/2000, p. 18.

²¹¹ Agenda 2000 Commission Opinion on Latvia's Application for Membership of the European Union, Bulletin of the European Union, Supplement 10/1997, DOC/97/14, Brussels 15/7/97, pp. 16-21.

²¹² 1998 Regular Report from the Commission on Latvia's progress towards accession, November 1998. pp. 9-14.

In the 1999 Regular Report amendments to the Citizenship Law were welcomed and it was held that Latvia now fulfilled all recommendations expressed by the OSCE in the area of citizenship and naturalisation. It was further held that a number of important developments had taken place concerning the integration of minorities, notably through the adoption of laws, documents and programmes in the areas of education and language training.²¹³ The 2000 Regular Report continued to comment on Latvia's minority integration through language training and it was now considered that both the language law of 1999 and its implementing regulations were in conformity with Latvia's international obligations.²¹⁴

In May 2001 Latvia signed the European Convention on Nationality but entered reservations on certain aspects related to the acquisition of Latvian citizenship.²¹⁵ It further rejected to ratify the Framework Convention as it had done also the previous year. Some positive developments were highlighted such as further simplifications of the naturalisation procedure, the adoption of a Society Integration Programme and the adoption of implementing legislation for the Language Law. Concerns continued to be expressed over the integration of minorities into Latvian society, something that could be hindered by linguistic restrictions. The Commission concluded that although Latvia had achieved progress in the areas of Language Law and language training and integration of non-citizens, these efforts needed to continue.²¹⁶

The 2002 Commission report drew attention to the fact that Latvia had signed but not ratified the Additional Protocol No 12 to the ECHR prohibiting discrimination on any grounds. The Commission also no longer simply remarked that the Framework Convention had been signed but not ratified, but urged Latvia to ratify it. Some positive developments were also commented upon such as the abolition of language restrictions in the election law, acceleration of the naturalisation process and extended language training. The Commission expressed concerns over the fact that funding for the Naturalisation Board had been reduced and urged Latvia to ensure adequate funding for language training and ensure equality of treatment for non-citizens and minorities.²¹⁷ The 2003 Report only refers to minorities in the context of non-discrimination, in particular as regards integration of the Russian minority and the implementation of the Language

²¹³ 1999 Regular Report from the Commission on Latvia's progress towards accession, 13 October 1999, pp. 14-18.

²¹⁴ 2000 Regular Report from the Commission on Latvia's progress towards accession, 8 November 2000, pp. 19-24.

²¹⁵ European Treaty Series No. 166 Opened for signature 6 November 1997. Latvia has signed but not ratified the Convention.

²¹⁶ 2001 Regular Report from the Commission on Latvia's progress towards accession, 13 November 2001, SEC(2001)1749, pp. 20-28.

²¹⁷ 2002 Regular Report from the Commission on Latvia's progress towards accession, 9 October 2002, SEC(2002)1405, COM(2002)700 final, pp. 27-35.

Law. There is no section on the protection of minority rights as there has been in the previous reports.²¹⁸

4.2 The Czech republic

In the 1997 Agenda 2000 Commission opinion it was noted that the Czech Republic had signed but not ratified the Framework Convention. Concerns were expressed over the situation of the Roma and the fact that they suffered from discrimination, in particular regarding access to jobs and housing, and that they did not receive adequate protection from the authorities or the police.²¹⁹ It was concluded that no major problems over respect for fundamental rights existed and that the Czech republic respected and protected minorities. At the same time it was recognised that there was a problem of discrimination of the Roma, especially regarding the citizenship law.²²⁰ The 1998 Regular Report continued to express concerns over the situation of the Roma and held that the situation needed to improve. Measures taken in the field by the Czech Government such as the adoption of an action plan and the establishment of an Inter-Ministerial Commission on the Affairs of the Roma Community were welcomed. The appointment of a Human Rights Commissioner was also seen as a positive step.²²¹ The situation of the Roma continued to be of concern to the Commission in its following Regular Report and it was said that further efforts of improvement should be made through the implementation of an adequately funded policy and through the fight against discriminatory attitudes in society.²²²

In the Report from 2000 positive developments in the fields of education and housing were drawn upon, but it was also stated that further efforts were needed, in particular to combat anti-Roma prejudice and to strengthen the protection provided by the police and the courts. It was said that Roma unemployment remained very high, that health and housing conditions were still much worse in the Roma communities than amongst the general population and that further progress and lasting improvement in the situation of the Roma were needed.²²³

²¹⁸ Comprehensive monitoring report on Latvia's preparations for membership, 5 November 2003, p 36.

²¹⁹ Minorities in the Czech Republic account for about 7 per cent of the population, mainly Slovaks and Roma. Agenda 2000 – Commission Opinion on the Czech republic's Application for Membership of the European Union, Bulletin of the European Union, Supplement 14/1997, 15 July 1997, DOC/97/14, p. 19.

²²⁰ Ibid, pp. 17-20.

²²¹ 1998 Regular Report from the Commission on Czech Republic's progress towards accession, 13 October 1998, pp. 7-11.

²²² 1999 Regular Report from the Commission on Czech Republic's progress towards accession, 13 October 1999, pp. 15-17.

²²³ 2000 Regular Report from the Commission on Czech Republic's progress towards accession, 8 November 2000, pp. 25-27.

The 2001 Regular Report noted that the Czech republic had signed Protocol No 12 to the ECHR prohibiting all forms of discrimination, proceeded in implementing the Framework Convention and adopted the new Law on the Rights of National Minorities. Other positive developments included allocation of funds and staff to the Inter-Ministerial Roma Commission and grants given to support a number of activities by or for national minorities. It was also recognised that considerable further efforts had been made as regards national minorities and the Roma, but that the Roma still suffered from widespread discrimination, below average living conditions and opportunities and that they continued to be victims of racially motivated crimes. Furthermore, little had been done to reduce the high level of unemployment among the Roma and education levels for Roma children remained low. It was concluded that further measures to combat discrimination were needed and that the government should ensure that all levels of administration fully abided by and implemented the legislation in place as regards minority rights and that the financial resources necessary to do so were available.²²⁴

Despite the fact that the Czech Republic had signed Protocol No 12 to the ECHR, the 2002 Regular Report held that comprehensive anti-discrimination legislation was lacking. Roma were still considered to suffer from widespread discrimination in education, employment and housing. The Commission believed that an effective appeal system that could lead to compensation and sanctions was needed in order to deal with cases of discrimination. It was also held that decisive measures were needed to combat racially motivated violence, including in cases where the police had committed such violence.²²⁵ The 2003 Report only refers to minorities in the context of non-discrimination. It is said that discrimination and social exclusion facing the Roma continues to give cause for concern and that efforts need to be made as regards access to education and housing.²²⁶

4.3 Slovakia

In the 1997 Agenda 2000 Commission opinion it was noted that Slovakia had ratified the Framework Convention but not subscribed to Recommendation 1201 of the Parliamentary Assembly of the Council of Europe. It was held that the Constitution guaranteed the rights of minorities.²²⁷ Moreover, there was representation of minorities in the public

²²⁴ 2001 Regular Report from the Commission on Czech Republic's progress towards accession, 13 November 2001, SEC(2001)1746, pp. 24-27.

²²⁵ 2002 Regular Report from the Commission on Czech Republic's progress towards accession, 9 October 2002, SEC(2002)1402, COM(2002)700 final, pp. 26-27, 30-34.

²²⁶ Comprehensive monitoring report on the Czech Republic's preparations for membership, 5 November 2003, pp. 34-35.

²²⁷ Minorities in Slovakia make up between 18 and 23 per cent of the population, principally Hungarians and Roma. Agenda 2000 – Commission Opinion on Slovakia's

institutions and the state budget included funding to grant minorities the right to develop their own culture. However, some tensions between the government and the Hungarian minority as well as problems with the law on the national language, which did not benefit the Hungarian minority, were highlighted. The treatment of the Roma was also a matter of concern and it was stated that they faced considerable discrimination in access to employment, housing and public services in general.²²⁸ Slovakia was considered to be the only candidate country that failed to meet the Copenhagen criteria.²²⁹

The 1998 Regular Report noted no progress on the adoption of minority language legislation and no significant change in the protection of minorities. The implementation of the State Language Law had led to a weaker minority protection. Concerns continued to be expressed over the treatment of the Hungarian and Roma minorities. On the positive side was the adoption of a plan for Solving Romany Problems, but it was held that this programme needed further development.²³⁰

In the 1999 Regular report, a number of positive developments were commented upon. A Deputy Prime Minister for Human Rights, national Minorities and Regional Development was appointed. Parliament had established a Committee for Human Rights and National Minorities, including a commission for Roma issues. Moreover, a Government Council for National and Ethnic Minorities, which had representatives of all the minorities, had been restructured as an advisory body to the government. Minority units had also been created within the Ministries of Culture and Education and within the Office of Government. Further progress included the adoption of a Law on the Use of Minority Languages and the inclusion of representatives of the Hungarian minority in the Slovak government.²³¹ Programmes had been launched to support the education of Roma and encourage school attendance and integration. Measures had been taken to improve monitoring and prevent racially motivated attacks. A strategy to tackle the problems of the Roma community was adopted and was considered to be a step in the right direction although it lacked a precise timetable. Despite these positive steps, the treatment of the Roma minority continued to be a matter of concern. They were considered to suffer disproportionately high levels of poverty, unemployment, discrimination, school segregation and violence. Furthermore, they lacked protection from

Application for Membership of the European Union, Bulletin of the European Union, Supplement 9/1997, 15 July 1997, DOC/97/20, p. 21.

²²⁸ Ibid, pp. 21-23.

²²⁹ The principal shortcoming was however that stability of institutions was not ensured rather than a lack of minority rights protection.

²³⁰ 1998 Regular Report from the Commission on Slovakia's progress towards accession, November 1998, pp. 12-13.

²³¹ The law provides that persons belonging to minorities are able to use their language in official communications with public administrative organs and organs of self-administration in those municipalities where the minority constitutes at least 20 per cent of the population.

the police. It was concluded that particular attention should be paid to improving the situation of the Roma and to fight discriminatory attitudes in society. However, in 1999 Slovakia was considered to fulfil the Copenhagen criteria for the first time.²³²

Progress regarding the Law on the use of Minority Languages was observed in the 2000 Report, but limited progress was noted concerning actual implementation. The adoption of an action plan to prevent all forms of discrimination, racism, xenophobia, anti-semitism and other forms of intolerance was welcomed, but concerns were still raised regarding discriminatory treatment of the Roma. Efforts undertaken to improve the situation were regarded as insufficient and a gap between policy formulation and implementation was considered to exist.²³³

In November 2000 Slovakia signed Protocol No 12 to the ECHR. It was held in the 2001 Regular Report that Slovakia was in the process of developing anti-discrimination legislation with the aim of providing clear definitions and bans on discrimination as well as procedures to enforce these rules. The Commission recognised that minorities in Slovakia were comparatively well integrated into Slovak society. However, the situation of the Roma remained difficult. Some positive developments were however observed such as the ratification of the European Charter for Regional and Minority languages, implementation of the Government Roma strategy, improvements of housing situations for the Roma and finally efforts taken in the fields of employment and education. Notwithstanding these positive steps, it was held that efforts still needed to be reinforced to remedy the numerous disadvantages that the Roma were faced with. The gap between policy formulation and actual implementation was still considered to be present.²³⁴

The 2002 Regular Report highlighted further steps that had been taken to implement the Roma strategy with a view to address the difficult situation facing the Roma community. In particular, the office of the Government Plenipotentiary for Roma Affairs was strengthened and the relevant strategy enhanced and financial means increased. It was concluded that the efforts had to be continued and reinforced to effectively combat discrimination and improve the living conditions of the Roma community. Adoption of comprehensive anti-discrimination legislation would be an important step forward.²³⁵ In the latest report, minority rights are only mentioned in the context of non-discrimination. It is held that the majority of persons belonging to the Roma community are still exposed to social inequalities,

²³² 1999 Regular Report from the Commission on Slovakia's progress towards accession, 13 October 1999, pp. 16-18.

²³³ 2000 Regular Report from the Commission on Slovakia's progress towards accession, 8 November 2000, pp. 20-22.

²³⁴ 2001 Regular Report from the Commission on Slovakia's progress towards accession, 13 November 2001, SEC(2001)1754, pp. 20, 22-24.

²³⁵ 2002 Regular Report from the Commission on Slovakia's progress towards accession, 9 October 2002, SEC(2002)1410, COM(2002)700 final, pp. 30-33.

social exclusion and widespread discrimination in education, employment, the criminal justice system and access to public services. It is further mentioned that living conditions, including housing and health, are far below average. It is finally believed that considerable efforts need to be continued to remedy the situation.²³⁶

4.4 Romania

In the 1997 Agenda 2000 Commission opinion it was pointed out that Romania had ratified the Framework Convention for the protection of National Minorities.²³⁷ It was further stated that Romania also had endorsed the principles laid down in Recommendation 1201 when signing a bilateral treaty with Hungary in 1996.²³⁸ Concerns were expressed over discriminatory treatment of the Roma. The Hungarian minority on the other hand was well integrated.²³⁹

The 1998 Regular Report noted that the protection of minorities in Romania remained satisfactory with the major exception of the Roma. Discrimination against the large Roma minority was thought to be widespread. Even though an Inter-Ministerial Committee for National Minorities had been set up, social and economic integration of the Roma required substantial additional efforts.²⁴⁰

The following year's report entailed some positive remarks. It was held that the conditions for use of minority languages, in particular Hungarian, had improved. A new Education Law that created the legal framework for establishing multi-cultural universities and gave the right to national minorities to study in their mother tongue at all levels and forms of education for which there was sufficient demand was welcomed. In addition, a law of local administration, stipulating that civil servants working directly with the public must speak the language of the an ethnic minority in areas where the minority represents at least 20 per cent of the population, was also thought to be a positive development. Progress was registered in established institutional frameworks to improve the situation of

²³⁶ Comprehensive monitoring report on Slovakia's preparations for membership, 5 November 2003, p. 34.

²³⁷ Minorities account for 13-15 per cent of Romania's population. The largest minorities are Hungarians and Roma. The number of Roma in Slovakia is estimated by the Government to be around 400 000 (official figure in 1997) whereas the Commission believes the number to be between 1.8 and 2.5 million. Agenda 2000 – Commission Opinion on Romania's Application for Membership of the European Union, 15 July 1997, DOC/97/18, p. 17.

²³⁸ A footnote added to the treaty at Romania's request expressly ruled out any recognition of collective rights under the Recommendation.

²³⁹ Agenda 2000 – Commission Opinion on Romania's Application for Membership of the European Union, 15 July 1997, DOC/97/18, pp. 15, 17-19.

²⁴⁰ 1998 Regular Report from the Commission on Romania's progress towards accession, November 1998, pp. 11-12.

the Roma, such as the setting up of a Working Group of Roma Associations. An agreement had further been signed between the Department for the protection of National Minorities and the Working Group on elaboration of a strategy for the protection of the Roma minority. However, prejudice against the Roma continued to be of concern for the Commission and progress on the ground was considered to be very slow. It was concluded that adequate budgetary resources should be made available and efforts should be made to fight discriminatory attitudes in society.²⁴¹

In the 2000 Regular Report, the Commission believed the treatment of minorities in Romania to be mixed. In contrast to the lack of development relating to the treatment of the Roma, Romania was held to actively promote a positive policy to protect other minorities. However, it was concluded that continued high levels of discrimination were a serious concern. The Accession Partnership's short-term priorities still needed to be met as regards the elaboration of a national Roma strategy and providing adequate financial support to minority programmes. Progress was considered to be limited to programmes aimed at improving access to education.²⁴²

The 2001 report mentioned that Romania had signed Protocol No. 12 to the ECHR. A major development was the issuing of an Emergency Ordinance on the prevention and combating of all forms of discrimination that was considered to be in line with the Race Directive. However, it was also noted that it was not operational since the necessary legislation had not been adopted and the implementing body had not been established. Positive steps were also commented upon, such as the adoption of a National Strategy for Improving the Condition of Roma and the approval of new legislation extending the use of minority languages. However, difficulties for the Roma in the forms of police harassment, access to schools, medical care and social assistance were pointed out. The Roma strategy had also not yet been implemented.²⁴³

In the 2002 Report a law approving the Government Ordinance on Preventing and Punishing all Forms of Discrimination was welcomed. However, it was pointed out that further amendments to the law were needed in order to fully conform with Community law based on article 13 EC Treaty. Positive developments included implementation of legislation extending the use of minority languages and steps taken to implement the National Strategy for Improving the Condition of Roma. One problem with the Strategy was however the lack of financial support.²⁴⁴ The discriminatory treatment of the Roma constitutes to be a concern also in the

²⁴¹ 1999 Regular Report from the Commission on Romania's progress towards accession, 13 October 1999, pp. 18-20.

²⁴² 2000 Regular Report from the Commission on Romania's progress towards accession, 8 November 2000, pp. 24-25.

²⁴³ 2001 Regular Report from the Commission on Romania's progress towards accession, 13 November 2001, SEC(2001)1753, pp. 22, 29-30.

²⁴⁴ 2002 Regular Report from the Commission on Romania's progress towards accession, 9 October 2002, SEC(2002)1409, COM(2002)700 final, pp. 28, 35-38.

2003 Regular Report. The implementation of the Roma Strategy has continued although a lack of resources has limited the results. Further measures taken to enhance the rights of national minorities, notably as regards language, education and anti-discrimination, are highlighted.²⁴⁵

4.5 Analysis

The opinions are based on a broad conception of what constitutes a minority, including that part of the permanent population that has not been granted citizenship. This broad interpretation is in line with HRC general comment on article 27 ICCPR. However, in the EU member states no common definition of what constitutes a minority exists. Many member states have adopted restrictive definitions of minorities. In Italy, minority rights are guaranteed to traditional minority groups such as the French, German and Slovenian minorities. Both Muslims and Roma, two of the most vulnerable groups in the country, are excluded. In Germany, Roma are a recognised minority group along with Danes, Frisians and Sorbs, but Muslims are not. In France the concept of minority is not even seen as relevant.²⁴⁶

The minority rights instrument most frequently referred to in the Reports is the Council of Europe's Framework Convention. Candidate states are urged to ratify it although it has not been ratified by all present EU member states. Belgium, Greece, Luxembourg and the Netherlands have all only signed but not ratified the Convention, whereas France has neither signed nor ratified.²⁴⁷ Another instrument referred to is Recommendation 1201 of the Parliamentary Assembly of the Council of Europe, an instrument that is not legally binding. Furthermore, all progress reports refer to additional Protocol No. 12 to the ECHR which has only been ratified by 5 countries and thus not yet entered into force. Denmark, France, Spain, Sweden and the United Kingdom have not even signed the instrument.²⁴⁸ Finally, the European Charter of Regional and Minority Languages is mentioned in the 2001 Regular Report on Slovakia. This instrument has been signed by 11 EU member states and ratified by only eight.

²⁴⁵ 2003 Regular Report from the Commission on Romania's progress towards accession, 5 November 2003, pp. 29-32.

²⁴⁶ Open Society Institute, EU Accession Monitoring Program, "Monitoring the EU Accession Process": *Minority Protection Volume 1, An Assessment of Selected Policies in Candidate States*, 2002, pp. 54-55. Sweden recognises the Sami, sverigefinnar (Finnish), tornedalingar, Roma and Jews, all of which have lived in Sweden for a very long time. Sweden only recognises minorities that have lived on its territory since before the year 1900. See "National minorities and minority languages. A summary of the Swedish Government's policy on national minorities" at http://justitie.regeringen.se/pressinfo/pdf/FaktaJu_0310e.pdf last visited 2003-12-19.

²⁴⁷ <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> ETS No. 157. Last visited 2003-11-26.

²⁴⁸ <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> ETS No. 177. Last visited 2003-11-26.

Clear benchmarks to measure progress in the field of minority rights protection is lacking in the Reports. References are only made as to whether or not the country in question has signed or ratified the different legal instruments. No analysis as regards actual implementation is made apart from references to adoption of domestic laws and special mechanisms. References to other international instruments on minority protection besides the ones mentioned consist of vague references. The standards are never specified.²⁴⁹ Article 27 of the ICCPR and the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities are not referred to. Perhaps the lack of references is due to fear that the instruments could be used against the EU member states themselves forcing them to improve their own behaviour when it comes to minority protection.

The reports note the adoption and change of laws concerning minority rights in the areas of citizenship, naturalisation, language rights, education and parliamentary representation. Furthermore, they address the establishment of institutions that manage minority issues and government programmes on minorities. The reports do not however assess the structure and operation of these institutional frameworks or laws. Problems in the implementation of minority protection are often explained by a lack of staff and funding. The commitments of the candidate states to improve minority protection are often taken at face value and described in positive terms, such as “significant progress”, “considerable efforts” and “a number of positive developments”.²⁵⁰ It must be kept in mind that the adoption of special programmes for minorities raises certain risks in that they may be used as a pretext for the state to rid itself of the responsibility to provide minorities with the protection, benefits and services that are due to all. While specialised programmes may be essential to address the specific needs of minorities, general programmes should also include minorities.²⁵¹

Although all candidate countries mentioned have significant minority populations, only problems as regards two minority groups are consistently mentioned in the Regular Reports; the Russian minority in Latvia and the

²⁴⁹ The 1999 Regular Report on Slovakia states that Slovakia brings national legislation on minority language use into conformity with the Slovak Constitution, *applicable international standards and specific recommendations from the OSCE, the Council of Europe and the European Commission* (author’s emphasis). 1999 Regular Report from the Commission on Slovakia’s progress towards accession, 13 October 1999, p. 17, para. 3. Another example is the 1999 Report on Latvia that holds that Latvia now fulfils all recommendations expressed by the OSCE in the area of citizenship and naturalisation. 1999 Regular Report from the Commission on Latvia’s progress towards accession, 13 October 1999, p. 17, para. 2.

²⁵⁰ Hughes and Sasse, “Monitoring the Monitors: EU Enlargement Conditionality and Minority protection in the CEECs”, *Journal on Ethnopolitics and Minority Issues in Europe*, Issue1/2003, pp. 15-16.

²⁵¹ Open Society Institute EU Accession Monitoring Program, *Monitoring the EU Accession process: Minority Protection Volume II, Case Studies in Selected Member States*, 2002, p. 27.

Roma minority in the Czech Republic, Slovakia and Romania. Hungarians are mentioned in the Reports on Slovakia and Romania but considerably less attention is paid to them than the Russians and the Roma. The emphasis on the Russian and Roma minorities could mean that the EU is more concerned with security and migration problems than actual minority protection. Especially discrimination facing the Roma is held out to be a serious problem in the candidate states. The policy failures and the weakness of the implementation of minority protection are noted in several Reports. When it comes to the Roma there is a lack of clear correlation between the Reports and an improvement of minority protection or their integration.²⁵² However, the Roma face unjust treatment not only in the candidate states but also in the current member states. The Roma population in Germany and Spain face prejudice, exclusion and discrimination in areas such as employment, education, housing, access to public goods and services, and the criminal justice system, as well as barriers to the full enjoyment of minority rights. Furthermore, in contrast to the candidate states, Germany has not adopted a special government programme to address those issues. Spain's "Roma Development Programme" was adopted back in the 1980s and is outdated and in need of revision.²⁵³

Emphasis is put on the integration of minorities, mainly in the forms of linguistic integration and social and political integration. When too much emphasis is put on integration there is a danger that it borders with promoting assimilation. Moreover, little has occurred by way of condemnation or official sanction in relation to similar problems in EU member states such as Germany, Belgium and Greece.²⁵⁴

The Reports also focus to a large extent on citizenship laws. The introduction of an increasingly inclusive nationality policy in Latvia coincided with the country's unsuccessful attempts to join negotiations for membership until 1999. Its desire to join the EU was crucial in the reform of Latvian citizenship legislation.²⁵⁵ Despite the focus on candidate states' legislation, EU member states also face problems in this area. Large numbers of Muslims living in France have become citizens only in the past decade or are non-citizens and the majority of Muslims living in Italy have

²⁵² Hughes and Sasse, "Monitoring the Monitors: EU Enlargement Conditionality and Minority protection in the CEECs", *Journal on Ethnopolitics and Minority Issues in Europe*, Issue1/2003, p. 27.

²⁵³ Open Society Institute. EU Accession Monitoring Program, *Monitoring the EU Accession Process: Minority Protection Volume 1, An Assessment of Selected Policies in Candidate States*, 2002, p. 38.

²⁵⁴ A. Williams, "Enlargement of the Union and Human Rights Conditionality: A Policy of Distinction", 25 *European Law Review*, 2000, pp. 611-612.

²⁵⁵ H. Morris, "EU Enlargement and Latvian Citizenship Policy", *Journal on Ethnopolitics and Minority Issues in Europe*, Issue1/2003, pp. 5, 27.

not obtained citizenship.²⁵⁶ Furthermore, lack of citizenship prevents access to minority rights for as many as half of all Roma living in Germany.²⁵⁷

Finally, protection against discrimination is another part of minority protection that is held out to be a problem in the candidate states and several of the states are encouraged to adopt legislation on the issue. However, not all EU member states have brought their legislation into compliance with EU standards in the area of non-discrimination, as set forth in the Race Directive. Also, these standards are not sufficiently comprehensive when it comes to the protection of minorities, as the Race Directive does not cover discrimination on grounds of language or religious affiliation. Protocol No. 12 to the ECHR contains a freestanding prohibition on discrimination, including on grounds of religious affiliation, but this instrument has not been ratified by a single EU member state.²⁵⁸

Even though the Commission Progress Reports continuously holds that further improvements are needed as regards the respect for and protection of minorities all the candidate states here examined are still considered to have fulfilled the Copenhagen criteria. Cases of non-compliance with minority protection are glossed over. In the 1997 Agenda 2000 Commission opinion on the Czech Republic it is concluded that no major problems over respect for fundamental rights exists and that minorities are respected and protected. At the same time it is recognised that there is a problem of discrimination of the Roma.²⁵⁹ The 2002 Report on Latvia urges the country to ratify the Framework Convention and notes EU and OSCE concerns over naturalisation and effective political participation by minorities due to restrictive language laws. Still, it is concluded that the country has made considerable progress in further consolidating and deepening respect for and protection of minorities.²⁶⁰ It seems as if progress is promoted and encouraged at all costs. Even though serious problems facing minorities are emphasised, candidate states are still considered to have fulfilled the criteria as regards protection of minorities. This indicates that minority protection is not the EU's main concern when it comes to the enlargement process.

In conclusion, there do not seem to be any clearly established, objective evaluation criteria. Minority protection is an ill-defined political requirement for EU membership. In order for the criteria to be credible, monitoring beyond analyses of constitutional provisions and state

²⁵⁶ Open Society Institute EU Accession Monitoring Program, *Monitoring the EU Accession process: Minority Protection Volume I, An Assessment of Selected Policies in Candidate States*, 2002, p. 55.

²⁵⁷ Open Society Institute EU Accession Monitoring Program, *Monitoring the EU Accession process: Minority Protection Volume II, Case Studies in Selected Member States*, 2002, p. 145.

²⁵⁸ *Ibid.*, p. 41.

²⁵⁹ Agenda 2000 – Commission Opinion on the Czech republic's Application for Membership of the European Union, Bulletin of the European Union, Supplement 14/1997, 15 July 1997, DOC/97/14, p. 20.

²⁶⁰ 2002 Regular Report from the Commission on Latvia's progress towards accession, 9 October 2002, SEC(2002)1405, COM(2002)700 final, pp. 30-34.

ratification of international instruments for the protection of minorities must take place. Real commitments of states to respect minority rights, for example governments' performances when it comes to fulfilling minority rights obligations they have undertaken, should be monitored. However, since the standards that candidate states are encouraged to follow are not respected by the member states themselves a better solution would be that no in depth minority rights scrutiny of the applicant states take place in the accession process.

5 Conclusion

Conditionality as regards membership is enshrined in a few provisions of the EU Treaties. Article 6(1) of the TEU states that “*the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law [..]*”. This provision is emphasised also in article 49. Until the entry into force of the Amsterdam Treaty, article 49 TEU (former article O) did not contain any formal requirements for membership of the EU, apart from having to be a European state.²⁶¹ The new version spells out that accession is only open to states that respect the principles set out in article 6(1) and are thereby committed to the protection of human rights.²⁶² If the principles set out in article 6(1) are those upon which the Union is founded, it is logical that they should serve as conditions for membership. Yet the formula set out in the Copenhagen political criteria is more demanding upon the candidate states as it also includes protection of minorities as one of the indispensable requirements for accession, something that is not mentioned in article 6(1).²⁶³ It could be argued that the concept of human rights and fundamental freedoms in article 6(1) in principle includes all human rights recognised by EU member states in the context of the UN, the OSCE and the Council of Europe and thus also minority rights. An additional requirement that future member states also have to respect and protect minorities thus seems superfluous.

The immediate consequence of the Copenhagen declaration was that candidate states were required to demonstrate that they ensured minority protection in order to become members of the EU. However, the EU’s own commitment to minority protection is insufficiently developed and inconsistently applied. There is thus a problem of double standard in that there is a discrepancy between the EU’s lack of internal commitment to minority rights and its efforts to promote minority protection when dealing with candidate states.

The EU’s condition on minority protection has been unclear and actual improvement in minority protection has been limited.²⁶⁴ A large margin of appreciation has been given to applicant states in deciding how to meet the criteria and to what degree. Moreover, the EU has not been clear about how much adoption of new measures that is required in order to result in a

²⁶¹ M. Nowak, “Human Rights Conditionality in the EU”, Alston (ed.), *The EU and Human Rights*, 1999, p. 691.

²⁶² Although the principles in article 6(1) as such seem to fall outside the jurisdiction of the ECJ it may still review decisions of the EU institutions determining, in line with article 49 TEU, whether a candidate state respects these principles or not.

²⁶³ B. De Witte, “Politics versus law in the EU’s approach to ethnic minorities”, J. Zielonka (ed.), *Europe Unbound – Enlarging and reshaping the boundaries of the European Union*, 2002, p. 140.

²⁶⁴ P. Vermeersch, “EU Enlargement and Minority Rights Policies in Central Europe: Explaining Policy Shifts in the Czech Republic, Hungary and Poland”, *Journal on Ethnopolitics and Minority Issues in Europe*, Issue1/2003, p. 9.

positive evaluation. The EU's conditionality policy has led to some limited forms of changes in the candidate states such as introduction of new documents and legislation but a monitoring mechanism to ensure implementation is lacking.²⁶⁵

If it is to be clear that respect for and protection of minorities is a EU value to be promoted in the enlargement process, all the Copenhagen criteria should be fully integrated into existing EU standards.²⁶⁶ Since the TEU is legally binding one might draw the conclusion that the EU has abandoned the minority protection provision of the conditionality for membership. It seems that it was not desired that minority rights be given the status of a founding principle of the EU, assuming clear binding force and an internal dimension.²⁶⁷ As was shown in the analysis of the Reports, the conditionality of minority protection imposed on the candidate states has been largely rhetorical on the part of the EU.

Signing and ratifying the Framework Convention has for many states been an ideal way of showing their commitment to the idea of protecting minorities without needing to adopt an ambitious catalogue of minority rights.²⁶⁸ However, if that had been a requirement for membership many of the current member states would not have been eligible had they reapplied today. Some of the member states have not ratified the Framework Convention for the Protection of National Minorities, while nevertheless requiring ratification from the candidate states. Also, a few of those member states that have ratified have entered reservations.²⁶⁹

The Commission has consistently held that most applicant states have fulfilled the Copenhagen political criteria necessary to assume membership of the EU. Either the criteria is flawed, in the sense that it operates as no more than a guide rather than a condition, or the Commission interferes in the affairs of candidate states regardless of whether or not the criteria is accepted internally within the Union. Imposing compliance with minority protection standards on candidate states while the member states do not fully abide by the same standards themselves is not only double standard but

²⁶⁵ Ibid, p. 21.

²⁶⁶ Open Society Institute EU Accession Monitoring Program, *Monitoring the EU Accession process: Minority Protection Volume II Case Studies in Selected Member States*, 2002, p. 18.

²⁶⁷ K. Henrard, "The impact of the Enlargement process on the Development of a Minority Protection Policy within the EU: Another aspect of Responsibility/Burden-Sharing?", *Maastricht Journal of European and Comparative Law*, 2002, Volume 9, Issue 4, p. 384.

²⁶⁸ P. Vermeersch, "EU Enlargement and Minority Rights Policies in Central Europe: Explaining Policy Shifts in the Czech Republic, Hungary and Poland", *Journal on Ethnopolitics and Minority Issues in Europe*, Issue1/2003, p. 7.

²⁶⁹ Denmark only recognises a German minority and only in a part of its territory. Germany only recognises the Danish, Sorbian, Frisian, Sinti and Roma minorities of German citizenship. Furthermore, Luxembourg does not recognise any minorities on its territory. Belgium, Greece, Luxembourg and the Netherlands have signed but not as of yet ratified the Convention whereas France has neither signed nor ratified.

See <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> last visited 2003-12-08.

seems to violate the principle of non-discrimination. When the current member states impose the respect of minority rights as a condition of accession on candidate states, it implies that the former already complies with this requirement. Such difference in treatment does not have objective or reasonable justification and does not pursue a legitimate aim.²⁷⁰

To conclude, what would then be the solution? Two scenarios are possible. To make it clear that respect for and protection of minorities is a core EU value, all the Copenhagen criteria should be fully integrated into existing Community law (articles 6(1) and 49) and compliance with minority rights standards by all EU member states, future and current, should be monitored. Ratification of legal instruments should not be regarded as enough commitment towards protecting minorities, but these instruments need to be respected and implemented.

In my opinion, a better solution would be that no in depth minority rights scrutiny of the applicant states takes place in the accession process. Despite the clear declaration at Copenhagen concerning the obligations of new candidates for membership there is no consensus within the EU as to whether recognition of the existence of minorities is a requirement for membership,²⁷¹ nor any clear EU standards in the area of minority protection.²⁷² Furthermore, even if the Copenhagen criteria were applied clearly to candidate and member states, they remain ill-defined and allows for such broad and disparate interpretations as to render them of minimal utility in guiding states' actions.²⁷³ The candidate countries are required to meet "European standards" of human rights and minority rights protection. There are however no clear and coherent, let alone binding, standards of minority protection to be found in the EU. Rather, international standards entailed in the UN, the OSCE and the Council of Europe systems should provide the same minority rights protection that applies to the member states.

²⁷⁰ K. Henrard, "The impact of the Enlargement process on the Development of a Minority Protection Policy within the EU: Another aspect of Responsibility/Burden-Sharing?", *Maastricht Journal of European and Comparative Law*, 2002, Volume 9, Issue 4, p. 390.

²⁷¹ As has been noted previously in this presentation, France does not recognise the existence of minorities on its territory.

²⁷² See the before mentioned Chapman case at note 134.

²⁷³ Open Society Institute, EU Accession Monitoring Program, "Monitoring the EU Accession Process": *Minority Protection Volume 1, An Assessment of Selected Policies in Candidate States*, 2002, pp. 18-19.

6 Final reflections

An interesting question to ask oneself is what will happen to the protection of minorities in Europe after the candidate states have acquired membership. At the moment minority protection is not the EU's main concern. The conditionality of minority protection imposed on candidate states through the Copenhagen criteria has not been transferred directly into the treaties. Moreover, the requirements imposed on the candidate states have not been respected by the EU member states themselves. Some member states, such as France and Germany, can be expected to oppose the strengthening of minority protection within the Union. There is a risk that once a country is accepted for membership, the minority question will be regarded as solved as far as the EU is concerned. Some scholars however believe that the actual membership of the candidate states, their induced commitments towards minority protection and the new minorities they will bring within the EU borders might have an impact on, and might be the main triggering factor for, the development of a coherent system of minority protection at EU level.²⁷⁴ De Witte believes that once the EU has let the devil escape from the bottle, through its activist minority policy towards the candidate states, it may be difficult to put it back in after accession.²⁷⁵ If the EU continues to expand to include countries such as Turkey, its role in minority protection may expand also and this would refocus attention on the issue of minority protection within the EU itself. Turkey has serious failings in its record on human rights and its treatment of the Kurdish minority is one of the reasons behind the failure of its application. Enlargement as regards Turkey is likely to be a very drawn out procedure and this could mean a renewed focus on all the Copenhagen criteria, including respect for and protection of minorities.²⁷⁶

Other authors hold that although the enlargement process has created an increased awareness of minority protection issues, different roles and agendas of European institutions, the varied understandings of how to define a minority within and among European countries and an ever changing political climate renders the creation of a long term and effective minority rights strategy unlikely. Therefore, minority protection is expected to remain at the level of a basic framework such as the Framework

²⁷⁴ See for example K. Henrard, "The impact of the Enlargement process on the Development of a Minority Protection Policy within the EU: Another aspect of Responsibility/Burden-Sharing?", *Maastricht Journal of European and Comparative Law*, 2002, Volume 9, Issue 4, p. 384.

²⁷⁵ B. de Witte, "Politics versus law in the EU's approach to ethnic minorities", J. Zielonka (ed.), *Europe unbound. Enlarging and reshaping the boundaries of the European Union*, 2002, p. 156.

²⁷⁶ Hughes and Sasse, "Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs", *Journal on Ethnopolitics and Minority Issues in Europe*, Issue 1/2003, p. 28.

Convention.²⁷⁷ Another route could be the ECJ through a process of judicial review of human rights and anti-discrimination provisions as opposed to a codification of minority rights.²⁷⁸

In my opinion, it is important that minority issues get the attention and focus they deserve. A development of a coherent system of minority protection at EU level need however not take place. Rather, the Council of Europe, the UN and the OSCE systems should provide minority rights protection to the EU member states, new as well as current ones. Efforts should be made to improve and secure implementation of these instruments. Full use should be made of existing legal frameworks instead of trying to develop a new one.

²⁷⁷ H. Morris, "EU Enlargement and Latvian Citizenship Policy", *Journal on Ethnopolitics and Minority Issues in Europe*, Issue1/2003, pp. 32-33.

²⁷⁸ Hughes and Sasse, "Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs", *Journal on Ethnopolitics and Minority Issues in Europe*, Issue 1/2003, p. 27.

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