Fordham International Law Journal

Volume 27, *Issue* 2 2003 *Article* 7

Enlargement of the European Union – The Discrepancy Between Membership Obligations and Accession Conditions as Regards the Protection of Minorities

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Christophe Hillion

Abstract

This Article will focus on one particular accession condition that is illustrative of this phenomenon, namely, the protection of minorities. The Copenhagen criteria encompass the "respect for and protection of minorities" as one of the conditions for acceding to the Union, but the Treaty on European Union ("TEU") does not explicitly mention the protection of minorities as one of the EU's principles, objectives, or competences. It is argued that the question of minority rights could find its way onto the EU internal policy agenda not only as a concern of various new Member States, but also as an unintended consequence of the pre-accession conditionality established by the Union in this regard. After examining the question of whether the "respect for and protection of minorities" is covered by EU law under the Treaty on European Union, this Article highlights some of the implications of accession for the respect for, and protection of, minorities. It then looks at whether the Draft Treaty establishing a Constitution for Europe, drafted by the European Convention, makes any suggestion to narrow the discrepancy between accession conditions and membership obligations, in regards to minority rights.

ENLARGEMENT OF THE EUROPEAN UNION — THE DISCREPANCY BETWEEN MEMBERSHIP OBLIGATIONS AND ACCESSION CONDITIONS AS REGARDS THE PROTECTION OF MINORITIES

*Christophe Hillion**

INTRODUCTION

It is a truism to say that accession of ten countries to the European Union ("EU" or the "Union")[1] will provoke a number of internal institutional modifications, notably as regards the Union's decision-making process and the functioning of the European Court of Justice.[2] It also seems obvious, in the light of previous EU enlargements and considering the remarkable number of acceding States, that additional policy areas that are closer to home for new Members will appear on the Union agenda. This Article suggests that the emergence of new policies could be catalyzed by the specific conditionality that was established by the Union to prepare the candidates for accession.

This conditionality consists of a close EU monitoring of the candidates' progressive fulfillment of accession requirements defined by the European Council,[3] which elaborate on the provi-

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1. Namely Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

2. *See* R. Von Weiszäcker et al., *The Institutional Consequences of Enlargement* (Report for the European Commission, Brussels, 1999); *Adapting the Institutions to make a Success of Enlargement* (Commission IGC Opinion, 2000); Council of the European Union, *An Effective Council for an Enlarged Union* (Council's paper), *at* http://ue.eu.int/en/Info/index.htm (last visited Jan. 24, 2004). *See also* Bruno de Witte, *The Impact of Enlargement on the Constitution of the European Union, in* THE ENLARGEMENT OF THE EUROPEAN UNION 209 (Marise Cremona ed., 2003).

3. *See* Copenhagen European Council, Conclusions of the Presidency, E.U. BULL., no. 6, at § 7(A)(iii) (1993) [hereinafter Conclusions of the Presidency] (establishing these accession requirements). The latter have since been referred to as the "Copenhagen criteria." To be able to accede, the Copenhagen criteria require a candidate country to have achieved the following:

> [S]tability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pres-

sions of Article 49 of the Treaty on European Union ("TEU").[4] This method aimed to ensure not only that candidates would be as fit as possible to accede, but also that such an unprecedented enlargement would not hold back the momentum of integration.[5] In view of these aims, the accession conditionality has sometimes entailed requirements that, at least in certain areas, are more extensive and stricter than those which the Member States are expected to comply with, *qua* Member States of the EU. In other words, a discrepancy has appeared between some EU accession requirements and corresponding membership obligations. It is even arguable that in the context of pre-accession, the constitutional principle of "conferral of powers" does not apply, or at least not as strictly as in the internal context.[6]

> sure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

Id.

4. Consolidated version of the Treaty on European Union, art. 49, O.J. C 325/5, at 31 (2002), 37 I.L.M. 67, at 78 (ex Article O) [hereinafter Consolidated TEU], *incorporating changes made by* Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts Feb. 26, 2001, O.J. C 80/1 (2001) [hereinafter Treaty of Nice] (amending Treaty on European Union ("TEU"), Treaty establishing the European Community ("EC Treaty"), Treaty establishing the European Coal and Steel Community ("ECSC Treaty"), and Treaty establishing the European Atomic Energy Community ("Euratom Treaty") and renumbering articles of TEU and EC Treaty). Article 49 of the Consolidated TEU states:

> Any European State which respects the principles set out in Article 6(1) may apply to become a Member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.
>
> The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

Id.

5. This concern became the so-called fourth Copenhagen criteria: enlargement should be subject to "[t]he Union's capacity to absorb new members, while maintaining the momentum of European integration . . . in the general interest of both the Union and the candidate countries." Conclusions of the Presidency, *supra* note 3, at Introduction. *See also* Geoffrey Edwards, *Reforming the EU Institutional Framework: A New EU Obligation?*, *in* ENLARGEMENT OF THE EUROPEAN UNION: A "LEGAL" APPROACH (Christophe Hillion ed., forthcoming 2004).

6. This principle is based on Article 5 of the EC Treaty, which states that the "Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein." Consolidated version of the Treaty establishing the European Community, art. 5, O.J. C 325/33, at 41-42 (2002), 37 I.L.M. 79, at 80-81

The logical consequence of this phenomenon is that, in some areas, the EU could be less influential vis-à-vis the acceding countries once they have entered, than it was before they became full-fledged Members. The current Member States might, therefore, require that the same level of monitoring be carried on through new mechanisms to ensure that the accession criteria are still observed by the acceding States, once they have entered the Union. The extensive safeguard clauses introduced in the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia ("Accession Treaty")[7] tend to support that view.[8] At the same time, new Member States might equally feel that this monitoring should be extended to the current Member States as well, notably to obliterate the "double standards" or feelings of "second-class membership." Overall, membership obligations and accession conditions should be more consistent.

This Article will focus on one particular accession condition that is illustrative of this phenomenon, namely, the protection of minorities.[9] The Copenhagen criteria encompass the "respect for and protection of minorities" as one of the conditions for

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(ex Article 3b) [hereinafter Consolidated EC Treaty] *incorporating changes made by* Treaty of Nice, *supra* note 4.

7. Treaty of Accession to the European Union 2003, Apr. 16, 2003, *available at* http://www.europa.eu.int/comm/enlargement/negotiations/treaty_of_accession_2003/index.htm [hereinafter Accession Treaty].

8. *See* Kirstyn Inglis, *The Accession Treaty and its Transitional Arrangements: A Twilight Zone for the Future Members of the Union, in* ENLARGEMENT OF THE EUROPEAN UNION: A "LEGAL" APPROACH, *supra* note 5.

9. *See* Minority Rights Group, EU Accession Exposes Double Standards on Minority Rights, *available at* http://www.minorityrights.org/news_detail.asp?ID=107 (Apr. 15, 2003); *see also* Open Society Institute, Monitoring the EU Accession Process: Minority Protection, *available at* http://www.eumap.org/reports/2002/content/07 (2002). *See, e.g.*, Giuliano Amato & Judy Batt, *Minority Rights and Enlargement to the East*, ROBERT SCHUMAN CENTRE POLICY PAPER, No. 98/5 (Eur. Univ. Inst., 1998); Bruno de Witte, *Politics Versus Law in the EU's Approach to the Issue of Ethnic Minorities*, ROBERT SCHUMAN CENTRE POLICY PAPER, No. 2000/4 (Eur. Univ. Inst., 2000); Gabriel Toggenburg, *A Rough Orientation Through a Delicate Relationship: The European Union's Endeavours for (its) Minorities, in* 4 EUROPEAN INTEGRATION ONLINE PAPERS 16 (2000); Manfred Nowak, *Human Rights "Conditionality" in Relation to, and Full Participation in, the EU, in* THE EU AND HUMAN RIGHTS 687, 692 (Philip Alston ed., 1999); Andre Liebich, Ethnic Minorities and Long-Term Implications of EU Enlargement (Robert Schuman Centre Working Paper No. 98/49, 1998) (on file with the European University Institute); Kristin Henrad, *The Impact of the Enlargement Process on the Development of a Minority Protection Policy within the EU: Another Aspect of Responsibility/Burden — Sharing?* 9 MAASTRICHT J. EUR. & COMP. L. 357 (2002); Gaetano Pentassuglia, *The EU and the Protection of Minorities: the case of Eastern Europe*, 12 EUR. J. INT'L L. 20 (2001).

acceding to the Union, but the Treaty on European Union ("TEU") does not explicitly mention the protection of minorities as one of the EU's principles, objectives, or competences. It is argued that the question of minority rights could find its way onto the EU internal policy agenda not only as a concern of various new Member States, but also as an unintended consequence of the pre-accession conditionality established by the Union in this regard.

After examining the question of whether the "respect for and protection of minorities" is covered by EU law under the Treaty on European Union, this Article highlights some of the implications of accession for the respect for, and protection of, minorities. It then looks at whether the Draft Treaty establishing a Constitution for Europe,[10] drafted by the European Convention, makes any suggestion to narrow the discrepancy between accession conditions and membership obligations, in regards to minority rights.

I. *RESPECT FOR AND PROTECTION OF MINORITIES' RIGHTS UNDER THE TREATY ON EUROPEAN UNION*

Three sets of provisions will be examined to establish whether EU law covers the requirement of "respect for and protection of minorities": (1) the foundational principles of the Union; (2) the fundamental rights to be respected by the EU as general principles of Community Law; and (3) the list of EU competences.

First, the EU foundational principles, as provided in Article 6 of the TEU, are not unambiguous as to whether they could include respect for and protection of minorities. Article 6(1) refers to the principle of "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law . . . ."[11] No specific mention is made of minorities' rights, and it is unclear whether they are included in the expression "human rights and fundamental freedoms . . . ."[12]

Article 6(2) of the TEU is equally silent on this point. It

10. Draft Treaty establishing a Constitution for Europe, July 18, 2003 O.J. C 169/1 (2003) (not yet ratified) [hereinafter Draft Treaty].

11. Consolidated TEU, *supra* note 4, art. 6(1), O.J. C 325/5, at 11 (2002), 37 I.L.M. at 69 (ex Article F).

12. It should be recalled that the Copenhagen criteria make a distinction between human rights on the one hand, and the respect for and protection of minorities, on the

provides that: "[t]he 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."[13] The question is whether the concept of minority rights is encapsulated within the notion of "fundamental rights," which have to be respected as general principles of Community Law.

Article 6(2) makes an explicit reference to Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), which provides that: "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, *association with a national minority*, property, birth or other status."[14] Since the EU shall respect the fundamental rights guaranteed by the ECHR as general principles of Community Law, one could suggest that the EU is also bound to ensure the principle of non-discrimination based on association with a national minority. One should note, however, that Article 14 of the ECHR does not establish a free-standing right, given that it refers to "the enjoyment of the rights and freedoms set forth in this Convention."[15] On the other hand, the general principles of Community Law do not incorporate the provisions of the ECHR, as such, in EU law; they rather extract the general principles enshrined in the ECHR and apply them in the context of the Treaty provisions.[16] Hence, the general principle of non-discrimination set out in Article 14 of the ECHR binds the Union as a general principle of Community

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other hand, thereby suggesting that the latter is distinct from the former. *See supra* note 3.

13. Consolidated TEU, *supra* note 4, art. 6(2), O.J. C 325/5, at 12 (2002), 37 I.L.M. at 69 (ex Article F).

14. European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 312 U.N.T.S. 221, *available at* http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm [hereinafter ECHR] (emphasis added).

15. *Id.*

16. *See, e.g.*, Johnston v. Chief Constable of the Royal Ulster Constabulary, Case 22/84, [1986] E.C.R. 1651, ¶ 18; Coote v. Granada Hospitality Ltd., Case C-185/97, [1998] 5199, ¶¶ 21-23; *see also* Opinion of Advocate General Trabucchi, Watson & Belmann Case 118/75, [1976] E.C.R. 1185, 1207.

Law in the context of the TEU, and not solely in relation to the rights and freedoms set forth by the Convention.

Since Article 6(2) also refers to "the constitutional traditions common to the Member States," the question arises as to whether the conjunctive "and" found between the reference to the ECHR and "as they result" suggests that the constitutional traditions common to the Member States are not an alternative source of human rights protection, but rather a cumulative requirement for protection. If that were the right interpretation, the argument that protection should also derive from the constitutional traditions common to the Member States would not sit easily with the fact that some of the latter are not particularly receptive to the concept of minorities, as notably illustrated by the list of parties to the Council of Europe Framework Convention on the Protection of National Minorities.[17] On the other hand, Article 6(2) encapsulates the well-established case law of the European Court of Justice regarding the observance of the general principles of Community Law. The Court has always considered that, in ensuring the observance of fundamental rights that belong to the general principles of Community Law, it draws *inspiration* from the constitutional traditions common to the Member States, and also from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories.[18] In other words, the recognition of a fundamental right in the sense of Article 6(2) of the TEU does not require that it is provided by the ECHR *and* that it is also a constitutional tradition common to the Member States. Moreover, the absence of the recognition of minority rights by one Member State's constitutional tradition should not necessarily constitute an obstacle to

17. Framework Convention for the Protection of National Minorities, Feb. 1, 1998, E.T.S. No. 157, *available at* http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm [hereinafter Framework Convention]. According to the Council of Europe website, France is the only Member State that has not signed it. Regarding the new Member States, Cyprus, Czech Republic, Estonia, Hungary, Lithuania, Malta, Poland, Slovakia, Slovenia are parties, while Latvia is a signatory. *See also* Nowak, *supra* note 9; de Witte, *supra* note 9.

18. See J. Nold, Kohlen-und Baustoffgross Handlung v. Comm'n of the EC, Case 4/73, [1974] E.C.R. 491, ¶ 13; Hauer v. Land Rheinland-Pfalz, Case 44/79, [1979] E.C.R. 3727; Roquette Frères SA v. Directeur Général de la Concurrence, de la Consommation et de la Répression des Fraudes, C-94/00, [2002] E.C.R. I-9011, ¶¶ 23-24; SA Cimenteries CBR v. Comm'n of the EC, Case T-25/95, [2000] E.C.R. II-491, ¶ 713.

its recognition by the Court as a fundamental right derived from the constitutional traditions of the Member States, in the sense of Article 6(2) of the TEU.[19] Indeed, all the Member States are signatories of the ECHR and thus bound by its provisions, whether or not their constitutional tradition otherwise includes the protection of minorities.

Consequently, it can be suggested that the general principle of non-discrimination enshrined in Article 14 of the ECHR is part of the fundamental rights that the EU is bound to respect, as a general principle of Community Law, on the basis of Article 6(2) of the TEU.

What does that mean in practical terms? Since the Court is granted jurisdiction by Article 46(d) of the TEU to guarantee the observance of provisions of Article 6(2) of the TEU, a member of a minority who would be discriminated against in the context of EU law should be able to challenge that discrimination. In principle, this route would only offer a limited opportunity to enforce a non-discrimination action given that under Article 46(d) of the TEU, the Court guarantees the observance of Article 6(2) of the TEU only "with regard to action of the *institutions*, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under the . . . [TEU]."[20] Hence, an individual would not be able to invoke Article 6(2) of the TEU against a Member State that would infringe the fundamental rights referred thereto. On the other hand, the Court of Justice has made it clear that the general principles of Community Law apply not only to actions of institutions, but also to actions by the Member States when acting in the context of Community law.[21] In other words, it seems likely that individuals would be able to rely on the general principles of Community Law to challenge a measure, taken either by the institutions or by a Member State acting within the scope of Community law,

19. *See* Transocean Marine Paint Ass'n v. Comm'n of the EC, Case 17/74, [1974] E.C.R. 1063.

20. Consolidated TEU, *supra* note 4, art. 46(d), O.J. C 325/5 at 30 (2002), 37 I.L.M. at 77 (ex Article L) (emphasis added).

21. *See* Wachauf v. Bundesamt für Ernahrung und Forstwirtschaft, Case 5/88, [1989] E.C.R. 2609, ¶ 19; Queen v. Bostock, Case C-2/92, [1994] E.C.R. I-955, ¶ 16; *Johnston*, Case 22/84, [1986] E.C.R. 1651, ¶ 19; *Roquette Frères SA*, Case C-94/00, [2002] E.C.R. I-9011, ¶ 25.

that would discriminate against them because of their association with a national minority.

Along with the judicial remedy, a political route could also be envisaged to challenge a breach of minority rights. Article 7 of the TEU establishes a procedure to suspend the rights of a Member State as a result of a clear risk of a serious breach of fundamental principles by this State, even if not acting within the scope of EU law. These provisions, however, only refer to those principles established in Article 6(1) of the TEU. As pointed out earlier, Article 6(1) relates *inter alia* to "human rights and fundamental freedoms," but not explicitly to minority rights. Moreover, the procedure of Article 7 of the TEU might be too cumbersome for adopting adequate measures against a wrong-doing Member State. Consider particularly the first paragraph, which provides that the Council needs to act by a majority of four-fifths of its members to determine the risk of a serious breach. Furthermore, the Council is not under an obligation to act. By using the term "may determine," Article 7(1) of the TEU suggests that the Council has discretion in this regard.

The foregoing suggests that the provisions of Article 6(1) and 6(2) of the TEU could provide for a limited remedy against a breach of the principle of non-discrimination based on "association with a national minority." As a general principle of Community Law, it could be enforced by the European Court of Justice both against institutions and against Member States acting in the context of EU law. In addition, if minority rights are included in the notion of "human rights and fundamental freedoms," political action of the Council would also be possible against a State likely to breach the fundamental principles of the Union, although at the Council's own discretion, and provided that some institutional hurdles are overcome.

Turning to the question of a potential EU competence to ensure "respect for and protection of minorities," one needs particularly to consider the provisions of Article 13 of the Treaty establishing the European Community ("EC Treaty") which enables the Council of the European Union (the "Council") to adopt European Community ("EC") measures to combat discrimination.[22] While the "association with a national minority" is

22. Consolidated EC Treaty, *supra* note 6, art. 13, O.J. C 325/33, at 43 (2002), 37 I.L.M. at 82 (ex Article 6a). The present contribution does not explore the provisions

not explicitly mentioned, Article 13 of the EC Treaty endows the Council with the power to take appropriate action to combat discrimination based, *inter alia*, on "racial or ethnic origin . . . ."[23] Although uncertain, one could wonder whether Article 13 of the EC Treaty offers a basis for adopting measures also against discrimination based on association with a national minority.

Without explicitly mentioning the expression "national minorities," the Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin nonetheless refers in its Preamble to several sources which partly cover the question of minorities.[24] For instance, it mentions the *Employment Guidelines for 2000* that were agreed upon by the Helsinki European Council, and which aimed *inter alia* at combating discrimination against groups "such as ethnic minorities."[25] It also cites a 1996 Council Joint Action concerning action to combat racism and xenophobia,[26] which contains provisions that could cover the protection of minorities.[27] Furthermore, the Commission's Communication, "Countering Racism, Xenophobia and Anti-Semitism in the Candidate Countries," contains several sections on the situation of national minorities in Central and Eastern Europe.[28]

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of Article 151 of the EC Treaty, on cultural cooperation. These provisions have not been used so far to promote "respect for and protection of minorities." On these provisions, see de Witte, *supra* note 9; Henrard, *supra* note 9.

23. Consolidated EC Treaty, *supra* note 6, art. 13, O.J. C 325/33, at 43 (2002), 37 I.L.M. at 82 (ex Article 6a).

24. Council Directive No. 2000/43/EC, pmbl., O.J. L 180/22, at ¶¶ 2-3 (2000) (citing, e.g., Art. 6 Consolidated TEU, the ECHR, and the Universal Declaration of Human Rights as support for the Directive).

25. *Employment Guidelines for 2000* No. 13606/99 (1999).

26. Joint Action of 15 July 1996 adopted by the Council on the basis of Article K.3 (now Article 31) of the Treaty on European Union, concerning action to combat racism and xenophobia No. 96/443/JHA, O.J. L 185/5 (1996).

27. *Id.* tit. I(A), O.J. L 185/5 (1996). Title I(A) of the Joint Action states:

> In the interests of combating racism and xenophobia, each Member State shall undertake . . . to ensure effective judicial cooperation in respect of offences based on the following types of behaviour, and, if necessary for the purposes of that cooperation, either to take steps to see that such behaviour is punishable as a criminal offence or, failing that, and pending the adoption of any necessary provisions, to derogate from the principle of double criminality for such behaviour: (a) public incitement to discrimination, violence or racial hatred in respect of a group of persons or a member of such a group defined by reference to colour, race, religion or *national or ethnic origin* . . . .

Id. (emphasis added).

28. Communication from the Commission, Countering Racism, Xenophobia and

It could thus be suggested that Article 13 of the EC Treaty, although silent on the question of minorities, could nonetheless be relied upon by the Council for adopting measures which would cover, *inter alia*, discrimination against persons based on their status as national minorities. By contrast, however, it seems unlikely that the Council could adopt a measure dealing *specifically* with that type of discrimination, as the Directive mentioned above did in relation to discrimination based on racial or ethnic origin.[29]

A look at the provisions of the EU Charter of Fundamental Rights ("Charter") might be informative in this regard.[30] Article 21(1) of the Charter provides that "[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, *membership of a national minority*, property, birth, disability, age or sexual orientation shall be prohibited."[31] The fact that the Charter makes an explicit reference to "membership of a national minority" as an additional basis for non-discrimination could be interpreted as barring Article 13 of the EC Treaty from being used to adopt specific measures to combat discrimination based on *membership of a national minority*. The explanation given to Article 21 of the Charter by the Convention that drafted it is the following: "Paragraph 1 draws on Article 13 of the EC Treaty, Article 14 of the ECHR and Article 11 of the Convention on Human Rights and Biomedicine as regards genetic heritage."[32] It could be argued that the expression "membership of a national minority" finds its source in Article 14 of the ECHR rather than in EC law, even if the wording of Article 21 of the Charter is slightly different from that of Article 14 of the ECHR. This would tend to confirm that Article 13 of the EC Treaty could not be used as a basis for adopting measures specifically to combat discrimination based on membership of a na-

Anti-Semitism in the Candidate Countries, COM (1999) 256 Final, *available at* http://europa.eu.int/comm/europeaid/projects/eidhr/documents_en.htm (May 26, 1999).

29. *See* Council Directive No. 2000/43/EC, O.J. L 180/22 (2000).

30. Charter of Fundamental Rights of the European Union, O.J. C 364/1 (2000) [hereinafter Charter].

31. *Id.* art. 21(1), O.J. C 364/1, at 13 (2000) (emphasis added).

32. *See* Council of the European Union, Charter of Fundamental Rights of the European Union: Explanations relating to the complete text of the Charter, at 39, *available at* http://www.consilium.eu.int/df/default.asp?lang=en (Dec. 2000) (explaining Article 21).

tional minority. Indeed, the Charter makes it clear in its so-called horizontal clauses that it "does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."[33] Last but not least, the Charter is not presently enforceable. Solemnly proclaimed in Nice by the Council, the Commission, and the European Parliament, it was not made binding by the Member States.

Nevertheless, the Charter was thereafter published as an inter-institutional agreement and as such binds the three institutions. The principles established by the Charter are thus taken into account in the EU decision making processes.[34] Furthermore, as a statement of Union law,[35] the provisions of the Charter could be indirectly binding through the medium of the general principles of Community Law. Although, it still does not give competence to the Union to adopt measures to combat discrimination based on membership of a national minority, it reinforces the argument that was made earlier regarding the principles enshrined in the ECHR.

The foregoing suggests that under the TEU, discrimination based on association with a national minority can be challenged before the European Court of Justice, on the basis that such discrimination would violate one of the general principles of Community Law. Moreover, if respect for, and protection of, minorities is considered to belong to the Union's fundamental principles, it could lead to the suspension of membership rights of a Member State that would breach or risk to breach this funda-

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33. *See* Charter, *supra* note 30, art. 51(2), O.J. C 364/1, at 21 (2000).

34. *See also* Jacqueline Dutheil de la Rochère, *The Charter of Fundamental Rights and Beyond*, 4 CAMBRIDGE Y.B. OF EUR. LEG. STUD. 133 (2001); F. Jacobs, *The EU Charter of Fundamental Rights*, *in* ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION 275 (Anthony Arnull & Daniel Wincott eds., 2002); Gráinne de Búrca, *The Drafting of the European Union Charter of Fundamental Rights*, 26 EUR. L. REV. 126 (2001).

35. Charter, *supra* note 30, pmbl., O.J. C 364/1, at 8 (2000). The Preamble of the Charter states in its fifth indent that

> [t]his Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.

Id. *See also* Opinion of Advocate General Tizzano, The Queen v. Secretary of State of Trade and Industry, Case C-173/99, [2001] ECR I-4881, ¶¶ 27-28.

mental principle, on the basis of Article 7 of the TEU. Finally, the principle of non-discrimination as provided in Article 21 of the Charter entails that the EU institutions are to take it into account in the exercise of their powers. It also reinforces the idea that it is a general principle of Community Law that is binding on institutions and on Member States when acting within the scope of Community law. At the same time, EU law, as it stands, does not seem to entitle the Union to adopt positive measures specifically to combat discrimination against national minorities. *A fortiori*, it does not entitle the Union to adopt measures to ensure the respect for and protection of minorities to the extent that it did in relation to the accession candidates.[36]

The protection of minorities is thus likely to be less scrutinized and ensured in a Member State than in a candidate country. On the one hand, it could be argued that since the candidates were declared ready to join by the European Council, they were, as such, deemed to have fulfilled the accession conditions including the one related to the protection of minorities. On the basis of this assumption, the strict political, economic, and legal conditionality attached to the pre-accession strategy would

36. For instance, on the basis of the 1999 Accession Partnership, which establishes the list of priorities of candidates' preparation for accession, the Commission set the following medium-term requirements for Slovakia: it should "continue implementation of the minority language legislation and protect the use of minority languages in the field of education, culture and the media including adoption of any necessary legislation." Slovakia: 1999 Accession Partnership, § 4.2, at 7 (1999), *available at* http://europa.eu.int/comm/enlargement/dwn/ap_02_00/en/ap_sk_99.pdf. Similarly, the 2001 Accession Partnership set the following priority for Slovakia:

> –Continue improving the situation of the Roma through strengthened implementation of the relevant strategy, including the provision of the necessary financial support at national and local levels; measures aimed at fighting against discrimination (including within the public administration), fostering employment opportunities, increasing access to education, improving housing conditions; provide adequate financial support.
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> –Ensure due implementation of the minority language legislation.
>
> –Ensure that an effective system for redressing police misconduct is established.

Slovakia: 2001 Accession Partnership, § 4, at 6 (2001), *available at* http://europa.eu.int/comm/enlargement/report2001/apsk_en.pdf.

The 2001 Accession Partnership with Latvia requires it to, "[c]ontinue to implement further concrete measures for the integration of non-citizens, on the basis of the National Programme 'The Integration of Society in Latvia', including language training and information campaigns, and provide the necessary financial support." Latvia: 2001 Accession Partnership, § 4, at 6 (2001), *available at* http://europa.eu.int/comm/enlargement/report2001/aplv_en.pdf.

no longer be necessary. On the other hand, a quick look at the Accession Treaties shows that a number of transitional periods have been established. While some of them resulted from various Member States' pressures, such as the transition on the free movement of workers,[37] others were established in view of the fact that accession preparation was not yet finished. Indeed, the safeguard clause shows that the current Member States have only a limited trust in the ability of the newcomers to fulfill their obligations.[38] Thus, in general terms, adaptation to meet the membership requirements will continue after accession, and transitional periods as well as safeguard clauses will be used, in addition to the classic enforcement mechanisms such as Article 226 of the EC Treaty,[39] to tackle problems of implementation of EC law.

If one turns to the question of the protection of minorities, one may wonder how such a post-accession approach would apply. Even if that protection was considered to be satisfactory upon accession,[40] one could still speculate as to how an unsolved or indeed new minority problem would be tackled inside the EU. The Accession Treaty does not seem to contain any particular provisions to solve potential problems of that kind, and the EU will not have the same leverage and pro-active stance that it used to have in the pre-accession context. Such a discrepancy could be problematic considering that minority problems are clearly likely to persist after enlargement, as the next part will highlight.

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37. *See* Michael Dougan, *A Sceptre is haunting Europe: Free Movement of Persons and the Eastern Enlargement*, *in* ENLARGEMENT OF THE EUROPEAN UNION: A "LEGAL" APPROACH, *supra* note 5.

38. *See also* Inglis, *supra* note 8.

39. Consolidated EC Treaty, *supra* note 6, art. 226, O.J. C 325/33, at 125 (2002), 37 I.L.M. at 125 (ex Article 169).

40. In that regard, it is instructive to compare the Commission Progress Reports with the report published by the Open Society Institute, *Monitoring the EU Accession Process: Minority Protection* (Open Soc'y Inst., 2002), *available at* http://www.eumap.org/reports/2002/content/07. It has been argued that the Commission Progress Reports were sometimes too lax so far as the treatment of minorities is concerned, particularly in the Baltic States. *See, e.g.*, Marc Maresceau, *The EU Pre-Accession Strategies: A Political and Legal Analysis*, *in* THE EU'S ENLARGEMENT AND MEDITERRANEAN STRATEGIES 3 n.16 (Marc Maresceau & E. Lannon eds., 2001); P. van Elsuwege, *The Baltic States on the Road to EU Accession: Opportunities and Challenges*, 7 EUR. FOREIGN AFF. REV. 171 (2002).

II. *THE QUESTION OF MINORITIES IN THE ENLARGED EU*

As suggested earlier, the EU has sought through the Copenhagen criteria to warrant, *inter alia,* the respect for and protection of minorities in the candidate countries; it also wanted to make sure that they would not bring international tensions when they join the Union. In this perspective, the candidates were encouraged to conclude bilateral agreements between themselves, notably to guarantee minority rights. Accession conditionality has also forced candidate countries to review their internal rules regarding their minorities. The EU accession conditionality has undoubtedly played a positive role.[41] While many of the previous minority problems have been solved, it is, however, likely that several will remain for some time to come, and others could well emerge in the post-accession context.

Consider the situation of the Russian-speaking minorities in the Baltic States, particularly in Estonia and Latvia. While their conditions have, to a large extent, been improved by the respective national authorities, notably under the pressure of the Union, it is noteworthy that many members of these minorities are still "non-citizens" or "Stateless." Under EU law, these "non-citizens" will have difficulties enjoying the same rights as their countrymen and women, particularly when it comes to free movement rights and rights connected with European citizenship.[42]

Another consequence of accession will be that some minorities will be cut off from their motherland. For instance, as a new Member State, Hungary will have to apply stricter border controls vis-à-vis Croatia, Romania, Serbia, and Ukraine. Like the other candidates, Hungary had to adopt the so-called Union *acquis* on the basis of the third Copenhagen criteria. Since the

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41. *See* Judith Kelley, *Membership, Management and Enforcement: European Institutions and Eastern Europe's Ethnic Politics* (Ann. Meeting of the Am. Pol. Sci. Assoc., 2002), *available at* http://apsaproceedings.cup.org/Site/papers/015/015011KelleyJudi.pdf (discussing the role of conditionality).

42. *See, e.g., Latvian Non-Citizens Excluded from Voting,* EU OBSERVER, Oct. 15, 2003, *available at* http://www.euobserver.com/index.phtml?aid=13003. Such difficulties may exist even if some legislation extends certain rights to stateless persons. *See, e.g.,* Council Regulation No. 307/1999, O.J. L 38/1 (1999) ("[A]mending Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No. 574/72 laying down the procedure for implementing Regulation (EEC) No. 1408/71 with a view to extending them to cover students.").

Amsterdam Treaty, the Union *acquis* includes the Schengen *acquis*[43] on border controls.[44] The latter has to be applied by the new Member States, if not all from the day of accession, then very soon thereafter.[45] Consequently, for the members of the Hungarian minority living in Romania, accession of Hungary to the Union will mean that crossing the border to their motherland might become more complicated. The situation will be even more intricate for members of the Hungarian minorities based in Ukraine, since, unlike the Romanians, Ukrainians need a visa to enter the EU.[46]

In addition, as a new Member State, Hungary will be under the obligation of Article 307 of the EC Treaty[47] to adjust or even denounce its pre-accession external commitments if they are incompatible with the *acquis*.[48] In particular, it may have to review some of the bilateral agreements it concluded with the neighboring countries that host Hungarian minorities. These agreements were concluded in the context of the Framework Convention for the Protection of National Minorities ("Framework Convention"), under the auspices of the Council of Europe,[49] and

43. *See* Europa, *FAQ — Freedom to Travel: What is the Schengen acquis?*, *at* http://europa.eu.int/comm/justice_home/faq/freetravel/faq_freetravel_en.htm (last visited Dec. 9, 2003) [hereinafter Europa, FAQ] ("Schengen acquis is the set of rules which has been adopted into an inter-governmental framework and have been integrated in the framework of the European Union with the entry into force of the treaty of Amsterdam. Countries seeking EU membership must adopt this acquis 'in full' into their own national legislation.").

44. *See* Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1, at 96 (1997) [hereinafter Treaty of Amsterdam] (amending TEU, EC Treaty, ECSC Treaty, and Euratom Treaty and renumbering articles of TEU and EC Treaty).

45. *See* Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, O.J. L 236/33, art. 3 (2003) [hereinafter Act of Accession] (stating that the provisions of the Schengen *acquis* shall be binding on new Members from the date of accession).

46. *See* Council Regulation (EC) No. 539/2001, O.J. L 81/1 (2001) ("[L]isting the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.").

47. Consolidated EC Treaty, *supra* note 6, art. 307, O.J. C 325/33, at 152-53 (2002), 37 I.L.M. at 139 (ex Article 234).

48. *See* Attorney General v. Burgoa, Case 812/79, [1980] E.C.R. 2787, ¶ 6; Levy, Case C-158/91, [1993] E.C.R. I-4287, ¶ 11; Commission v. Portugal, Case C-62/98, [2000] E.C.R. I-5171, ¶ 43; 38 COMMON MKT. L. REV. 1269 (2001).

49. *See* Framework Convention, *supra* note 17.

aimed *inter alia* at ensuring that Hungarian minority rights would be guaranteed. Indeed, the signing of these types of bilateral or multilateral agreements was regarded by the EU as a way to fulfill the accession condition relating to the protection of minorities, given that one of the important aspects of such agreements was that cross-border exchange between members of national minorities and their motherlands would be encouraged by the parties.[50]

The foregoing illustrates the potential tension between the accession criteria and membership obligations. One could foresee incompatibilities between the Schengen *acquis* and the bilateral agreements that Hungary *qua* candidate was encouraged to sign with its neighbors to ensure the rights of Hungarian minorities. In other words, what it was encouraged to do to fulfill the political accession conditions might have to be deconstructed as a result of accession, notably due to the application of the Schengen rules. Further, the accession obligations derived from the third Copenhagen criteria (i.e., adoption of the *acquis*) seem to clash with the obligations attached to the first Copenhagen criteria (i.e., protection of minorities rights).[51]

Similar risks of inconsistencies could appear in the context of the EU policy vis-à-vis the countries from the Western Balkans, which have been recognized by the EU as "potential candidates."[52] One of the key requirements the latter have to fulfill is

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50. Article 17(1) of the Framework Convention provides:

> The Parties undertake not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage.

Id.

51. It has been otherwise suggested that the Union might be in breach of international principles in relation to minorities. *See, e.g.*, Amato & Batt, *supra* note 9 (arguing that the EU and its Member States could contravene the 1990 CSCE Copenhagen Document; the 1992 UN Declaration on the Rights of the Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; and the Council of Europe's Framework Convention).

52. *See* Feira European Council, Conclusions of the Presidency, E.U. BULL., no. 6, at ¶ 67 (2000). The European Council recognized the Western Balkans (Albania, Bosnia & Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, as well as Serbia & Montenegro) as potential candidates. The EU has established a specific policy of "Stabilization and Association" in relation to these countries, with a view notably towards preparing their future membership. Their "European perspective" was forcefully confirmed by the Copenhagen and Thessaloniki European Councils in December

to commit themselves to enhance regional cooperation.[53] While this requirement might be crucial to foster the process of reconciliation in the Western Balkans, it might not sit easily with other principles of the EU pre-accession strategy vis-à-vis these countries, namely the "own merits" and "catch up" principles. Consider, for instance, the (not so unlikely) situation whereby Croatia, which has already formally applied for membership, would fulfill the accession criteria faster than its neighbors. An application of the "own merits" principle means that Croatia would more likely become a member before the other candidates from the Western Balkans. An early accession of Croatia would probably mean that it would have to adjust or denounce some of the agreements that it had to conclude with its neighbors under the pre-accession condition of regional cooperation.[54]

To sum up, accession does not mean the end of the minority question. Acute minority issues are likely to remain in the new Member States,[55] or indeed to appear upon accession, and these issues will become Union problems. One should add, at this point, that these issues are not exclusive to the new Member States.[56]

It has been suggested that, while the remaining adaptation

2002 and June 2003 respectively. The latter took the step of consolidating their accession perspective by adopting an "Agenda" that sets out the guidelines to prepare such an accession. *See also* Thessaloniki European Council, Conclusions of the Presidency, E.U. BULL., no. 6, at 13, ¶ 41 (2000).

53. *See, e.g.*, Maresceau, *supra* note 40; *see also* Marc Maresceau, *Pre-accession, in* 9 THE ENLARGEMENT OF THE EUROPEAN UNION, *supra* note 2, at 34-37 (providing detailed analysis of the key requirements).

54. As stated earlier, one of the accession conditions is the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union. *See supra* notes 3-5, 47-50 and accompanying text (discussing requirements of the *acquis*). In other words, the candidate has to take on the *acquis communautaire* and the rules incompatible with it should be adjusted. *Id.*

55. *See* Mihaela Gherghisan, *Hungary Changes Controversial Status Law*, EU OBSERVER, June 25, 2003, *available at* http://www.euobserver.com/index.phtml?aid=11861 (discussing the remaining tensions between Hungary and Slovakia concerning the Hungarian Status Law granting various rights and privileges to members of Hungarian minorities). One could also mention the difficult situation of the Roma. "Romani communities in Germany and Spain have received very limited [S]tate support" in "protecting and promoting their distinct cultural and linguistic identities . . . ." *See* Open Society Institute, *Monitoring the EU Accession Process: Minority Protection*, *supra* note 9, at 57-59.

56. *See* Open Society Institute, *Monitoring Minority Protection in EU Member States* (2002) *available at* http://www.eumap.org/reports/2002/content/09 (last visited Nov. 13, 2003).

deficiencies as regards the *acquis* will be solved on the basis of the Accession Treaty's arrangements, the situation will be different in the case of the protection of minorities. The Accession Treaty does not deal with minority issues and the EU cannot be actively involved in promoting respect for and protection of minorities internally. It will not be in a position to put pressure on the Member States as it was, and still is, in relation to the candidates.

The discrepancy between the remaining minority questions and the limited tools available in the EU to tackle them might thus generate the need to develop mechanisms to supervise the respect for and protection of minorities equally after enlargement. If that were the case, accession requirements and membership obligations would be more in line with each other.[57] This Article will now turn to the Draft Constitution proposed by the European Convention to examine whether these concerns have been addressed.

III. *MINORITY RIGHTS UNDER THE DRAFT CONSTITUTION FOR EUROPE*

The provisions of the TEU that were examined earlier were: the principles on which the Union is based, the EU competence to combat discrimination, and the provisions of the Charter. This Section will look at whether the Constitution has modified these provisions, in a sense of providing additional ability for the Union to address the minority question.[58]

In the Draft Constitution ("Draft Treaty"), the principles on which the Union is based (Article 6(1) of the TEU) are provided in a new Article I-2 of the Draft Treaty, concerning Union's Values: "The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and

57. Such a need for post-accession monitoring mechanisms has already been partly addressed. *See supra* Part I. The mechanism set out by Article 7 of the TEU was notably established in the perspective of the accession of Central and Eastern European Countries ("CEECs"), regarded as "young" democracies. *Id.*

58. *See* Michael Dougan, *The Convention's Draft Constitutional Treaty: Bringing Europe Closer to its Lawyers*, 28 EUR. L. REV. 763 (2003) (providing commentary on the Draft Constitution).

non-discrimination."[59] Similar to Article 6(1) of the TEU, these provisions do not refer explicitly to the protection of minority rights. However, in contrast to Article 6(1) of the TEU, Article I-2 of the Draft Treaty introduces "human dignity" and "equality" in the list of "Union values."[60] In addition, the last part of the provisions of Article I-2 of the Draft Treaty — i.e., "in a society of pluralism, tolerance, justice, solidarity and non-discrimination" — is new. It is arguable that these concepts, particularly "pluralism," "tolerance," and "non-discrimination" — here used on its own — could be more amenable to the respect for and protection of minorities.

Mr. Péter Balázs, a Hungarian member of the European Convention, suggested amendments to Article I-2 of the Draft Treaty on two occasions in the course of the Convention's discussions. First, he proposed that respect for human rights be supplemented by the expression "including those of national minorities."[61] He explained that his proposal would ensure that Article I-2 of the Draft Treaty also refers to the missing element of the Copenhagen criteria "which makes an important part of the *acquis*."[62] His second proposed amendment, supported by other *Conventionnels*, was that the expression "respect for human rights" be replaced by "respect for and protection of human rights and those of minorities."[63] Again, the argument was that the missing element of the Copenhagen criteria should be included. However, neither of the amendments were discussed or accepted at that point.

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59. Draft Treaty, *supra* note 10, art. I-2, O.J. C 169/1, at 5 (2003).

60. One could also point out that the expression "fundamental freedoms" has been removed.

61. Peter Balazs, *Suggestion for Amendment of Article:* 2, AMENDMENT FORM, *at* http://european-convention.eu.int/Docs/Treaty/pdf/2/Art%202%20Bal%C3%A1zs.pdf (last visited Jan. 27, 2004).

62. This amendment was proposed when Article I-2 of the Draft Treaty was drafted as follows: "The Union is founded on the values of respect for human dignity, liberty, democracy, the rule of law and respect for human rights, values which are common to the Member States. Its aim is a society at peace, through the practice of tolerance, justice and solidarity." *See* The European Convention, Draft of Articles 1 to 16 of the Constitutional Treaty, art. 2, ann. I, CONV 528/03, *available at* http://register.consilium.eu.int/pdf/en/03/cv00/cv00528en03.pdf (Feb. 6, 2003).

63. The amendment was supported by eleven members of the Convention, including a former French Minister, Mr. Alain Lamassoure. This second amendment was proposed on the basis of the new formulation of Article I-2 of the Draft Treaty which includes the expression "non-discrimination."

The absence of any reference to the protection of minorities in Article I-2 of the Draft Treaty is indeed remarkable in the light of the quasi-constitutional nature which was granted to the Copenhagen criteria.[64] The Draft Treaty provisions on accession provide that the latter is subject to the respect of the "values referred to Article in 2 . . . ."[65] Considering the prominence of the protection of minorities in the EU accession conditionality, one could have anticipated, as did the Hungarian representative, that it would have been mentioned in Article I-2 of the Draft Treaty.[66] This omission suggests that "respect for and protection of minorities" as an accession criterion is either implicitly included in the more general values enshrined in Article I-2 of the Draft Treaty, or alternatively, while being an accession condition, it is regarded as a principle which is not important enough to be listed among the other Union values.

The Italian Presidency, under which the Convention's draft Constitution was initially discussed by the EU Heads of State or Government, submitted an amended version of Article I-2 of the Draft Treaty. The new text reads as follows: "The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, *including the rights of persons belonging to minority groups* . . . ."[67]

Yet, it remains to be seen whether the Member States will eventually accept this new version. Inserting the "protection of minorities" in the list of principles mentioned in Article I-2 of the Draft Treaty would make it clear that the EU could sanction

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64. See Christophe Hillion, *The Copenhagen Criteria and their Progeny*, *in* ENLARGEMENT OF THE EUROPEAN UNION: A "LEGAL" APPROACH, *supra* note 5; *Enlargement: A Legal Analysis*, in ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION, *supra* note 34, at 403.

65. Draft Treaty, *supra* note 10, art. I-57(1), O.J. C 169/1, at 21 (2003).

66. The House of Lords Select Committee on the European Union suggested that Article I-57 of the Draft Treaty should include a statement of the Copenhagen criteria. *See* Select Committee on European Union, Eighteenth Report, 2002-03, 7, at ¶ 8.

67. *See* Conference of the Representatives of the Governments of the Member States, IGC 2003 — Intergovernmental Conference (12 -13 December 2003) ADDENDUM 1 to the Presidency proposal, CIG 60/03 ADD1, *available at* http://www.consilium.eu.int/igcpdf/en/03/cg00/cg00060-ad01.en03.pdf (Dec. 9, 2003) (emphasis added). This was an amended version included in the consolidated set of proposals submitted by the Presidency. The Presidency proposal for the Naples Ministerial Conclave of November 25, 2003 already contained this amendment. *See* Conference of the Representatives of the Governments of the Member States, IGC 2003 — Naples Ministerial Conclave: Presidency proposal, CIG 52/03 ADD1, *available at* http://www.consilium.eu.int/igcpdf/en/03/cg00/cg00052-ad01.en03.pdf (Dec. 9, 2003).

a State that would fail to ensure the respect for and protection of minorities. Article I-58 of the Draft Treaty, inspired by the provisions of Article 7 of the TEU, provides for a procedure to suspend that State's membership rights.[68] It is noteworthy that the procedure for the Council to determine "that there is a clear risk of a serious breach by a Member State of the values mentioned in Article 2" has been maintained: it still involves a four-fifths majority of Council's members, which in an enlarged EU will increase the number of States required to support the action before the latter can be taken.[69]

As regards fundamental rights, Article I-7 of the Draft Treaty states:

> 1. The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II of the Constitution.
> 2. The Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.
> 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.[70]

The two first paragraphs are more detailed than the provisions of Article 6(2) of the TEU concerning the sources of fundamental rights which apply to the EU. The first paragraph partly clarifies the status of the EU Charter of Fundamental Rights. Although drafted in an ambiguous fashion, Article I-7 of the Draft Treaty is the basis for the Charter to become binding. The provisions of Article II-21 of the Draft Treaty[71] (presently Article 21 of the Charter) would then be turned into a full-fledged obligation. According to Article II-51 of the Draft Treaty, the address-

68. Draft Treaty, *supra* note 10, art. I-58, O.J. C 169/1, at 21-22 (2003). It is symbolic that these provisions follow those concerning "the conditions of eligibility and accession to the Union" set out in Article I-57 of the Draft Treaty. *Id.* art. I-57, O.J. C 169/1, at 21 (2003).

69. *Id.* art. I-58, O.J. C 169/1, at 21-22 (2003). This means in practice that in a Union of twenty-five Member States, twenty will have to back the decision, instead of fifteen in an EU of fifteen members.

70. *Id.* art. I-7, O.J. C 169/1, at 9 (2003).

71. *Id.* art. II-21, O.J. C 169/1, at 25 (2003).

ees of this obligation would be both the EU "Institutions, bodies and agencies with due regard for the principle of subsidiarity and . . . the Member States only when they are implementing Union law."[72]

The law under the Draft Treaty would thus slightly contrast with the law under the TEU, insofar as the former introduces an express legal basis for the principle of non-discrimination based on membership of a national minority. It is also noteworthy that the principle established by the Charter is more assertive than the provisions of Article 14 of the ECHR. While the latter states that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as . . . *association with a national minority* . . . ,"[73] the Charter requires that such discrimination "shall be prohibited," i.e., within the entire scope of application of Union law.[74]

This new development could be consolidated by the Union's obligation to seek accession to the ECHR, as contained in Article I-7(2) of the Draft Treaty. The Agreement on accession to the ECHR would make the ECHR binding on the Union and its Member States, and the provisions of Article 14 of the ECHR would accordingly be part of the Union's legal obligations which could be enforced.[75] While it is already the case through the medium of the general principles of Community Law, these obligations would be guaranteed by the European Court of Justice, given its clear jurisdiction on the provisions of Article I-7.[76] The Court should also have the power to interpret the provisions of the agreement between the Union and the ECHR, and could possibly grant them direct effect.[77] In addi-

72. *Id.* art. II-51(1), O.J. C 169/1, at 28 (2003).

73. *See supra* note 14 and accompanying text.

74. *See supra* notes 14-15 (discussing Article 14 of the ECHR).

75. *See* Draft Treaty, *supra* note 10, art. III-225(2), O.J. C 169/1, at 72 (2003) (providing that: "[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States").

76. The only limits to the Court's jurisdiction are contained in Article III-282 of the Draft Treaty and concern the provisions related to the Common Security and Defence Policy. Article III-282 of the Draft Treaty provides in its first paragraph that "[t]he Court of Justice shall not have jurisdiction with respect to Articles I-39 and I-40 and the provisions of Chapter II of Title V of Part III concerning the common foreign and security policy." *See id.* art. III-282, O.J. C 169/1, at 81 (2003).

77. This will depend on whether the Court of Justice finds that the test is met for determining whether the provisions of the external agreement concerned are directly effective. *Cf.* Demirel v. Gmund, Case 12/86, [1987] E.C.R. 3719; The Queen v.

tion, the EU could be directly called to account before the European Court of Human Rights for breach of Article 14 of the ECHR.

On the other hand, two limitations should be underlined. First, as regards the Charter, the horizontal provision which prevents any extension of the Union's competence on the basis of the Charter has been maintained.[78] In effect, Article II-51(2) of the Draft Treaty provides: "[t]his Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution."[79]

This type of clause is also featured in Article I-7(2) of the Draft Treaty, to the effect that accession of the Union to the ECHR shall not affect the Union's competences as defined in the Draft Constitution.

These two limiting clauses are particularly significant as regards the question of the Union's competence to adopt measures to combat discrimination based on "membership of a national minority." In the Draft Treaty, the provisions of Article 13 of the EC Treaty have inspired the drafting of a new Article III-8:

> 1. Without prejudice to the other provisions of the Constitution and within the limits of the powers conferred by it upon the Union, a European law or framework law of the Council of Ministers may establish the measures needed to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The Council of Ministers shall act unanimously after obtaining the consent of the European Parliament.
> 2. European laws or framework laws may establish basic principles for Union incentive measures and define such incentive measures, to support action taken by Member States, excluding any harmonisation of their laws and regulations.[80]

"Membership of a national minority" has still not been inserted

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Gloszczuk, Case C-63/99, [2001] E.C.R. I-6369; Hermes International v. FHT Marketing Choice BV, Case C-53/96, [1998] E.C.R. I-3603 (discussing the question of direct effect of the WTO Agreement).

78. *See* Charter, *supra* note 30, art. 51(2), O.J. C 364/1, at 21 (2000). Article 51(2) states: "[t]his Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties." Id.

79. *See* Draft Treaty, *supra* note 10, art. II-51(2), O.J. C 169/1, at 28 (2003).

80. *Id.* art. III-8, O.J. C 169/1, at 29-30 (2003).

in the provisions enabling the Council to take measures to combat discrimination. These provisions and those of Article II-21 of the Draft Treaty have not been aligned.

Read jointly with the clauses of Articles I-7(2) and II-51(2) of the Draft Treaty, the provisions of Article III-8 of the Draft Treaty suggest that the Union will not be more competent to undertake positive actions than it is presently under Article 13 of the EC Treaty, particularly in view of the emphasis they put on the principle of conferral of powers.[81] Indeed, even if the notion of "membership of a national minority" were introduced in the new Article III-8 of the Draft Treaty by the Intergovernmental Conference in charge of adopting the Constitution, or more generally, if the horizontal clauses of Articles I-7(2) or II-51(2) of the Draft Treaty were to be removed (which is highly unlikely), a number of difficulties could still arise. In particular, Article III-8 of the Draft Treaty requires unanimity for the adoption of measures to combat discrimination. Maintaining unanimity considerably undermines the likeliness of such measures being adopted.[82]

Hence, the Draft Treaty does not seem to bring revolutionary changes regarding the Union's competence to adopt specific measures against discrimination based on membership of a national minority. At best, the Union's institutions will have to take the requirements of the Charter into account in defining and implementing EU policies.[83] Otherwise, one could challenge

81. Id. art. II-21, O.J. C 169/1 at 25 (2003). If the provisions of Article II-21 of the Draft Treaty are considered to establish a *principle* rather than *rights* as such (which is unlikely considering the use of the expression, "shall be prohibited"), one would then need to consider the provisions of Article II-52(5) of the Draft Treaty:

> The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

Id. art. II-52(5), O.J. C 169/1, at 28 (2003).

82. One could suggest the use of a flexibility clause on the basis of Article I-17 of the Draft Treaty to adopt the relevant measures; the procedure nevertheless requires first a unanimous decision in the Council. *Id.* art. I-17, O.J. C 169/1, at 11 (2003).

83. Although the horizontal clause on non-discrimination introduced by Article III-3 of the Draft Treaty does not mention membership of national minorities either, it provides that "[i]n defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." *Id.* art. III-3, O.J. C 169/1, at 29 (2003). Considering that the Charter becomes binding and that the provisions

any measure that would contradict them.

More generally, despite various changes which suggest that the protection of minorities is expressly part of EU law, the foregoing nevertheless shows that such protection is granted only a modest role, at least much more modest than in the context of accession conditionality, where it occupies a prominent place. Perhaps the Convention's constitutional exercise should have taken the minority issue more seriously in view of the persisting problems that have been briefly recalled earlier, and as a matter of consistency with the Union's actual policies, notably in the context of the pre-accession strategy.

For instance, following Gráinne de Búrca's and Jonathan Zeitlin's suggestion to develop the use of the open method of coordination ("OMC") mechanism[84] — now inserted in the Draft Treaty[85] — one could explore the expediency of this comparable arrangement to monitor the respect for and protection of minorities in the Union.[86]

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of Article 14 ECHR belong to the general principles of Union Law, however, one could argue that the Union should also, in defining and implementing the EU policies, aim to combat discrimination based on membership of national minority.

84. The open method of coordination is explained in the Commission White Paper on Governance along the following lines:

> It is a way of encouraging co-operation, the exchange of best practice and agreeing common targets and guidelines for Member States, sometimes backed up by national action plans as in the case of employment and social exclusion. It relies on regular monitoring of progress to meet those targets, allowing Member States to compare their efforts and learn from the experience of others.

Commission of the European Communities, European Governance: A White Paper, COM (2001) 428 Final, at 21 (July 2001). *See generally* Gráinne de Búrca & Jonathan Zeitlin, Constitutionalizing the Open Method of Coordination: What Should the Convention Propose?, *available at* http://europa.eu.int/futurum/documents/other/oth010203_en.pdf (Feb. 2003).

85. The term "OMC" does not appear explicitly in the Draft Constitution but the mechanism can be found notably in the field of social policy. Draft Treaty, *supra* note 10, art. III-107, O.J. C 169/1, at 49 (2003).

86. Combined with the other remedies explored in the paper, it would fill the gaps of the system of reports set up in the context of the Council of Europe Framework Convention on the Protection of Minorities. *See* Jeremy McBride, *Protecting Fundamental Rights in Europe: A Legal Analysis*, *in* ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION, *supra* note 34, at 264. Another suggestion was made by Jozsef Szájer, one of the Hungarian members of the European Convention, who proposed that the EU have a "minorities committee" that would oversee all issues affecting national or ethnic minorities, e.g., educational issues, language preservation and cultural questions, but also cross-border economic cooperation. It was suggested that the committee be established within the European Parliament and be authorized to make any decisions. Jozsef

CONCLUSION

While the requirement of respect for and protection of minorities is prominent in the EU accession conditionality, the fact that the Union is not well-equipped to monitor it internally leads to a paradoxical situation. The pressure to respect and protect minority rights will be less tangible for the new Member States than it was when they were candidates.

A brief examination of the law under the TEU suggests that remedies and guarantees exist to ensure that membership of a national minority does not lead to discrimination. These remedies and guarantees should be improved under the Constitution, unless the Member States decide otherwise at the Intergovernmental Conference on the Future of the Union. However improved, these guarantees nevertheless fall short of matching the more active and persuasive approach that the EU adopted in the pre-accession context to ensure both the respect for and the protection of minority rights. It has been suggested that the more severe conditionality that characterizes this approach may catalyze the need for the Union to become more involved in the monitoring of the protection of minorities internally. The rationale of this additional involvement would be threefold. First, it would provide the relevant tool to deal with the unfinished business of accession preparation as regards minority protection. Second, it would erase the perceived feeling of double standards and make accession conditions and membership requirements more consistent. Third, it would better ensure that the latter requirements are more permanently observed by the Member States, both old and new, and incidentally, it would improve the legitimacy of the Union's conditionality.

Szajer, delegated by the Hungarian National Assembly, *Unity in Diversity: Proposal for the Representation of National and Ethnic Minorities in the Institutional System of the European Union – Committee of National and Ethnic Minorities*, CONV 580/03, CONTRIB 258 (Feb. 26, 2003), *available at* http://register.consilium.eu.int/pdf/en/03/cv00/cv00580en03.pdf.