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# *The EU and the Protection of Minorities: The Case of Eastern Europe*

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## **Abstract**

*In recent years, attention is being increasingly drawn to the role of Europe in general, and the EU in particular, in shaping policies which may best serve, in the post-communist East, effective human rights protection and long-term inter-state peaceful relations. The gradual extension of the 'Western' integration project to Eastern Europe is resulting in importing a set of unresolved minority issues. In the wake of efforts undertaken by other international institutions, the EU is devising a range of ways and means of committing Eastern European countries to the protection of minorities. By so doing, it is highlighting patterns of scrutiny, providing guidance to an assessment on the prospects for improving state compliance. The present paper attempts to develop a preliminary framework for discussing the relatively unexplored role of minority rights considerations in this crucial context. The case of Eastern Europe reveals the vast potentialities, but also the dilemmas, of the EU action in the field, and reaches out to the question of whether — and to what extent — such an action can and should be taken vis-à-vis minority issues in all third countries and the EU member states as well.*

## **1 Introduction**

In a speech to the Royal Institute of International Affairs in London in October 1999, the US Deputy Secretary of State Strobe Talbott outlined, *inter alia*, the views and expectations of his government about the political role of the EU (and Europe generally) in the new century:

A crucial aspect of what has made the EU so successful to date and so promising for the future is the way it has dealt with the related issues of communal identity, civil society, national sovereignty and international integration. As we Americans watch what is happening under the aegis of the EU, one of the things we most admire is the way in which the old system of nation-states is giving way to a new system in which nations feel secure enough in their identities and in their neighborhoods to make a virtue out of their dependence on one another. The treaties of Westphalia and Versailles seem to be giving way to those of Maastricht and

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Amsterdam. On matters where borders have become an obstacle to efficiency and prosperity, such as commercial activity and monetary policy, much of Europe is investing authority in supranational bodies; on the other hand, where communal identities and sensitivities are at stake, such as language and education, central governments are devolving power to local authorities.

In this fashion, Europe is managing and sublimating forces that might have ignited civil strife and conflict across borders in what has, instead, been half a century of unprecedented peace and prosperity. Our hope is that the EU — as the principal force for positive change in Western Europe — will find new and imaginative ways to induce, in the post-communist East, the protection of minorities, the empowerment of regions and the pursuit of transnational cooperation.<sup>1</sup>

By the time these considerations were made, four months had passed since the cessation of NATO air strikes in Kosovo — the emphasis on issues of ‘communal identity’ traced back to recent, dramatic experiences on the ground. Yet, they pointed to indispensable long-term approaches designed to assist a sophisticated demarcation and linkage of common and separate domains within advanced human rights, institutional and security frameworks. In recent years, the re-emergence of minority problems in numerous countries, coupled with social tension and violence, has prompted the international community to search for constructive responses based on paramount humanitarian and stability concerns. In this respect, the complex rationale for the protection of minorities in the post-Cold War era may be captured by a mix of justifications, whereby respect for human dignity and cultural identity combines with conflict prevention purposes. This connection was explicitly made by former UN Secretary-General Boutros Boutros-Ghali in his 1992 *Report on an Agenda for Peace*.<sup>2</sup> Exercises in standard-setting and monitoring are being deployed along a broad spectrum of intergovernmental and non-governmental institutions — Europe represents the classical context wherein to make minority protection work.<sup>3</sup>

The fact that, for their part, the EU and other European institutions (the Council of Europe and the Organization for Security and Cooperation in Europe (OSCE)) are increasingly making progress in the area of minority rights should not detract from the ‘nation-state attitude’ of Western countries towards their own minorities. Needless to say, France, with its well-known reservation to Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and its reluctance to enable group accommodation within the existing, or a revised, constitutional framework — as confirmed by the decision of the *Conseil constitutionnel* of 15 June

<sup>1</sup> *Newsweek*, 18 October 1999, 38 *et seq.*, at 39.

<sup>2</sup> UN Doc. A/47/277-S/24111, para. 18.

<sup>3</sup> See Alfredsson and Melander, *A Compilation of Minority Rights Standards — A Selection of Texts from International and Regional Human Rights Instruments and Other Documents* (Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Report No. 24, Lund, 1997). For an analysis of the relevant implementation mechanisms in a comparative perspective, see Pentassuglia, ‘Minority Protection in International Law: From Standard-Setting to Implementation’, 68 *Nordic Journal of International Law* (1999) 131 *et seq.*; as regards the specific European context, see further Pentassuglia, ‘Monitoring Minority Rights in Europe: The Implementation Machinery of the Framework Convention for the Protection of National Minorities — With Special Reference to the Role of the Advisory Committee’, 6 *International Journal on Minority and Group Rights* (1999) 417 *et seq.*

1999 and the political debate that followed<sup>4</sup> — provides one of the most vivid examples of the said attitude. From this point of view, Talbott's assertion that 'the old [European] system of nation-states is giving way to a new system where nations feel secure enough in their identities' is not automatically applicable to the situation of subnational groups.

In Europe, the notion of the autonomy of minorities as a tool for preserving their identities strikes at the heart of further complexities. There is no right to autonomy in international law. Autonomy is 'noted' in the OSCE context, as illustrated by the Copenhagen Document on the Human Dimension:

The participating states note the efforts undertaken to protect and create conditions for the promotion of . . . identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations.

Talbott's vision of central governments devolving power to local authorities 'where communal identities . . . are at stake' is correct insofar as reference is made (as the Copenhagen Document implicitly does) to a number of domestic arrangements which have long proved successful (though not necessarily uncontroversial) in accommodating minority concerns in the European space. International law does not seem to be taking the autonomy concept any further, not even within a regional context — it simply highlights a possibility, not a mandatory outcome. Last but not least, the recognition of a regional and cultural dimension to the process of European integration has so far resulted in no local devolution of power to the direct benefit of territorially based minorities, existing within the EU area. In merely institutional terms, one may even argue that European integration has tended to reinforce, rather than limit, the central states in their relation with local administrations.<sup>5</sup>

On the other hand, taking Talbott's views *en bloc*, it is clear that the ultimate focus is on Eastern Europe and its minority issues. Quite apart from the pressing, short-term needs originating in the Kosovo crisis, they may be said somewhat to reflect the attention being paid by the international community to the role of Europe in general, and the EU in particular, in shaping policies which may best serve, in that part of the continent, effective human rights protection and long-term inter-state peaceful relations. Not surprisingly, Eastern Europe is now one of the major preoccupations of the EU, demanding serious political involvement and adequate financial resources. The gradual extension of the 'Western' integration project to Eastern states is resulting, *inter alia*, in importing a set of unresolved minority questions. The Council of Europe and the OSCE are developing their own responses, including legally and non-legally binding texts (mainly the Framework Convention for the Protection of National Minorities and the already cited Copenhagen Document), conflict prevention mechanisms (e.g. the OSCE High Commissioner on National Minorities) and a variety of confidence-building measures. The EU, too, is devising a range of ways and means

<sup>4</sup> Oellers-Frahm, 'Charte européenne des langues régionales ou minoritaires, Decision No. 99-412 DC, French Conseil Constitutionnel, June 15, 1999', 93 *American Journal of International Law* (1999) 938 *et seq.*

<sup>5</sup> De Witte, 'The European Communities and its Minorities', in Brölmann, Lefeber and Zieck, *Peoples and Minorities in International Law* (1993) 167 *et seq.*

of committing Eastern European countries to minority protection. By so doing, it is highlighting patterns of scrutiny, providing guidance to an assessment on the prospects for improving minority rights compliance.

The aim of this paper is to describe and analyze, from a legal standpoint, the main components of the EU approach to Eastern Europe, in search for, in Talbott's words, 'new and imaginative ways to induce . . . the protection of minorities'. In other words, an attempt will be made to provide a preliminary framework for discussing the relatively unexplored role of minority rights considerations in this crucial context. While geographically focused on Eastern Europe, the study will also offer some points on the possibility of situating the EU concerns for the protection of minorities within a broader international setting. Comparative in character, the following analysis will avoid in-depth treatment of individual country situations or initiatives. Still, it will draw on examples from concrete cases in addition to general considerations. In order to situate the assessment in a proper perspective, we will first take a cursory glance at the relevant, general normative framework.

## 2 The Legal Setting

With the exception of the 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. The essentially economic nature of the Community, coupled with the insistence by some members on the political notion of national unity (and sovereignty), were clearly conducive to that effect.

In the *Nold v. Commission* case, the European Court of Justice (ECJ) stated that fundamental rights formed an integral part of the general principles of Community law, the observance of which the Court ensured:

In safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States . . . Similarly, 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.<sup>6</sup>

The Court progressively developed a case law on human rights despite the absence of specific human rights references in the EC Treaty. Arguably, this jurisprudence may reach out towards minority rights considerations. On the other hand, the ECJ gave human rights a prominent place in Community law at a time (early 1970s) when there was no particular concern for minority protection in the EC context.

In the Maastricht (and post-Maastricht) era, emphasis on human rights issues has increased considerably. In Opinion 2/94 on the accession by the Community to the European Convention on Human Rights (ECHR), the ECJ held that the Community had no competence to accede to the ECHR (notably on the basis of Article 308 (ex Article 235) of the EC Treaty). Still, it reaffirmed the above case law, stressing the

<sup>6</sup> Case 4/73, *Nold v. Commission* [1974] ECR 491, para. 13. The ECJ summarized this doctrine in Case C-299/95, *Friedrich Kremzow v. Austrian State* [1997] ECR I-2405, paras 14–15.

'special significance' of the ECHR. It also listed a number of sources which established the importance of respect for human rights, thereby pointing to a range of internal and external competences in the field. In this regard, the Court referred to various declarations of the member states and the Community institutions, the preamble to the Single European Act, the preamble to, and Article F(2) (now Article 6.2), Article J.1 (now Article 11) and Article K.2 (now Article 30) of, the Treaty on European Union (TEU), and Article 130u (now Article 177) of the EC Treaty.<sup>7</sup> The Amsterdam Treaty — we might add — has taken further steps forward in the process of strengthening human rights protection within the EU framework. Notably, a new Article 6.1 (ex Article F(1)) 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'. Respect for such principles is singled out as an essential admission requirement in the latest version of Article 49 (ex Article O). Restrictive measures relating to membership rights are now permissible under a new Article 7 (ex Article F.1), in the event of a serious and persistent breach of principles mentioned in Article 6.1 (ex Article F(1)).

With regard to specific minority concerns, they entered, albeit indirectly, the new stage of European integration opened up by the Maastricht Treaty, through the inclusion of Article 151 (ex Article 128) of the EC Treaty — committing the Community to contributing to the flowering of the cultures of the member states, while respecting their national and regional diversity (paragraph 1) — and a number of further education- and culture-related Community competences. Under the latest version of Article 151 (ex Article 128), as amended by the Amsterdam Treaty, respect for national and regional diversity is situated alongside efforts at 'bringing the common cultural heritage [of the member states] 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). Furthermore, the Amsterdam Treaty has inserted a new Article 13 (ex Article 6a) in the EC Treaty, which enables the Council, under certain conditions, to take appropriate action to combat discrimination based on, *inter alia*, racial or ethnic origin, and religion. This marks a progress in comparison with Article 12 (ex Article 6), which confines non-discrimination to nationality grounds.

In terms of ECJ case law and treaty provisions, the position of minority rights certainly requires further clarification. On the other hand, human rights protection may be seen, in recent commentators' words,<sup>8</sup> as a 'transverse' objective of the Community (EC/EU pillar), reaching out, with varying degrees of intensity, towards the (non-EC/EU) intergovernmental pillars (particularly the Common Foreign and Security Policy (CFSP)). One may even argue that, by virtue of Article 6.2 (ex Article F(2)) of the TEU (now falling, subject to certain limits, under the jurisdiction of the

<sup>7</sup> *Opinion 2/94* [1996] ECR I-1759, paras 23–36.

<sup>8</sup> Brandtner and Rosas, 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice', 9 *European Journal of International Law* (1998) 468 *et seq.*, at 472.

ECJ), the Union is bound to respect human rights in internal as well as external relations. Aside from the question of the precise delimitation of competences in the human rights field, the role of minority rights considerations, in a broader, external human rights policy, has been confirmed by the EU practice of the 1990s. While human rights concerns had long been voiced by EC member states in their relation with third countries, it was not until 1986 that they decided to adopt a Declaration on Human Rights, within the traditional framework of the European Political Cooperation (EPC). In spite of its importance as ‘the first comprehensive public statement by the Twelve on the fundamental elements of human rights’,<sup>9</sup> there was no reference to minority rights. Still, the end of the Cold War, with the resulting new challenges posed by the dissolution of the Soviet Union and Yugoslavia, were inevitably to bring about change in the perception of the significance of minority rights on the (now) EU agenda.

The Declaration on Human Rights adopted by the Luxembourg Summit in June 1991 signalled quite clearly the new attitude. Unlike its 1986 predecessor, such a declaration devoted an entire paragraph to minority protection:

The protection of minorities is ensured in the first place by the effective establishment of democracy. The European Council recalls the fundamental nature of the principle of non-discrimination. It stresses the need to protect human rights whether or not the persons concerned belong to minorities. The European Council reiterates the importance of respecting the cultural identity as well as rights enjoyed by members of minorities which such persons should be able to exercise in common with other members of their group. Respect for this principle will favour political, social and economic development.

Following this act of political recognition, and in the wake of other major international efforts designed to contain ethnic conflicts in the world, a number of Community/EU initiatives were progressively set in motion, addressing the human rights/minority rights situation in Eastern Europe as an essential component of a comprehensive, regional approach. An assessment of such initiatives will be provided in the next sections of the present paper.

It is important to remember in this context that further attention to minority rights protection as part of the external Community human rights policy is expected of the recent Council Regulations 975/1999 and 976/1999, concerning the financing and administering of Community action to promote respect for human rights and consolidate democracy and the rule of law, in development and non-development cooperation activities, respectively.<sup>10</sup> Significant references to minority and group issues feature in both Regulations. Interestingly enough, the second Regulation is based, in particular, on Article 308 (ex Article 235) of the EC Treaty: this may be interpreted as an acknowledgment of the possibility to use the said Article as a basis for external Community human rights/minority rights activities.

<sup>9</sup> This was the way the 1987 Belgian presidency described the Declaration. Memorandum on Action Taken in the Field of Human Rights, para. 2, 25 May 1987, 3/1 *EPC Documentation Bulletin* (1987) 187.

<sup>10</sup> OJ 1999 L 120/1 *et seq.* and 8 *et seq.*

### 3 The Case of Eastern Europe

#### A *Evolving Human Rights/Minority Rights Concerns (until 1989)*

In the Cold War era, contacts between the EC and the Eastern bloc were kept to a minimum. The sharp, political East–West divide reflected in major obstacles to encouraging economic interdependence. The Community refused a proposal submitted by Brezhnev in 1972 to negotiate a trade agreement with Comecon, which was clearly under Soviet hegemony, while manifesting willingness to deal with trade issues within the framework of bilateral agreements with each of the Comecon countries. Discussions on the point dragged on for a number of years, and eventually were suspended in 1980. In spite of this, the EC member states, through the EPC, frequently expressed concerns at the human rights record of many Eastern European countries, including the Soviet Union's. The (then) CSCE, with its trans-European membership and coverage of human rights issues, provided a forum for articulating the said positions. Furthermore, the EC as such developed its own initiatives, as illustrated by the European Commission's suspension of food aid to Afghanistan on 9 January 1980, in response to the Soviet invasion of that country, and the 1982 measures relating to trade with the Soviet Union, taken by the Council as a reaction to the declaration of martial law in Poland one year earlier.<sup>11</sup>

In the second half of the 1980s, EC–Comecon relations witnessed fundamental improvements as a result of Gorbachev taking over the Soviet leadership. In 1988, a Joint Declaration established official relations between the Community and Comecon. The Declaration did not preclude bilateral relations between the EC and Eastern European countries, thereby paving the way for the 'first generation' agreements on trade and cooperation which would be signed later on, initially with Poland and Hungary. General human rights/minority rights references in the preamble to the agreements with both such countries, as chiefly implied by the recognition of the importance attached by the parties to the 1975 Helsinki Final Act, revealed broader political objectives. Unlike the Agreement with Poland,<sup>12</sup> the one with Hungary<sup>13</sup> did not contain any reference to, *inter alia*, the CSCE Concluding Document of the Vienna Meeting, which constituted an advance on the previous CSCE position on minority rights and the implementation of human rights commitments generally.<sup>14</sup> At the same time, negotiations for a trade and cooperation agreement with a number of other Eastern countries were made conditional on respect for human rights, including minority rights. Notably, negotiations with Bulgaria started in April 1989 but were

<sup>11</sup> *Bulletin of the European Communities* 1/1980, para. 1.1.5; Regulations 596/82 and 597/82 of 15 March 1982, OJ 1982 L 72.

<sup>12</sup> Agreement Between the European Economic Community and the Polish People's Republic on Trade and Commercial and Economic Cooperation, 19 September 1989, OJ 1989 L 1.

<sup>13</sup> Agreement Between the European Economic Community and the Hungarian People's Republic on Trade and Commercial and Economic Cooperation, 26 September 1988, OJ 1988 L 327.

<sup>14</sup> Helgesen, 'Protecting Minorities in the Conference on Security and Cooperation in Europe (CSCE) Process', in Rosas and Helgesen (eds), *The Strength of Diversity, Human Rights and Pluralist Democracy* (1992) 159 *et seq.*, at 168–170.

suspended a month later, due to Community concerns about violations of the linguistic and religious rights of the Turkish minority in that country. Negotiations were resumed in December following domestic reforms which met the Community demands.<sup>15</sup>

Generally speaking, preambular references to CSCE human rights standards contributed, to a certain extent, to the interpretation of the respective treaties in their context.<sup>16</sup> In this respect, they could be used as a basis for raising concerns about non-compliance with those standards, while linking the primary purposes of encouraging economic progress to the country's transition to democracy. Thus, such concerns could not be countered on the basis of the non-interference argument or the fact that the EC as such was not a signatory of the Helsinki Final Act or other CSCE documents. Furthermore, the broad mandate of the joint committees established to monitor the functioning of the agreements provided a concrete opportunity for discussing alleged human rights violations.<sup>17</sup> Yet, the human rights/trade benefits linkage was still embryonic and rather limited in scope — it could not constitute a basis for, e.g. suspending or terminating the agreement in cases of non-compliance with CSCE human rights standards. With the collapse of the communist regimes in Eastern Europe still under way, the EC was acting in a rapidly changing context, in an attempt to provide a preliminary framework for constructive relationships. Minority rights considerations were minimal in this phase. In fact, their increased role was to emerge out of a forthcoming, greater challenge to the EU, namely, to articulate a meaningful and coherent response to the demise of the East–West confrontation, with its interlinked economic, political and humanitarian dimensions.

### **B Human Rights/Minority Rights Concerns in the 1990s**

The EU approach to Eastern Europe as developed in the 1990s rests on a variety of mechanisms and initiatives designed to favour and/or consolidate transition to market economy and further regional peace and stability. Concerns for effective human rights protection, in connection with the establishment of truly democratic regimes, now inform the Brussels agenda substantially. The underlying assumption is that the (Western) combination of 'prosperity, peace and freedom'<sup>18</sup> (with the latter, in turn, conceptualized through the triad of 'democracy, human rights and the rule of law') may be extended somewhat to contemporary Eastern European countries.

The EU involvement has brought to the forefront a complex set of activities, ranging from technical assistance to the negotiation, conclusion and/or supervision of association (and other) agreements, to financial support for specific reconstruction projects, to comprehensive institutional policies and conflict prevention measures. In

<sup>15</sup> King, 'The European Community and Human Rights in Eastern Europe', 2 *Legal Issues of European Integration* (1996) 93 *et seq.*, at 101.

<sup>16</sup> 1969 Vienna Convention on the Law of Treaties, Article 31.

<sup>17</sup> King, *supra* note 15, at 100.

<sup>18</sup> Pinder, 'Community Against Conflict: The EC's Contribution to Ethno-National Peace in Europe', in A. H. Chayes and A. Chayes (eds), *Preventing Conflict in the Post-Communist World: Mobilizing International and Regional Organizations* (1996) 148.

a recent account of the EU historical record in Eastern Europe, it is noted that such a record (from the last 10 years) ‘shows not only grandiose words, but also deeds that follow a plausible logic: the more Eastern Europe resembles the “civilized” West, the more is offered by the Union. EU policies in the region were relatively speedy, progressively up-graded, financially generous, and multidimensional’.<sup>19</sup>

The following will attempt neither to provide a detailed analysis of all such components of the EU approach, nor to deal with all the — general and specific — human rights aspects involved. Rather, as noted earlier, attention will be drawn to the above activities solely where they are relevant to establishing a preliminary framework for the assessment of the role of the EU as regards the promotion and protection of minority rights. Minority rights considerations are implied within different contexts, principally associated with the Community pillar, but reaching out towards the CFSP in significant respects. Aside from their possible regional focus *within* the area of Eastern Europe, pertinent elements may be discerned in connection with the process of enlargement, the use of a so-called ‘human rights clause’ in association (and other trade) agreements, unilateral policies — concerning, *inter alia*, trade preferences and technical assistance (including confidence-building measures) — based on conditionality requirements, and initiatives of preventive diplomacy and crisis management. It is to a description of these specific elements that we will now turn.

### 1 Membership, Trade, Economic and Technical Assistance

As noted earlier, the new version of Article 49 (ex Article O) of the TEU sets out, *inter alia*, democratic and human rights requirements for admission to EU membership. It is interesting to note that, until the Amsterdam Treaty, Article O of the TEU did not contain any particular membership requirement save that the prospective member was to be a European state. The European Council held in Copenhagen in 1993 broke new ground in this respect. It indeed agreed to a number of economic and political conditions to be met by new candidate countries, particularly from Eastern Europe. In terms of ‘political criteria’ for accession, the country concerned must have achieved ‘stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities’.<sup>20</sup> The latter reference reflects a remarkable progress in the approach to EU membership.

In assessing applications for accession, the Opinion of the Commission is of particular — substantive and procedural — significance. On the basis of the ‘Copenhagen criteria’, the Commission was asked by the Council to give its opinions on 10 Eastern European candidate countries.<sup>21</sup> In carrying out the assessment, the Commission drew on a number of sources of information, including answers given by the competent authorities to questionnaires sent to them in April 1996, bilateral follow-up meetings, reports from member states’ embassies and the Commission’s

<sup>19</sup> Zielonka, ‘Policies Without Strategy: The EU’s Record in Eastern Europe’, in J. Zielonka (ed.), *Paradoxes of European Foreign Policy* (1998) 131 *et seq.*, at 135.

<sup>20</sup> *Bulletin of the European Community*, 6/1993, at I.13 (emphasis added).

<sup>21</sup> COM (97) 2000 final, 1997, vols I and II (Agenda 2000); COM (97) 2001–2010 final, 1997.

delegation, assessments by international organizations (including the Council of Europe and the OSCE), and reports from NGOs. In addition to overviews of the functioning of the institutional system (under the separate heading ‘Democracy and the Rule of Law’) and the situation of civil and political, as well as economic, social and cultural rights, considerable attention is devoted to minority issues, through an autonomous chapter entitled ‘Minority Rights and the Protection of Minorities’. The analysis appears rather brief in the case of economic and social rights, and mainly focused on *de jure* (as opposed to *de facto*) developments. By contrast, the chapters on the protection of minorities reveal a relatively more extensive and critical assessment. The situations of, respectively, the Hungarian minorities in Slovakia and Romania, the Russian-speaking groups in the Baltic states, and the Roma in many of the candidate countries, feature among the major causes for concern. In this connection, such issues as the use of minority languages, the subsidization of minority education, and political and social discrimination in public life, are discussed at some length. As a result, a number of countries are singled out for their problematic record (i.e. Bulgaria, Latvia, Romania and Slovakia), whereas some of the countries praised by the Commission (also by virtue of their overall human rights/minority rights situation) are required to secure further improvements as regards the protection of particular groups (i.e. Hungary, the Czech Republic and Estonia). A similar framework of analysis may be discerned in the Regular Reports on Progress towards Accession issued by the Commission in 1998 and 1999. Some of the respective concerns are also reflected in the set of short-term priorities relating to the fulfilment of the Copenhagen political criteria, contained in the Accession Partnerships which have been adopted within the context of the enhanced pre-accession strategy.

Another vehicle of minority rights considerations in the Community relations with Eastern European countries may be offered by the already cited human rights clause, included in the ‘second generation’ trade agreements stipulated with the prospective members (Association, or Europe, agreements), with the new states that emerged from the collapse of the Soviet Union (Partnership and Cooperation agreements), and with some states from south-east Europe (Cooperation agreements). The clause makes ‘respect for the democratic principles and human rights as defined in the Helsinki Final Act and Charter of Paris for a New Europe’ an essential element of the agreement, thereby enabling a party (and thus the Community) to suspend or terminate such an agreement in connection with a failure of the other party to comply with those standards. In view of current procedural developments, this unilateral step (as distinct from ‘appropriate measures’ subject to prior consultations with the other party) may be taken in cases of special urgency. Indeed, a standard interpretative declaration clarifies that cases of special urgency include violations of essential elements of the agreement.<sup>22</sup> Both the Helsinki Final Act and the Charter of Paris for a New Europe firmly place respect for minority rights in the context of human rights

<sup>22</sup> On the human rights clause and related issues, see generally Brandtner and Rosas, *supra* note 8; Riedel and Will, ‘Human Rights Clauses in External Agreements of the European Communities’, in Alston (ed.), *The European Union and Human Rights* (1999) 723 *et seq.*

protection, as based on the paramount principles of non-discrimination and equality before the law. The Charter of Paris, in particular, acknowledges that 'the rights of persons belonging to national minorities must be fully respected as part of universal human rights', that such persons have 'the right freely to express, preserve and develop' their 'ethnic, cultural, linguistic and religious identity', and 'reaffirm[s] ... that the ... identity of national minorities be protected and conditions for the promotion of that identity be created'. Arguably, minority protection forms an integral part of the 'essential element' of the agreement constituted by the said, broader obligation to respect the human rights mentioned.

This argument is reinforced when considering that, except for the early (association) agreements with Hungary, Poland and Czechoslovakia, the above agreements contain in the preamble not only references to relevant CSCE (now OSCE) documents — sometimes including the comprehensive 1990 Copenhagen Document — but also an explicit recognition of the importance of protecting minority rights, in conformity with CSCE (now OSCE) standards.<sup>23</sup> The combination of such preambular paragraphs and the content of the human rights clause in the operative part of the agreement, suggests that, as a matter of principle, concerns for minority protection inform to a significant extent the scope of the linkage between human rights and economic liberalization established within this framework. The concrete impact of minority rights considerations on the functioning of the treaty-based linkage remains, however, to be seen. We shall return later to this issue.

Economic benefits have been linked to respect for human rights, including minority rights, through an autonomous policy elaborated by the Community *vis-à-vis* certain countries of south-east Europe, with which association agreements have not been concluded yet (i.e. Bosnia-Herzegovina, Croatia, the Federal Republic of Yugoslavia (FRY), the Federal Yugoslav Republic of Macedonia (FYROM) and Albania). Particularly important for present purposes are the Council conclusions on the principle of conditionality governing the development of the European Union's relations with these countries, adopted on 29 April 1997, and the most recent developments of such an approach as related to further, comprehensive efforts to consolidate peace and favour development in the region. As regards the 1997 Council conclusions,<sup>24</sup> they condition trade preferences, financial assistance, economic cooperation and contractual relations on, *inter alia*, respect for and protection of minorities (as part of a broader commitment to democracy, the rule of law, and human rights, and in line with the obligations assumed by some of these states under the Dayton Peace Agreements). Such a strategy serves as an incentive, not an obstacle, to the countries concerned to fulfil the respective conditions. The development of bilateral relations in this context allows for varying degrees of conditionality, depending on the situation in the country. Compliance with the said requirements is

<sup>23</sup> See e.g. the Europe Agreements with Bulgaria, Romania, the Slovak Republic, Lithuania, Latvia and Estonia. For a survey of pertinent references in trade agreements between the EC and OSCE countries, see *Bulletin of the European Union*, Supplement 3/95, 19–21.

<sup>24</sup> *Bulletin of the European Union*, 4/1997, point 2.2.1.

being monitored by the Commission on the basis of periodic ‘conditionality reports’, then submitted to the Council for possible (positive or negative) legislative measures to be adopted in accordance with the pertinent decision-making procedures.<sup>25</sup>

The FRY and Croatia have been harshly criticized by the Commission for their human rights/minority rights performance. By contrast, the FYROM has been praised for the efforts made to enhance protection of its Albanian minority, while Albania has been singled out for pursuing a moderate policy with regard to the situation of its kin-groups in neighbouring countries. A range of steps have been taken by the Council *vis-à-vis* the above states following the assessment of the Commission. The FRY is excluded from the regime of autonomous preferences as a result of, *inter alia*, its failure to comply with minority rights standards.<sup>26</sup> A similar approach was considered by the Council in relation to Croatia’s lack of performance as regards ‘fundamental principles of human and minority rights’ and ‘democratic procedures’.<sup>27</sup> However, the Council decided in October 1998 not to withdraw the Community trade preferences from Croatia. On the other hand, both such states do not enjoy technical assistance due to the said record.

The 1997 conditionality requirements are now being placed within the wider context of an enhanced approach to south-east Europe as a response to developments within and outside the region, including the most recent Kosovo crisis.<sup>28</sup> In May 1999, the Commission submitted a proposal for a Stabilization and Association process aimed at strengthening the prospects for increased rapprochement of the above states with the EU, eventually leading up to full integration into European structures.<sup>29</sup> The main component of this strategy, elaborated in the light of parallel initiatives within the framework of the CFSP (see below), is constituted by the negotiation and conclusion of so-called ‘Stabilization and Association agreements’, provided that the 1997 requirements are met (subject to due consideration of the situation of each country and the goals to be achieved). Thus, such a contractual category would give rise to a sort of ‘third generation’ agreements, after the early cooperation agreements of the late 1980s, the Europe agreements and the Partnership and Cooperation agreements. General objectives of consolidation of democracy and respect for human rights feature among the purposes that such new agreements will pursue. They are also seen in connection with the Copenhagen political criteria, embracing a long-term prospect of EU membership. Concerns for minority rights are likely to gain further prominence in this context. The Commission’s approach has been endorsed by the Council, and confirmed by the recent Lisbon European Council.<sup>30</sup> At present, the FYROM and Albania are being singled out for short-term developments in this direction, due to their more advanced relationship with the EU.

Technical (mainly financial) assistance to Eastern European countries provides yet

<sup>25</sup> Brandtner and Rosas, ‘Trade Preferences and Human Rights’, in Alston, *supra* note 22, at 712.

<sup>26</sup> *Ibid.*, at 713.

<sup>27</sup> Second conditionality report delivered by the Commission on 15 April 1998. COM (98) 237, final, at 3.

<sup>28</sup> The analysis of the EU contribution to the reconstruction of Kosovo is beyond the scope of this article.

<sup>29</sup> COM (99) 235 final.

<sup>30</sup> Presidency Conclusions, Lisbon European Council, 23–24 March 2000, Doc. 00/8, Part III.

another dimension to minority rights considerations. Specific programmes are in place for that purpose, particularly Phare<sup>31</sup> (for present applicant countries), Tacis<sup>32</sup> (for the former republics of the Soviet Union), and Obnova<sup>33</sup> (for the former republics of Yugoslavia, with the special aim of reinforcing the Dayton Peace Agreements). A common feature lies in the fact that the respective assistance is directly or indirectly linked to respect for human rights. As a result, a new Community instrument has been created which somewhat resembles the said human rights clause in bilateral trade agreements. Article 3.11 of the 1996 Tacis Regulation provides that in cases of violation of democratic principles and human rights (which thus, arguably, covers non-compliance with minority rights), the Council may take appropriate measures concerning assistance to a partner state. Article 2 of the Obnova Regulation contains a similar provision, further strengthened by an explicit incorporation of the specific conditions laid down by the Council for the implementation of cooperation with the former Yugoslavia. As noted earlier, the 1997 Council conclusions set out the conditionality requirements for the region. In this context, the Phare programme features as the framework for delivering assistance — its operational reach transcends, therefore, the more limited purposes pursued by Obnova. On the other hand, Phare has become the most important instrument for Community assistance to the applicant countries. 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,<sup>34</sup> enables the Council to take appropriate steps with regard to any pre-accession assistance granted to an applicant state, when in particular ‘the commitments in the Europe Agreements are not respected and/or progress towards fulfilment of the Copenhagen criteria is insufficient’ (Article 4). Thus, Phare assistance to these states is now conditioned on respect for human rights, with a special emphasis on minority rights as noted earlier, while at the same time reinforcing, ‘from the outside’, the above treaty commitments and admission requirements. The new Tacis Regulation 99/2000 of 18 January 2000 shows a similar pattern: besides reproducing *verbatim* the text of the above-mentioned Article 3.11 of the 1996 Regulation, Article 16 extends the application of the procedure to cases ‘of a serious violation of the obligations set out in the Partnership and Cooperation agreements’.<sup>35</sup>

A range of activities focusing on, *inter alia*, minority rights, equal opportunities and non-discrimination have been supported by the Community within the context of the Phare and Tacis Democracy Programme launched in 1992. Between 1992 and 1997 macro- and micro-projects carried out by involved NGOs included analyses of

<sup>31</sup> Council Regulation No. 3906/89 of 18 December 1989, as amended by Regulation 753/96 of 22 April 1996, OJ 1996 L 103, at 5. But *infra* note 34.

<sup>32</sup> Council Regulation 1279/96 of 25 June 1996, OJ 1996 L 165, at 6. See *infra* note 35.

<sup>33</sup> Council Regulation 1628/96 of 25 July 1996, as last amended by Regulation 851/98 of 20 April 1998, OJ 1998 L 122/1.

<sup>34</sup> OJ 1998 L 85/1–2.

<sup>35</sup> The text of this new Regulation is available at [www.europa.eu.int/comm/external\\_relations/tacis/intro/regulation.htm](http://www.europa.eu.int/comm/external_relations/tacis/intro/regulation.htm).

minority problems. Such a field constituted the third most selected area of activity in the micro-projects scheme, whereas it received relatively little attention in the macro-projects scheme.<sup>36</sup> By building on this experience, the Community is currently developing a joint programme with the Council of Europe designed to establish institutional ties between the authorities responsible for minorities in Eastern European countries.<sup>37</sup> The already cited Council Regulation 976/1999, concerning the financing and administering of Community action to promote respect for human rights and consolidate democracy and the rule of law, in connection with non-development cooperation activities, may further enhance the involvement of NGOs in projects directly concerning minority rights in Eastern Europe. Obviously, concerns for minority protection in this geographical area may also play a role under a whole series of Community budget lines aimed at promoting human rights generally.

## 2 *CFSP and Further Action*

The said activities have been supplemented by a number of direct political initiatives to manage conflict and encourage democratization in Eastern Europe. The EC responded to the Yugoslav crisis by establishing in September 1990 the Conference on Yugoslavia. In 1992 the EC Conference was replaced by the International Conference on the Former Yugoslavia (ICFY). Yet, the Working Group on Ethnic and National Communities and Minorities set up within the ICFY confirmed its commitment to the principles developed by the EC Conference, particularly in the ‘Treaty Provisions for the Convention’ (the so-called Carrington Draft) submitted in October 1991. Minority provisions featured prominently in the draft, which went as far as to provide for a special status of autonomy for persons belonging to a national or ethnic group forming a majority in the area where they lived. In December 1991, the EC member states, through the EPC, adopted a ‘Declaration on Yugoslavia’ and a ‘Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union’.<sup>38</sup> On the basis of these Guidelines, recognition would be granted to those new states which applied for it and met certain criteria, including respect for ‘the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE’. Thus, the political process of recognition was to be supplemented by the injection of principles of human rights law. The Declaration on Yugoslavia entrusted an Arbitration Commission (the Badinter Commission) with the task of advising, *inter alia*, on the fulfilment of the minority rights requirements (including acceptance of the relevant provisions of the cited Carrington Draft) within newly emerging states which had applied for recognition. To this end, it delivered a number of important Opinions. Minority rights as recognized by international law were clearly brought to the fore by the Commission in relation to the

<sup>36</sup> See the Final Report Concerning the Evaluation of the Phare and Tacis Democracy Programme 1992–1997, prepared by ISA Consult, the European Institute at Sussex University, and GJW Europe, available at [www.europa.eu.int/comm/dg1/evaluation/ptdp](http://www.europa.eu.int/comm/dg1/evaluation/ptdp).

<sup>37</sup> See, generally the Report from the European Commission on the Implementation of Measures Intended to Promote Observance of Human Rights and Democratic Principles (for 1995), COM (96) 672 final, 26.

<sup>38</sup> For the texts, see 4 *European Journal of International Law* (1993) 72–73.

situation of the Serbian population in the republic of Bosnia-Herzegovina and in the republic of Croatia.<sup>39</sup> From the specific point of view of the recognition of new states on the basis of the 1991 Guidelines, the Commission made a reservation in the case of Croatia as regards compliance with minority rights.<sup>40</sup>

As has been pointed out, the above initiatives were taken 'while the ink was drying on the Maastricht Treaty'.<sup>41</sup> The CFSP was created as an intergovernmental framework (the so-called second pillar) to coordinate and eventually unify EU foreign policy. The EC response to the crisis in the former Yugoslavia built on the experience of the EPC, but it was the new institutional framework set up under the Maastricht Treaty that projected the transition from a strategy of mainly economic integration to a broader approach encompassing the role of the (now) EU as a political actor on the global stage. One of the objectives of the CFSP is 'to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms' (Article 11, fifth indent (ex Article J.1, fifth indent) of the TEU). It is interesting to note that concerns for minority protection in Eastern Europe characterized the first major initiative taken by the EU within the CFSP. An extraordinary European Council meeting in Brussels, held on 29 October 1993, stressed the need for the CFSP to promote stability and peace in Europe, particularly in Eastern Europe, and, to this end, called for a stability pact to resolve the problems of minorities and to strengthen the inviolability of frontiers. The aims of the initiative were further clarified in the Conclusions of the Brussels European Council meeting which was held in December of that same year. The said pact was described as an instrument of preventive diplomacy, thus not concerned with countries in conflict. In fact, the pact would be principally directed at those countries of Eastern Europe which had a prospect of becoming members of the European Union and with which the European Union had concluded or negotiated agreements.

A joint action was eventually approved by the Council on 20 December 1993, which convened an inaugural conference on a pact of stability in Europe, to be held in Paris in 1994, and confirmed the linkage between conflict prevention purposes and the solution of minority problems, mainly through the conclusion of appropriate agreements among the states concerned.<sup>42</sup> Two regional round tables, one for the Baltic region (i.e. Estonia, Latvia, Lithuania and Poland, and their guests) and one for six states of Central Europe (i.e. Bulgaria, Hungary, Poland, Romania, Slovakia and the Czech Republic, and their guests), were established. The Pact on Stability in Europe was signed in Paris in 1995 by the representatives of 52 member states of the OSCE. The Pact as such is a 'political', non-legally binding document. It consists of a declaration and a listing of agreements and declarations adopted by some Central and Eastern European states among themselves, which deal wholly or partially with the

<sup>39</sup> Opinion No. 2 of the Arbitration Commission, reproduced in 31 ILM (1992) 1497–1498.

<sup>40</sup> Opinion No. 5 of the Arbitration Commission, reproduced in 31 ILM (1992) 1503 *et seq.*, at 1505.

<sup>41</sup> A. H. Chayes and A. Chayes, 'Mobilizing International and Regional Organizations for Managing Ethnic Conflict', in D. Wippman (ed.), *International Law and Ethnic Conflict* (1998) 178 *et seq.*, at 199.

<sup>42</sup> EPC Bulletin Doc. 93/533 (93/728/CFSP).

protection of minorities.<sup>43</sup> In this regard, important treaties have been incorporated such as the Treaty on Good-Neighbourliness and Friendly Cooperation Between the Slovak Republic and the Republic of Hungary of 19 March 1995. A range of accompanying measures set up by the European Commission are annexed to the Pact, as a specific contribution to the realization of the aims of the Pact; minority issues feature in connection with the implementation of good-neighbourliness agreements and particularly the Phare programmes. The monitoring of the implementation of the Stability Pact, including ‘the implementation of the agreements and arrangements’ incorporated therein, has been entrusted to the OSCE, thereby developing a framework for multilateral (as opposed to purely bilateral) supervision.

The adoption of the Stability Pact, coupled with the peace process in the former Yugoslavia as embodied in the Dayton Agreements (which were also signed in 1995), prompted the EU to take further initiatives basically serving conflict-prevention and confidence-building purposes. The so-called Royaumont Process, launched by the EU with a view to accompanying the implementation of the Dayton Agreements, constitutes an innovative, comprehensive approach to conflict alleviation in the broad region of south-east Europe.<sup>44</sup> Concerns for inter-cultural dialogue and human rights/minority rights education are reflected in the priority accorded to civil projects or programmes which meet the objectives of stability and regional cooperation. Basically, the Royaumont Process encourages democratization within new states, while at the same time fostering governmental and non-governmental cooperation networks across national borders. The EU has appointed a coordinator of the Royaumont Process who is responsible for following-up the relevant activities.

An attempt is currently being made by the EU to develop a coherent policy towards the Western Balkans. The recent Kosovo crisis has led to further progress in this respect. In May 1999, the EU, within the CFSP, convened a conference on south-east Europe aimed at adopting a Stability Pact for such a region.<sup>45</sup> The Pact was eventually adopted on 10 June 1999 by the EU member states, the south-eastern states concerned (Albania, Bosnia-Herzegovina, Croatia and FYROM, but not the FRY), other neighbouring countries and other interested states (e.g. the United States) and international institutions.<sup>46</sup> The basic aim of this Stability Pact (to be implemented in close association with the OSCE) will be to help stabilize and democratize the area by favouring bilateral and multilateral agreements as well as domestic arrangements covering the whole range of regional crisis factors, with a special emphasis on human rights/minority rights issues. The approach builds to a large extent on the 1995 Pact

<sup>43</sup> For a survey, see Benoit-Rohmer, ‘Le Pacte de stabilité: la première action “diplomatique” commune d’envergure de l’Union européenne’, 30 *Revue trimestrielle de droit européenne* (1994) 561 *et seq.*

<sup>44</sup> Roumeliotis, ‘The Royaumont Process — An Initiative for Stability and Good Neighbourliness in South-Eastern Europe’, 3 *Thesis — A Journal of Foreign Policy Issues* (1998) No. 3, 15 *et seq.*; see further the Common Position adopted by the Council on 9 November 1998 on the Process on Stability and Good-Neighbourliness in South-East Europe, Doc. 98/633/CFSP.

<sup>45</sup> Common Position of 17 May 1999, 1999/345/CFSP, OJ 1999 L 133/1–2.

<sup>46</sup> The text is available at [www.europa.eu.int/comm/dg1a/see/stapact/10\\_june\\_99.htm](http://www.europa.eu.int/comm/dg1a/see/stapact/10_june_99.htm). See also paragraph 17 of UN SC Res. 1244 (1999) on Kosovo, and para. 9 of its Annex 2, UN Doc. S/RES/1244 (1999).

on Stability in Europe. Besides setting out principles and objectives endorsed by the Pact, it provided for the setting up of a 'South Eastern Europe Regional Table' chaired by a special coordinator appointed by the EU, with the task of reviewing progress under the Pact, carrying it forward and providing guidance for advancing its objectives. The South Eastern Europe Regional Table will coordinate a number of working tables focusing on, *inter alia*, 'democratization and human rights, including the rights of persons belonging to national minorities'. Such working tables 'will build upon existing expertise, institutions and initiatives'. In terms of ongoing regional initiatives, a 'key role' is recognized to the above-mentioned Royaumont Process. This mechanism is supplemented by specific activities to be carried out by the most involved states and international institutions. The recent Lisbon European Council has reaffirmed the vital contribution of the EU to the 1999 Stability Pact, and the commitment to ensuring coherence to EU policies in the Western Balkans.

### 3 Assessment

The foregoing description enables a number of critical observations to be made. Minority issues in Eastern Europe are being dealt with within two frameworks (or pillars): the EC for instruments related to the accession procedure, trade and economic assistance; and the intergovernmental CFSP procedures for 'political' decisions. Despite the formal separation between the two pillars, the case of Eastern Europe reflects an advanced combination of instruments from both these frameworks, thereby revealing an essentially 'global approach'.<sup>47</sup> The need for 'consistency' within the pillar structure is already highlighted by such Articles as Articles 60 (ex Article 73g), 301 (ex Article 228a) or 309 (ex Article 236) of the EC Treaty, concerning restrictive measures towards third countries or member states in connection with measures adopted at the level of the CFSP or the Union generally. But the wide range of measures adopted by the EU *vis-à-vis* Eastern European countries in fact goes beyond a mere question of consistency between the first and second pillars: it strikes at the heart of a major effort at devising comprehensive strategies which are responsive to the role of a new, complex international actor. For instance, the pre-accession strategy, approved by the Essen European Council in December 1994, mixes aid, economic cooperation and political dialogue. It was not a CFSP decision. On the other hand, the 1995 Stability Pact came as a result of a joint action which, *inter alia*, supplemented the said 1994 initiative (and earlier related initiatives) in that it was principally concerned with the situation in the candidate countries. The same applies to the strict linkage between the Stabilization and Association process (within the EC framework) and the 1999 Stability Pact for south-east Europe (promoted within the CFSP).

Broadly speaking, most of the above EC instruments are being set up as basic components of broader approaches adopted under the general umbrella of the EU. Thus, respect for human rights/minority rights is also placed within a wide context of instruments and goals pursued. This overall tendency may be reinforced by the

<sup>47</sup> See generally Smith, 'The Instruments of European Foreign Policy', in Zielonka, *supra* note 19, at 68 note 8.

Amsterdam Treaty, under which the European Council ‘shall decide on common strategies to be implemented by the Union in areas where the member states have important interests in common’; such common strategies ‘shall set out objectives, duration and the means to be made available by the Union and the Member States’ (Article 13.2 (ex Article J.3)). Although these strategies are to be adopted within the CFSP framework, they are clearly intended to affect the whole pillar structure and could thus be a way to develop further global approaches.

Within this broad context, the protection of minorities in Eastern Europe is called for from two perspectives: (1) rapprochement and integration into EU structures, particularly by accession (‘outside-oriented’ dynamics); and (2) support for democratization, human rights protection and stability in connection with the enhancement of regional cooperation (‘inside-oriented’ dynamics). The role of minority rights considerations in the pre-accession strategy or in the context of a special strategy *vis-à-vis* the countries which arose out of the break-up of Yugoslavia, well illustrate the first perspective. The 1995 Stability Pact and the Royaumont Process are basically informed by the second perspective, in view of their emphasis on regional stability, good-neighbourliness agreements and support for ‘bottom-up’ activities within the countries concerned. On the other hand, such perspectives are complementary and mutually reinforcing: for instance, the 1995 Stability Pact was also conceived of as instrumental in preparing the so-called Phare countries for EU membership (just as the recent Stability Pact for south-east Europe is seen as instrumental in preparing south-eastern countries for the Stabilization and Accession process), whereas the accession, cooperation and rapprochement processes and related measures of technical assistance clearly attempt, *inter alia*, at developing internal dynamics of democratization and regional integration. EU concerns for minority rights lie at the heart of this ‘outside–inside’ logic: they result in conditions for stepping up the relationship with the EU (conditionality, or ‘carrots and sticks’, approach), which, in turn, are linked to a broader policy serving conflict-prevention and conflict-management purposes.

But what is the underlying concept of minority rights embraced by the EU in this context? With regard to the accession procedure, Article 49 (ex Article O) of the TEU refers back to the principles mentioned in Article 6.1 (ex Article F(1)), including ‘respect for human rights and fundamental freedoms’. In contrast with the Copenhagen political criteria, ‘respect for and protection of minorities’ is not explicitly referred to, yet the above-described practice of the enlargement process confirms the specific role of minority protection requirements precisely by virtue of the Copenhagen political criteria, in addition to their (‘implied’) significance as part of human rights requirements. When assessing the protection of minorities in the present candidate countries, the Commission’s Opinions contained in Agenda 2000 often make reference to the ECHR (which does not include specific minority provisions), the Framework Convention for the Protection of National Minorities, Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe,<sup>48</sup> and,

<sup>48</sup> For the text, see 14 *Human Rights Law Journal* (1993) 145 *et seq.*

occasionally, to some relevant bilateral treaties (e.g. the 1995 and 1996 good-neighbourliness treaties between, respectively, Hungary and Slovakia and Hungary and Romania<sup>49</sup>).

Such international instruments (in conjunction with the relevant national legislation) appear as material sources for an overall, pragmatic assessment rather than parameters for a strictly legal analysis. This may also explain a certain amount of flexibility on the Commission's part when considering group issues which do not necessarily fit the traditional framework of international minority rights law (e.g. the problematic situation of the Roma communities in many of the countries concerned and the non-citizens of Russian origin in Latvia and Estonia). Still, the Commission does not seem to be demanding a new, broader concept of minority, but rather it is encouraging solutions which can secure internal and international stability.<sup>50</sup> As noted, respect for the rights of persons belonging to national minorities in accordance with the commitments entered into within the context of the OSCE is frequently referred to in the preamble of the various Europe agreements, as well as in other trade agreements stipulated with Eastern European states. The 1990 Copenhagen Document and the 1994 Framework Convention are singled out in the 1995 Stability Pact among the instruments relevant to minority protection.<sup>51</sup> It should be noted that the 1990 Copenhagen Document was adopted unanimously by the (then) CSCE participating states, and may be considered as providing the most comprehensive set of minority rights standards within the framework of Article 6.1 (ex Article F(1)) of the TEU.<sup>52</sup>

The 1997 Council conclusions on conditionality *vis-à-vis* certain countries of south-east Europe mention 'generally recognized standards of human and minority rights'; yet, 'respect for and protection of minorities' described in the Annex to the Council conclusions combine 'traditional' guarantees for minorities (the 'right to establish and maintain their own educational, cultural and religious institutions, organizations or associations'; and 'adequate opportunities for these minorities to use their own language before courts and public authorities') with 'adequate protection of refugees and displaced persons returning to areas where they represent an ethnic minority'. Such a combination reflects the complexities of the situation in the former Yugoslavia and the interrelatedness of human rights issues as evidenced by the Dayton Agreements of 1995. It is a *sui generis* approach serving the practical need for protecting the rights most endangered on the ground, but the issue of refugees and displaced persons clearly falls outside the protection of minorities under international

<sup>49</sup> Such treaties feature among the recent bilateral agreements which deal wholly or partially with minority rights, reproduced in Bloed and van Dijk (eds), *Protection of Minority Rights Through Bilateral Treaties — The Case of Central and Eastern Europe* (1999) 360–365 and 370–377.

<sup>50</sup> For comments, see Pentassuglia, *Defining 'Minority' in International Law: A Critical Appraisal* (2000) 64–65. For considerations on the problematic position of the Roma, see Pogany, 'Accommodating an Emergent National Identity: The Roma of Central and Eastern Europe', 6 *International Journal on Minority and Group Rights* (1999) 149 *et seq.*

<sup>51</sup> Para. 7 of the Declaration incorporated in the Pact.

<sup>52</sup> See e.g. Nowak, 'Human Rights "Conditionality" in Relation to Entry to, and Full Participation in, the EU', in Alston, *supra* note 22, at 694.

law. In the early 1990s, OSCE commitments (in the context of the 1991 EC Guidelines), other international instruments (the Conference on Yugoslavia's drafts) and relevant pronouncements (the opinions of the EC Badinter Commission) were referred to as providing the basis for the protection of minority groups in the former Yugoslavia. The Badinter Commission made an innovative statement to the effect that '[peremptory] norms of international law require states to ensure respect for the rights of minorities'.<sup>53</sup> On the other hand, the overall EC (and then EU) approach to minority protection in Eastern Europe is basically concerned with facilitating the implementation of internationally recognized minority rights standards irrespective of their specific legal significance,<sup>54</sup> and as part of a pragmatic policy to promote stability in those states in transition towards democracy. In fact, the above instruments do not reveal the general purpose of establishing new standards in the field of the international protection of minorities.

Despite some important gains, the impact of such instruments on encouraging respect for minority rights is not entirely clear. Overall, the EU practice concerning the implementation of a policy of 'human rights conditionality' is fundamentally based on economic and political rather than legal and judicial criteria. The accession procedure in Article 49 (ex Article O of the TEU) falls within the jurisdiction of the ECJ (Article 46), though the principles mentioned in Article 6.1 (ex Article F(1)) as such do not. In theory, the ECJ could review decisions of the Council, the Commission or the European Parliament which determine compliance with such principles (including respect for minority rights) in connection with Article 49 (ex Article O). In practice, this is unlikely, due to the fact that candidate states may not initiate infringement proceedings under Article 230 (ex Article 173) of the EC Treaty. As noted, the Commission's approach to minority issues in the candidate countries reflects pragmatic concerns for internal and international stability. At the same time, the actual weight accorded to the implementation of minority rights as recognized in the relevant international instruments appears difficult to measure. The Framework Convention could offer a yardstick for a legal approach, but references to this instrument (and the other, above-mentioned instruments) are rather cursory (the references are essentially confined to the question of whether or not the candidate country has signed, ratified or recognized the relevant instrument), and thus there is no specific assessment of state performance in the light of the objective principles offered by that convention (or by the other instruments). This is indirectly confirmed by the fact that some of the issues discussed in the Opinions in relation to the protection of minorities, such as access to public posts, access to court or freedom of

<sup>53</sup> See *supra* note 39, at 1498.

<sup>54</sup> Since various international institutions include (to a lesser or greater extent) references to non-legally binding minority rights standards as a distinctive part of the relevant international *acquis*, the problematic question arises of the role of 'soft law' within the context of minority issues, and its relation to 'hard law'. Such a general question requires ad hoc comparative analysis and thus goes beyond the scope of this article. For interesting insights, see the recent article by Ratner, 'Does International Law Matter in Preventing Ethnic Conflict?', 32 *New York University Journal of International Law and Politics* (2000) 591 *et seq.*

information raise general questions of non-discrimination which are not the focus of minority rights instruments. By contrast, Article 27 of the ICCPR, the most important global treaty standard on minority rights, and the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the most important global non-treaty text, are not referred to by the Commission to monitor state compliance. It is hard to escape the impression that, in spite of its importance, the Commission's analysis is conducted on a case-by-case basis due to an absence of clearly established, objective evaluation criteria.

Another question is of whether the implementation of the human rights clause may have a significant impact on minority protection. Again, judicial control appears rather limited. Procedural rules for suspending or terminating the relevant treaties (or some of their provisions) are not unambiguous, though the new Article 300.2(2) (ex Article 228.2) of the EC Treaty, provided for by the Amsterdam Treaty, contains express clauses about procedures and Council quorums. Suspension decisions might be subject to ECJ review, but, aside from procedural questions brought up in infringement proceedings, it seems difficult to establish the competence of the ECJ to determine whether minority rights violations have been committed, and, if so, to what extent such violations amount to the violation of an 'essential element' of the agreement, save perhaps in relation to alleged cases of 'manifest errors of assessment'.<sup>55</sup> The ECJ has no role to play when no measure has been taken by the Council and/or Commission in response to violations of minority rights by the treaty partner — there is no judicially enforceable 'obligation to do' upon those institutions.

But, beyond such issues, the basic question is of whether minority rights considerations may influence the actual functioning of the clause. The so-called 'Baltic clause', first used in agreements with the Baltic states and Albania, reserves for the contracting parties the right to suspend the agreement in whole or in part if a serious breach of its essential provisions occurs. The so-called 'Bulgarian clause', first used in agreements with Romania and Bulgaria in 1993, refers to 'appropriate measures' (including suspension or termination) which may be taken by either party as a response to an alleged failure by the other party to fulfil an obligation incumbent upon it under the agreement, subject to prior consultations with the other party (through the Association Council), except in cases of special urgency (as noted, such cases include violations of essential elements of the agreement). As regards the latter (more commonly used) clause, one may wonder whether any infringement of the relevant human rights/minority rights constitutes a case of 'special urgency', entitling the other party to take appropriate measures. If so, human rights/minority rights considerations would open up a range of possibilities for response, though the

<sup>55</sup> Case C-162/96, *Racke GmbH v. Hauptzollamt Mainz* [1998] ECR I-3655. The ECJ stated that only 'manifest errors of assessment' concerning the conditions for applying the rules of customary international law should be subject to judicial review, in order to determine the validity of an EC act suspending a trade agreement by invoking those rules. One may perhaps wonder whether the same criterion should apply, *mutatis mutandis*, to the interpretation and application of international human rights/minority rights standards providing the substantive basis for an EC act which suspends the relevant trade agreement (or one of the above-mentioned autonomous technical assistance instruments).

measures envisaged would fall outside the conciliation procedure provided for by the clause. The latter effect would result from a restrictive interpretation of the clause, that appropriate measures may be taken only in response to serious breaches of the relevant human rights/minority rights as constituting cases of ‘special urgency’. When confined to extreme cases of large-scale violations, such (positive or negative) measures would gain a predominantly reactive rather than preventive connotation. Another understanding of the same clause may be one which allows for ad hoc measures in cases of gross violations as situations of ‘special urgency’, and which enables raising human rights/minority rights concerns and submitting preventive, long-term measures within the said conciliation framework.

A marked preventive content characterizes some contemporary approaches to the protection of minorities, going beyond short-term priorities originating in a specific context where egregious violations are at issue. It is submitted that the first or third of the above interpretations, while permitting (in conformity with EC practice) the limiting of recourse to the ‘stick’ to serious violations,<sup>56</sup> might better serve broader concerns for a permanent commitment to minority rights. The situation of minorities in numerous Eastern European countries is problematic and thus it is likely to be a source of instability. But, except for well-known cases, minority rights issues in Eastern Europe are not necessarily being considered in conjunction with — or as a major part of — for example, ‘a consistent pattern of gross and reliably attested violations’ (in the sense of the ECOSOC 1503 complaints procedure) or ‘a serious and persistent breach’ (in the sense of Article 7.1 (ex Article F.1(1)) of the TEU) of human rights and fundamental freedoms. The human rights clause (and related preambular references) may favour constructive, long-term approaches to minority issues, reaching out towards conflict prevention and confidence-building measures, in the spirit of the relevant OSCE documents referred to in the agreement.<sup>57</sup>

The point here is that the clearly recognized need for respecting minority rights is not matched with clauses detailing the standards to be implemented. The minority provisions in the Charter of Paris are essentially of a programmatic nature, though references to ‘rights’ should not be overlooked. The 1990 Copenhagen Document is far from being consistently cited (the text is mentioned in the preamble to the Europe Agreements with the Baltic states), and there is no mention of Article 27 of the ICCPR and the 1992 UN Declaration. The minority provision in the Helsinki Final Act (Principle VII) is of major importance, but the emphasis is on non-discrimination rather than protection of cultural identity. As a result, one may argue that the ‘mechanism’ set up under the agreement points to an overall assessment of the situation of minorities in the country concerned, but appears to be unclear as regards the substantive scope of the monitoring of state compliance. The fact that explicit references to minority rights are contained in the preamble, not in the operative part, of the agreement, coupled with the absence of a third-party procedure to ensure respect for the recognized human rights, suggests that ‘promotional’ goals constitute

<sup>56</sup> See e.g. Brandtner and Rosas, *supra* note 25, at 713.

<sup>57</sup> The same considerations may apply, *mutatis mutandis*, to the Community technical assistance programmes which incorporate provisions similar to the human rights clause.

the primary — though by no means the exclusive — object of concern within the ‘context’ of the treaty. In this regard, the 1997 Council conclusions on conditionality seem to be more advanced in that they spell out the international standards on which to focus, though no independent body is set up to monitor compliance. A mainly ‘promotional’ approach may well combine with long-term aims as described earlier. At the same time, unclear references to minority standards (*de facto* entrusted to unilateral, EC monitoring) may lead to selectivity in country assessment and thus have little regard to legal (as distinct from political) considerations. All the more so that the — certainly welcome — ‘legalization’ and/or ‘prescriptive force’ of ‘political’ (OSCE) commitments (this latter as an advance on the Cold War era trade agreements) does not per se clarify the content of the rights constituting the object of such commitments. Obviously, the weaknesses revealed by the minority references are, in turn, linked to the more general question of the lack of well-defined substantive and procedural criteria for the implementation of the human rights clause.<sup>58</sup>

‘Anticipatory effects’ may be seen as characterizing to a large extent the practical application of EU conditionality in Eastern Europe.<sup>59</sup> The EU institutions may decline to take certain steps favourable to the country on the basis of a lack of respect for, *inter alia*, minority rights. This is clearly illustrated by the already cited 1997 Council conclusions on conditionality, where, for instance, the opening of negotiations for contractual relations is expressly subject to ‘a credible commitment . . . to comply with the generally recognized standards of . . . minority rights’. Such an approach tends to prompt the country which is interested in the benefits deriving from those steps, including the obtaining of EU membership, to demonstrate effective compliance. The above-mentioned efforts by the FYROM and Albania in view of the prospect of a ‘Stabilization and Association agreement’ may be seen in this light. The same consideration applies when the treaty is being negotiated (see also the earlier case of Bulgaria in 1989), has been signed but not yet ratified by the Community, or has been ratified by both parties: the pending ratification and the ‘threat’ of — or actual — suspension on human rights grounds may be used as means of persuasion. The ensuing, often flexible, new tools are intended to help, not to obstruct, the process of implementation; hence, they are referred to as ‘incentives’. On the other hand, the ‘sanctions’ (or ‘disincentives’) provided for as a last resort against non-compliant states (i.e. suspension of a treaty, suspension of financial assistance and/or trade preferences, denial of membership, etc.) show a complementary reactive approach to implementation by providing the competent bodies with a degree of direct or indirect coercive power over the states concerned.<sup>60</sup>

<sup>58</sup> See e.g. Riedel and Will, *supra* note 22, especially at 748–749.

<sup>59</sup> The expression is used by Riedel and Will, *ibid.*, at 739 and 741, with regard to the practical impact of the human rights clause in trade agreements, but we believe it can be used also generally to describe the dynamics prompted by the EU human rights conditionality in Eastern Europe.

<sup>60</sup> In a comparative perspective, we should note that other international institutions, such as the OSCE or the Council of Europe, develop ‘lower-key’, essentially non-coercive forms of human rights/minority rights monitoring. See Pentassuglia, ‘Minority Protection’, *supra* note 3, at 140–142 and 151–157; Chayes and Chayes, *supra* note 41, at 181–191.

Improvements of the minority rights record are being made by a number of countries, particularly those which are candidates for EU membership. For instance, the EU has had occasion over the past few years to reiterate that Slovakia will not join the EU unless it, *inter alia*, protects minority rights. The EU criticism mainly originated from the Slovak Language Law of 1995, which, in contradiction to express constitutional guarantees (Article 34 of the 1992 Constitution) and the relevant international standards, introduced heavy restrictions on the use of minority languages, especially in contacts with public authorities and in the field of education; the slow or no progress in the implementation of the 1995 Basic Treaty with Hungary; and the adoption of other laws which were further detrimental to the Hungarian minority. The new Slovak Government elected in September 1998 is now developing a constructive approach towards its neighbours and national minorities. The Hungarians registered 9 per cent of the votes and entered a coalition government, occupying both ministerial and secretary of state posts. A member of the Hungarian Coalition Party was appointed to the post of Deputy Prime Minister for Human Rights, National Minorities and Regional Development. The Law on the Use of Minority Languages in Official Communications was adopted in July 1999, and other relevant laws (notably, concerning the issuing of bilingual school certificates) have been amended. One of the main areas of contention concerning the 1995 Basic Treaty with Hungary (ratified by Slovakia only in March 1996), namely, the composition of the Joint Intergovernmental Committee set up by the Treaty, has been recently overcome by virtue of an agreement reached with Hungary on the matter. Minority members are now allowed to be appointed to the Joint Committee following a proposal by their organizations. The Joint Committee started its work in January 1999.<sup>61</sup>

An analogous pattern is illustrated by the situation in Romania. The treatment of the Hungarian minority in Romania is greatly improved following measures adopted by the new 1996 coalition government which includes the Democratic Alliance of Hungarians in Romania. Although there are still areas of disagreement on specific issues, basic questions such as language rights and the degree of power to be devolved to local administrations are being dealt with in a more positive climate.<sup>62</sup> In July 1999, a new Education Law was passed which created the legal framework for the education rights of minority members. Other legislative provisions recognize language rights in contacts with local administrations where the minority represents at least 20 per cent of the population. The signing of the Basic Treaty between Romania and Hungary in 1996 and the subsequent establishment of the Joint Intergovernmental Committee set up by the Treaty are major signals of a cooperative attitude aimed at the improvement of minority protection in both countries. In the first Regular Report on Romania's Progress Towards Accession, delivered in 1998, the Commission observes that 'in general terms, the protection of minorities in Romania remains satisfactory, with the

<sup>61</sup> Edwards, 'Hungarian National Minorities: Recent Developments and Perspectives', 5 *International Journal on Minority and Group Rights* (1998) 345 *et seq.*, at 361–363; and the Commission's Second Regular Report on Slovakia's Progress towards Accession, 1999, available at [www.eu.int/comm/enlargement/docs/index.htm](http://www.eu.int/comm/enlargement/docs/index.htm).

<sup>62</sup> Edwards, *supra* note 61, at 355–361; Commission's Second Regular Report, *supra* note 61.

major exception of the Roma'. The Commission's 1999 Regular Report confirms this evaluation and underlines the progress made.

It is difficult to measure precisely the contribution of the EU's efforts to these improvements, yet the overall situation in Slovakia and Romania is clearly linked to the (anticipatory) effects of conditionality requirements for prospective EU members. It should be remembered that both countries have not been included in the list of candidates for the 'first wave' of enlargement, precisely because of human rights/minority rights considerations. Another comparable example from the recent EU application of conditionality is offered by the practice concerning autonomous trade measures in the former Yugoslavia, on the basis of the requirements set forth in the 1997 Council conclusions. In its second conditionality report of 15 April 1998, the Commission highlighted many deficiencies in Croatia's performance with regard to 'the fundamental principles of human and minority rights'.<sup>63</sup> The question was discussed by the General Affairs Council (GAC) in connection with a failure by Croatia to produce an important refugee programme. In its Conclusion of 25 May 1998, the GAC invited the Commission to submit a proposal which included the possibility of Croatia's withdrawal from the autonomous trade measures scheme.<sup>64</sup> As a result of this move, Croatia shortly after produced the long-expected report and the GAC reversed its approach in the next months, deciding not to withdraw Croatia from the Community trade preferences.

The case of the Partnership Agreement with the Russian Federation brings up the question of how consistent the Community is when applying conditionality criteria. After the signing of the said Partnership Agreement in June 1994, and an interim trade agreement in December 1994, the relations between the Community and Russia deteriorated due to the Chechnya crisis. In early 1995, the European Parliament urged the Community to use the human rights clause and endorsed the Commission's decision to suspend ratification of the interim agreement. By June 1995, the Community had decided to ratify the interim agreement 'even though fighting was still raging'.<sup>65</sup> Seen against the background of large-scale human rights violations in Chechnya, it may be argued that the level of human rights/minority rights compliance expected of Russia in order to foster economic relations with the Community was manifestly lower than that expected of other Eastern European countries on other occasions. This reflects the above-mentioned danger of selectivity in country assessment as a result of predominantly political (*realpolitik*) considerations. At the same time, the Russian case illustrates the dilemmas which are being confronted by the EU when choosing among positive or negative responses to human rights problems in third countries. Positive measures may sometimes conceal reluctance to suspend or terminate trade agreements on the basis of the human rights clause, rather than truly reflect constructive, long-term approaches addressing the

<sup>63</sup> See *supra* note 27.

<sup>64</sup> Agence Europe, 27 May 1998, at 4.

<sup>65</sup> Smith, 'The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective?', 3 *European Foreign Affairs Review* (1998) 253 *et seq.*, at 273.

sources of violations. As pointed out by Smith, ‘fostering interdependence and dialogue can have a positive influence. But this approach opens the EU up to charges of complicity and appeasement.’<sup>66</sup>

On the other hand, the FRY has been excluded from the Community regime of trade preferences of Regulation 2636/97 (concerning the former Yugoslavia) because of a lack of compliance with, *inter alia*, minority rights standards, in accordance with the 1997 Council conclusions on conditionality. According to Brandtner and Rosas, ‘this may imply that the possibility of suspension will not remain a dead letter’.<sup>67</sup> In June 1998, the EU even suspended landing rights of Yugoslav airlines within the EU in order to coerce the FRY to respect the human rights/minority rights of the Kosovar Albanians. Overall, the Kosovo crisis demonstrates that no major progress is being made by this country as regards minority protection — ‘anticipatory’ effects seem to be far from forthcoming.<sup>68</sup>

Aside from the issue of consistency, the EU approach to Eastern Europe poses a more general question within the context of conditionality: how strict should the EU be in interpreting and applying the human rights/minority rights requirements as a condition for membership and/or economic benefits? Should the EU take a loose approach to such requirements, which would favour admission and/or economic benefits in the short term but would be likely to reduce leverage over the human rights/minority rights record of the country, or should it take a stricter approach, which would ensure those gains to the truly deserving but would be likely to leave out ‘borderline’ countries? In fact, minority issues are situated within a broad political and economic framework; thus pragmatic concerns (the loose approach) tend to contain considerations based on international human rights law (the strict approach). Still, as evidenced by the recent practice, there is great potential to use the flexible — yet powerful — EU political and financial levers for securing effective minority protection, while at the same time achieving practical goals such as the prevention of possible ethnic conflicts.

The impact of direct diplomatic action on minority protection also presents problematic aspects. The 1991 EC Guidelines were not applied consistently as regards the minority rights requirements for recognition. The Badinter Commission advised the EC not to recognize Croatia because of its failure to perform minority rights commitments. Yet, the EC went ahead with recognition on schedule. By the same token, the Badinter Commission advised the EC to recognize Macedonia, having ruled favourably on its compliance with the requirements, which included approval of its arrangements for participation of minorities in the decision-making process. Yet, the EC did not recognize Macedonia responding to a Greek veto to alleged territorial claims on the Macedonian side, which were somehow connected with the disputed existence

<sup>66</sup> See *ibid.*

<sup>67</sup> Brandtner and Rosas, *supra* note 8, at 489.

<sup>68</sup> As is well known, the international security and civil presences in Kosovo established under Resolution 1244 (1999) of the UN Security Council are now providing a wide measure of international supervision.

of a 'Macedonian' minority in Greece.<sup>69</sup> This attitude does in fact undermine the credibility of conditionality approaches. The 1995 Stability Pact did not produce a large-scale process of negotiation of minority rights agreements. On the contrary, extremely few agreements were negotiated and concluded during the *travaux* of the Pact. Most of the agreements incorporated in the Pact precede it in time, thus they are not a direct result of the EU diplomatic initiative. The Basic Treaty between Hungary and Slovakia was signed before the adoption of the Pact, but the Basic Treaty between Hungary and Romania was signed only one year later. The outcome of both such treaties, especially their legal quality, has been controversial, though important progress has been made in recent years.<sup>70</sup> The bilateral approach to minority rights matters emphasized by the EU presents advantages and disadvantages which cannot be discussed in this context.<sup>71</sup> At the very least, the states concerned should not be pushed into an agreement absent a genuine will by them to cooperate, nor should such an agreement be seen as a substitute for the protection of minorities within a wider international law framework. On the positive side, the notion of 'preventive diplomacy' has clearly entered the realm of EU policies in Eastern Europe, involving minority issues to a large extent. As noted earlier, the 1995 initiative set the framework for further conflict prevention steps, such as the Royaumont Process and the Pact on Stability for south-east Europe.

#### 4 Towards a Broader EU Vision of Minority Protection? A Note

Seen from an historical perspective, one may wonder whether the EU approach to minority issues is really innovative as compared to earlier times. Conditioning recognition of new territorial orders and/or new states on respect for (at least some) rights afforded to minorities and their members dates back as early as the 1815 Congress of Vienna (e.g. in connection with the partition of Poland), the 1878 Congress of Berlin (where certain minority guarantees were in fact the price of the Great Powers for their acquiescence to border changes in the Balkans) and the League of Nations system set up after the First World War.<sup>72</sup> The League of Nations' Covenant set out no admission requirements concerning the protection of minorities. Yet, the

<sup>69</sup> See e.g. Pazartzis, 'Le Statut des minorités en Grèce', 38 *Annuaire français de droit international* (1992) 377 *et seq.*, at 383. See further the judgment of the European Court of Human Rights in *Sidiropoulos et al. v. Greece*, delivered on 10 July 1998, No. 57/1997/841/1047; 27 *European Human Rights Reports* (1999) 633; 19 *Human Rights Law Journal* (1998) 328 *et seq.*

<sup>70</sup> For a survey, see e.g. Pogany, 'Bilateralism Versus Regionalism in the Resolution of Minorities Problems in Central and Eastern Europe and in the Post-Soviet States', in Cumper and Wheatley (eds), *Minority Rights in the 'New' Europe* (1999) 105 *et seq.*, at 114–121.

<sup>71</sup> It is sufficiently clear that the contemporary bilateral treaties are not playing a significant role with regard to the elaboration (if at all) of adequate implementation mechanisms: Pentassuglia, 'Minority Protection', *supra* note 3, at 146. For a comprehensive analysis of such bilateral treaties, see Bloed and van Dijk, *supra* note 49; Gál, 'The Role of Bilateral Treaties in the Protection of National Minorities in Central and Eastern Europe', UN Doc. E/CN.4/Sub.2/AC.5/1998/CRP.2.

<sup>72</sup> Preece, *National Minorities and the European Nation-State System* (1998) 55–94; Thornberry, *International Law and the Rights of Minorities* (1991) 38–52.

contemporary EU logic of minority rights conditionality (and related approaches) as regards the acquisition of membership and other benefits seems to resemble that underlying such historical precedents: the collapse of the Soviet Union and Yugoslavia has prompted Western Europe to set parameters for accommodating newly established countries in the East within the framework of the larger Europe. The geographical focus of the initiatives and the above-mentioned diplomatic efforts at developing bilateral regimes between the countries concerned provide strong evidence to that effect. On a closer look, the EU approach reveals not only similarities with earlier patterns but also contemporary, forward-looking tendencies in international law and diplomacy. Minority issues are being dealt with in the context of ‘increased global interdependence, accelerated regionalization and marked development of the international legal systems’.<sup>73</sup> Political (including security), economic and legal considerations have been brought to the fore in a comprehensive effort to consolidate peace, democracy and human rights. The activities of international and regional actors such as financial institutions, security arrangements, etc. are being supplemented by those of transnational social forces (NGOs, etc.). International law principles of equality and protection of cultural identity, effective political participation, internal self-determination and cross-border contacts, variably combined, further pierce ‘the veil of sovereignty’ and set the framework for constructive approaches to group accommodation. As a result, the protection of minorities is being demanded in a more fluid and open scenario, thereby causing a shift of responsibility for enforcement to multiple non-state entities.<sup>74</sup> The overall EU approach is clearly in line with the already mentioned growing international concerns for conflict prevention and confidence building (notably in the UN, the OSCE and the Council of Europe contexts) and the related, increasing use of the financial lever as instrumental in encouraging the implementation of human rights standards, which are now said to be ‘universal, indivisible and interdependent and interrelated’.<sup>75</sup>

On the other hand, the limitation of the EU concerns for minority protection to Eastern Europe (certainly the Western Great Powers’ most enduring legacy to contemporary Europe) may turn out to be insufficient in the long term, prompting complaints of differential treatment and eventually undermining the credibility of monitoring. In this regard, we should learn from the shortcomings of the League of Nations machinery. This poses the question of whether the EU may situate minority

<sup>73</sup> Mertus, ‘The Dayton Peace Accords: Lessons from the Past and for the Future’, in Cumper and Wheatley, *supra* note 70, 261 *et seq.*, at 278.

<sup>74</sup> With regard to specific crises, see e.g. the pertinent regimes adopted or proposed for the former Yugoslavia (1995 Dayton Peace Agreements), Northern Ireland (1998 Belfast Agreement) and the region of Kosovo (1999 Rambouillet Draft).

<sup>75</sup> This is one of the key concepts contained in the Vienna Declaration and Programme of Action of 1993, adopted by consensus by the World Conference on Human Rights in June 1993. For an assessment of the monitoring mechanisms relevant to minority protection, serving conflict prevention purposes, see Pentassuglia, ‘Minority Protection’, *supra* note 3, at 151–157; as regards the contribution of specific international financial institutions, including the European Bank for Reconstruction and Development, to ethnic conflict prevention, see Chayes and Chayes, *supra* note 41, at 191–196; Tomaševski, ‘Aid to Eastern Europe’, in *Human Rights in Developing Countries* (1993) 21 *et seq.*, at 41.

rights considerations within a broader international setting. In fact, the EU should develop a general, preventive approach focused on the monitoring of minority rights compliance both internally and externally. As regards the external dimension, the systematic inclusion of a specific 'minority rights clause' (coupled with more precise references to international minority rights standards) in the instruments governing the EU's relations with all third countries, as well as the development of a coherent minority rights policy within the framework of the CFSP, might be extremely helpful to that effect.

In the statement made by the Finnish EU presidency at the 54th session of the Third Committee of the UN General Assembly (1999), on human rights questions, the concept of interrelatedness, indivisibility and interdependence of all human rights was reiterated. Respect for minority rights is referred to not only in the context of the former Yugoslavia, but also in relation to the situation in other countries such as Uzbekistan, Turkey, Pakistan, India, China (with regard to Tibet), Burma/Myanmar, Indonesia, Iran, Eritrea and Ethiopia. This broad approach to minority rights should be further encouraged in EU practice and possibly 'entrenched' in EU law. In a 1995 public statement issued within the framework of the CFSP, the EU presidency 'deplored' the treatment of the Ogoni minority in Nigeria;<sup>76</sup> the CFSP Common Position of 25 May 1998 defined by the Council concerning human rights, democratic principles, the rule of law and good governance in Africa<sup>77</sup> confirms the concept of interrelatedness, indivisibility and interdependence of all human rights but, regrettably, contains no *explicit* reference to the protection of minorities.

Steps taken by the Amsterdam Treaty, such as the establishment of a Policy Planning and Early Warning Unit and the integration of the 'Petersburg Missions' (which include peace-keeping and crisis management functions), can and should lead to reinforcing the minority rights component of CFSP activities in the field of conflict prevention. For its part, the European Parliament has been active in supporting a broad approach to human rights and minority protection. In 1996, it actually suspended a customs union agreement between Turkey and the Community, partly because of the treatment of the Kurdish minority in Eastern Turkey. In fact, minority rights in Turkey continue to be a major cause for concern in relation to the position of Turkey as a prospective EU member.<sup>78</sup> In general, the European Parliament has advocated an external EU human rights policy based on a strong commitment to standard-implementation, in connection with the use of instruments for conflict

<sup>76</sup> Tanca, 'La politique étrangère et de sécurité commune de l'Union européenne en 1995', 6 *European Journal of International Law* (1996) 447 *et seq.*, at 452.

<sup>77</sup> Doc. 98/350/CFSP, OJ 1998 L 158/1-2.

<sup>78</sup> See e.g. Bacia, 'The Turkish Debate on EU Membership is Only Getting under Way', *Frankfurter Allgemeine* (English edition), 29 July 2000, 2.

prevention.<sup>79</sup> For the present, increased attention to the protection of minorities in a progressively broader (preventive) perspective might derive from the enactment of the two already cited Council Regulations 975/1999 and 976/1999, concerning development and non-development cooperation activities. In the preambles to both Regulations, a focus on, *inter alia*, minorities and indigenous peoples is called for in relation to the objectives of Community action falling within the scope of application of such Regulations.<sup>80</sup> Furthermore, with a view to pursuing the main objectives of the implementation of international human rights standards and strengthening democracy, reference is made — in the operative part of both Regulations — to Community technical and financial aid aimed, *inter alia*, at supporting ‘minorities, ethnic groups and indigenous peoples’,<sup>81</sup> as well as conflict prevention measures designed to deal with group issues.<sup>82</sup>

As regards the internal dimension, the development of policies on minority protection appears much more problematic. As noted earlier, the ECJ has progressively developed a case law on human rights despite the absence of specific human rights references in the EC Treaty. Judicial control has been established as regards both Community measures and member state measures falling within the scope of Community law. Arguably, the *dictum*<sup>83</sup> in *Nold* may reach out towards minority rights considerations (or minority issues generally), in relation to basic international treaty standards. A view has been expressed that major ‘soft law’ texts such as the 1992 UN Declaration should also provide guidelines to be followed within the framework of Community law.<sup>84</sup> On the other hand, it has been observed that in spite of the fundamental rights discourse embraced by the ECJ and even the elevation of such rights to the level of general principles of Community law, it has been the general Community rule or objective which has often prevailed against claims as to the violation of such fundamental rights.<sup>85</sup> In *Nold*, the ECJ admitted the possibility of justifying restrictions on fundamental rights where necessary for pursuing overall Community objectives. *A fortiori*, this approach may lead to minimizing minority rights considerations on the basis of the general Community interest. In the recent *Bickel and Franz* case,<sup>86</sup> the ECJ upheld the right of Mr Bickel and Mr Franz, two German-speaking persons of, respectively, Austrian and German nationality, being

<sup>79</sup> Resolution A4–0409/98 of 17 December 1998 on the Communication from the Commission to the Council and the European Parliament on ‘The European Union and the External Dimension of Human Rights Policy: from Rome to Maastricht and Beyond’, COM(95) 0567-C40568/95, OJ 1999 C 98/267 *et seq.*, especially at paras 18–20 and 30–31; and Resolution A4–0410/98 of 17 December 1998 on Human Rights in the World in 1997 and 1998 and European Union Human Rights Policy, OJ 1999 C 98/270 *et seq.*, at paras 20–26.

<sup>80</sup> Common preambular para. 14.

<sup>81</sup> Common Article 3.1(d).

<sup>82</sup> Common Articles 3.3(d) and 3.3(c).

<sup>83</sup> See the text accompanying *supra* note 6.

<sup>84</sup> Martin Estébanez, *International Organizations and Minority Protection in Europe* (1996) 177.

<sup>85</sup> Coppel and O’Neill, ‘The European Court of Justice: Taking Rights Seriously?’, 29 *Common Market Law Review* (1992) 683; de Witte, ‘The Past and Future Role of the European Court of Justice in the Protection of Human Rights’, in Alston, *supra* note 22, 859 *et seq.*, at 878.

<sup>86</sup> Case C-274/96, *Criminal Proceedings against Bickel* [1998] ECR I-7637.

prosecuted in the province of Bolzano, to have the criminal proceedings conducted in the German language, on the same basis as the members of the German-speaking minority living in the region of Trentino-Alto Adige. The Court applied Article 6 (now Article 12) of the EC Treaty in conjunction with the general freedoms of movement and residence granted to the citizens of the Union, to justify the extension to the defendants of the relevant domestic rules (i.e. those concerning the right to opt for German in judicial proceedings taking place in the province of Bolzano). In reply to the Italian Government's main contention that the domestic rules in issue were designed to protect the ethno-cultural minority residing in the province and that the defendants were thus entitled only to the legally distinct 'fair trial' guarantees, including the right to the free assistance of an interpreter (e.g., ex Article 6.3(e) of the ECHR), the Court observed that 'the protection of such a minority may constitute a legitimate aim',<sup>87</sup> but 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.<sup>88</sup> One may perhaps wonder whether the Court would use minority protection to justify differential treatment under the EC Treaty if it could be established that such a protection pursues a 'legitimate aim' and meets the objectivity and proportionality requirements; the European Court of Human Rights has developed these criteria for differential treatment, but so far it has appeared rather hesitant to use the 'legitimate aim' argument to uphold domestic measures protecting minority groups.<sup>89</sup> On the other hand, the fact that the ECJ insisted on equal treatment of Mr Bickel and Mr Franz under EC law, notwithstanding the minority protection regime adopted by Italy, seems implicitly to suggest that the situations where the ECJ might uphold minority protection in the event of a *prima facie* (direct or indirect) conflict with a general Community rule or objective are likely to be exceptional. The references to the ECHR (which does not contain specific minority provisions) and the common constitutional traditions of the member states (which have never been assessed by the ECJ with regard to the protection of minorities) in Article 6.2 (ex Article F(2)) of the

<sup>87</sup> *Ibid.*, at para. 29.

<sup>88</sup> Although the ECJ failed to consider the right to a free interpreter in court under international human rights law, it in fact disregarded the difference between this right as part of 'fair trial' guarantees and the particular language rights of minority members (with regard to such a general distinction, see e.g. the Human Rights Committee's General Comment on Article 27 of the ICCPR, No. 23(50), UN Doc. CCPR/C/21/Rev. 1/Add.5, para. 5.3; and the judgment of the Italian Constitutional Court No. 15, 29 January 1996, I *Giurisprudenza Costituzionale* (1996) 140). Reasoning from different premises, and in view of the circumstances of the case, the ECJ went as far as to extend protection of the defence rights of Mr Bickel and Mr Franz (and, by analogy, of EU citizens generally) in relation to language: see e.g. Safferling, 'In Re Bickel and Franz', 94 *American Journal of International Law* (2000) 155 *et seq.*, at 158. Such general considerations should in principle be seen as without prejudice to the problematic aspects of the specific legal regime in South Tyrol in relation to EC law: see e.g. the judgment of the ECJ in Case 281/98, *Angonese v. Cassa di Risparmio di Bolzano SpA* [2000] All ER (EC) 577; Gattini, 'Prospettive dell'"accordino" italo-tedesco nel quadro della normativa comunitaria', 74 *Rivista di diritto internazionale* (1991) 301 *et seq.*, at 310–319.

<sup>89</sup> See e.g. Spiliopoulou Åkermark, *Justifications of Minority Protection in International Law* (1996) 202–208 and 213–218; Gilbert, 'Minority Rights under the Council of Europe', in Cumper and Wheatley, *supra* note 70, 53 *et seq.*, at 56–61.

TEU, make the substance of minority rights which may be protected within this context further problematical. At the very least, the ‘special significance’ of the ECHR repeatedly stated by the ECJ in indicating the substance of fundamental rights as part of general principles of Community law should be taken seriously and should lead the Court to draw, in appropriate circumstances, on the case law being developed under such a Convention, in relation to general needs and rights of minorities and their members.<sup>90</sup>

Although the protection of the ‘common European heritage’ remains the dominant theme, a number of Community projects have been adopted (based, notably, on Article 128 (now Article 151) of the EC Treaty) which safeguard and promote, directly or indirectly, regional and cultural diversity.<sup>91</sup> Still, the Community’s role has so far been one of supporting and supplementing the action of the member states (i.e. at the governmental level) in several pre-defined areas. This in fact reflects a restrictive interpretation of the principle of subsidiarity enshrined in Article 5 (ex Article 3b) of the EC Treaty, as regards educational and cultural policies.<sup>92</sup> At the same time, the principle of subsidiarity seems to call for a broader approach when read in conjunction with Article 1 (ex Article A) of the TEU, which refers to decisions taken ‘as openly as possible and closely as possible to the citizen’. In this respect, the creation of the Committee of the Regions and Local Authorities is noteworthy. According to Thornberry, ‘while the powers are essentially minor, there is potential to assist in transforming subsidiarity into practice for subnational groups’.<sup>93</sup> So far, this has not been the case.<sup>94</sup> We have even noticed a reverse tendency to reinforce, rather than limit, the central states in their relation with local administrations.

As noted earlier, the Amsterdam Treaty has inserted a new Article 13 (ex Article 6a) into the EC Treaty, which enables the Council, under certain conditions, to take appropriate action to combat discrimination based on, *inter alia*, racial or ethnic origin, and religion. Unlike Article 12 (ex Article 6), the provision does not contain a

<sup>90</sup> See e.g. the interesting survey provided by Gilbert, *supra* note 89; and in ‘Jurisprudence of the European Court and Commission of Human Rights in 1999 and Minority Groups’, UN Doc. E/CN.4/Sub.2/AC.5/2000/CRP.1. Further protection of relevance to the ECJ may derive from the recently adopted Protocol No. 12 to the ECHR, setting forth a general prohibition of discrimination. It was opened for signature in November 2000 and its entry into force will require 10 ratifications.

<sup>91</sup> Biscoe, ‘The European Union and Minority Nations’, in Cumper and Wheatley, *supra* note 70, 89 *et seq.*, at 93–96; Estébanez, *supra* note 84, at 159–168. Along the same lines, the European Parliament adopted in 1994 a resolution on ‘linguistic and cultural minorities in the European Community’, A3–0042/94, OJ 1994 C 61/110–113. This initiative was taken a few years after a Parliament proposal for a charter of rights for ethnic groups had failed to be endorsed at the Community level. For an analogous, recent stand by the Parliament, see Drafting of the EU Charter of Fundamental Rights, Resolution of 16 March 2000, reproduced in 21 *Human Rights Law Journal* (2000) 109–111, at preambular para. P.

<sup>92</sup> Estébanez, *supra* note 84, at 161–162.

<sup>93</sup> Thornberry, ‘Minority Rights’, in *Collected Courses of the Academy of European Law* (1995), vol. VI-2 (1997) 307 *et seq.*, at 331.

<sup>94</sup> Biscoe, *supra* note 91, at 94.

directly effective prohibition which the ECJ may use as a standard for reviewing either Community or member state measures. Despite its programme-type nature and the requirement of unanimity for Council measures, it may be seen as a (rather timid) development for future human rights policies.<sup>95</sup> Although disadvantaged groups stand to benefit from anti-discrimination measures (notably, as part of efforts to combat such phenomena as racial and ethnic hatred, xenophobia, anti-Semitism, etc.<sup>96</sup>), the ensuing dimension of protection cannot be seen as a substitute for a policy focused on minority rights. The proposed EU Charter of Fundamental Rights (whose elaboration was decided by the Cologne European Council of 1999) would further develop the non-discrimination approach, as it embodies a provision on equality before the law (Article 20) and a general clause on non-discrimination (Article 21.1) — whose scope of application would thus reach beyond the more limited one of, for example, Article 14 of the ECHR — addressed to EU institutions and bodies as well as member states only when implementing EU law, in accordance with their respective powers (Article 51). Such a free-standing clause (listing ‘membership of a national minority’ among the prohibited grounds of discrimination) might also allow for differential treatment, along the lines indicated in the HRC’s General Comment No. 18 (37) on non-discrimination, with regard to, *inter alia*, the comparable clause in Article 26 of the ICCPR (though the latter does not contain an equally explicit reference to a national minority) and further reflected in the recently adopted Protocol No. 12 to the ECHR, providing for a general prohibition of discrimination (indicating, like Article 14 of the ECHR, ‘association with a national minority’ as a non-discrimination ground). Despite the importance of these (potential) gains, in conjunction with references to respect by the Union for cultural diversity in preambular paragraph 3 and Article 22 (in the latter case combined with respect for religious and linguistic diversity) in conformity with earlier developments (notably under Article 151, ex Article 128, of the ECT), the overall Charter approach to the issue of minorities would not, therefore, reach out to ‘minority rights’ *stricto sensu*. Whatever the eventual nature of this document (at present, some Member States prefer it to have no legally binding character), the EU Charter could not prejudice higher levels of international and constitutional protection under the terms of Article 53.<sup>97</sup> In our view, ‘soft law’ texts should be included when they enjoy full support from the member states and/or are

<sup>95</sup> See e.g. Gearty, ‘The Internal and External “Other” in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe’, in Alston, *supra* note 22, at 327 *et seq.*

<sup>96</sup> See e.g. para. 40 of the 1990 Copenhagen Document.

<sup>97</sup> There is reason to believe that the reference in Article 53 to, *inter alia*, the international conventions to which all member states are parties, is to be interpreted to mean common adherence to those conventions, irrespective of reservations which individual member states may have formulated to specific provisions contained therein, upon their signature and/or ratification. Since all member states are parties to the ICCPR, it follows that Article 27 of this Convention should be covered by Article 53 of the draft EU Charter, irrespective of the already mentioned French reservation. For rather distinct purposes, the same line of reasoning (notably, in relation to its implications for minority protection) should apply, *a fortiori*, to the international human rights treaties to which ‘the Member States have collaborated or of which they are signatories’, mentioned in *Nold* by the ECJ (see section 2 above).

somehow interrelated to existing, legally binding provisions covered by the above-mentioned Article 53.

As a matter of fact, the absence of an explicit mention of the Copenhagen criterion of ‘respect for and protection of minorities’ in Article 6.1 (ex Article F(1)) of the TEU might lead some Western countries to take a restrictive view on the respective concept of human rights. This view should be rejected. Minority rights are clearly part of human rights, as evidenced, *inter alia*, by the preamble of the 1992 UN Declaration, para. 30 of the Copenhagen Document, Article 1 of the Framework Convention and the above-mentioned process of enlargement, based on Article 49 (ex Article O) of the TEU in conjunction with Article 6.1. The principle of indivisibility and interdependence of all human rights so proudly asserted by the EU<sup>98</sup> further strengthens the placing of minority rights within the context of Article 6.1. The point here is that Western EU countries strongly emphasize a variety of methods for protecting minority rights in Eastern Europe, but they are less than forthright in addressing the situation of their own minorities within the same or other international contexts.<sup>99</sup> As of March 2000, the Framework Convention had been ratified only by Austria, Denmark, Finland, Germany, Italy, Spain, Sweden and the United Kingdom, and the European Charter for Regional and Minority Languages of 1992 had been ratified only by Finland, Germany, the Netherlands and Sweden. On the other hand, all EU member states adopted (as OSCE participating states) the 1990 Copenhagen Document, are bound by Article 27 of the ICCPR (with the exception of France) and actively contributed to the drafting and adoption of such a major international text on minority rights as the consensus 1992 UN Declaration. As noted earlier, the Copenhagen Document may be seen as a basic reference text within the context of Article 6.1, but it is difficult to foresee the actual impact of its minority provisions on the internal activities of the EU. In the light of the said practice in the OSCE and the UN, the ‘minimalist’ (non-discrimination-based) approach of the proposed EU Charter of Fundamental Rights should not, however, prevent (especially if the Charter was adopted as a non-legally binding document) a wider and more adequate notion of minority protection from being fully embraced by the TEU under its Article 6.1. ‘Opting out’ mechanisms may be considered within the context of the relevant pillars in connection with possible further progress in this field. But reasons of credibility and objectivity in addressing the protection of minorities should prompt the EU to devise generally applicable regimes.

With regard to minority protection, the EU approach to Eastern Europe’s legacy to the West might be reinforced by importing pertinent issues within the framework of Article 7 (ex Article F.1) of the TEU, concerning restrictions on membership rights in

<sup>98</sup> See e.g. Rosas, ‘Economic, Social and Cultural Rights: An EU Perspective’, in Pentikäinen, *EU–China Dialogue — Perspectives on Human Rights — With Special Reference to Women* (2000) 90 *et seq.*, especially at 95–99.

<sup>99</sup> At the Union level, exceptional references to ‘internal’ minorities can be found e.g. within the context of the Accession Treaties, as regards the position of the Sami people in traditional Sami areas and the Swedish-speaking population in the Åland Islands, and in relation to the EU Special Support Programme for Peace and Reconciliation in Northern Ireland.

the event of a serious and persistent breach of human rights and fundamental freedoms. Some commentators have aptly stressed the conflict prevention nature of the mechanism as primarily addressed to prospective EU members.<sup>100</sup> Yet, it is beyond dispute that the mechanism is intended to be of general application, thereby involving all the (current and future) member states on a footing of equality. There remains to be seen how significant such a mechanism will be in EU practice, and to what extent it may involve minority rights considerations. The crucial determinations are not subject to judicial control,<sup>101</sup> thereby placing the mechanism fully in the hands of the political bodies. At the very least, cooperation with other international institutions (notably, the OSCE and the Council of Europe<sup>102</sup>) may facilitate an accurate assessment of eventual, serious human rights and minority rights problems in the EU area.

## 5 Concluding Observations

As the EU makes progress in the field of political integration, human rights issues add to the complexities of the internal and external activities of the Union. Although a number of shortcomings can still be discerned in this respect (e.g. so far, no international human rights treaty has been entered into by the Community or the Union), significant steps forward have been taken in recent years, as evidenced, *inter alia*, by the relevant provisions introduced by the Amsterdam Treaty. As regards the protection of minorities, the EU practice in Eastern Europe is noteworthy but in need of improvement. To paraphrase Strobe Talbott's words,<sup>103</sup> the EU approach is not entirely new (due to comparable historical aspects) and its 'imaginative' components, prompted by the said post-Cold War scenario (basically constituted by the use of substantial political and economic leverage to induce respect for minority rights and encourage cooperative dynamics within and between the respective societies and states, for the sake of conflict prevention and confidence building), remain to be fully realized. To this end, the prospects for improving compliance with minority rights within this context may be strengthened by at least:

<sup>100</sup> Pollet, 'Human Rights Clauses in Agreements Between the European Union and Central and Eastern European Countries', 3 *Revue des Affaires Européennes* (1997) 290 *et seq.*, at 298. The preventive content would be further strengthened should there be agreement on an amendment proposal currently under discussion. This proposal would enable the Union to adopt recommendations addressed to the State concerned before any serious infringement of rights actually occurs.

<sup>101</sup> With regard to possible infringement proceedings under Article 230 (ex Article 173) of the EC Treaty, Nowak excludes judicial review on the decision of the Council determining whether a serious and persistent breach of human rights has been committed (see Nowak, *supra* note 52, at 697). This view confirms the rather limited role played by the ECJ within the context of the EU policy of human rights conditionality. See further *supra* section 3.B.3 and *supra* note 55.

<sup>102</sup> Pentassuglia, 'Minority Protection', *supra* note 3.

<sup>103</sup> See the text accompanying *supra* note 1.

- 1 clarifying the standards on which to focus for implementation purposes;
- 2 setting up permanent, independent monitoring bodies (which should work in close cooperation with other pertinent international bodies<sup>104</sup>) to assess periodically, on the basis of state and non-state sources of information,<sup>105</sup> the minority rights situation in the countries concerned;
- 3 minimizing *realpolitik* considerations so as to increase consistency and follow-up capabilities when addressing pertinent questions, in full accordance with international human rights law;
- 4 subjecting minority rights conditionality to objective, legal criteria for determining when (and what) measures are to be adopted in response to reported minority rights issues;
- 5 extending the range of possibilities for judicial review by the ECJ; and
- 6 building up a broad network of systematic technical assistance activities (in coordination with comparable international efforts) on the basis of Council Regulation 976/1999, so as to secure effective and enduring processes of regional reconciliation.

A credible commitment to the promotion and protection of minority rights can best serve the paramount concerns for cultural diversity and stability. The case of Eastern Europe illustrates the vast potentialities, but also the dilemmas, of EU action in this field: incentivizing implementation (with a complementary degree of direct or indirect coercive power over the states concerned) demands substantial political and economic resources which are lacking in such institutions as the Council of Europe or the OSCE.<sup>106</sup> The challenge is how to channel the new dimensions of monitoring resulting from such an incentivization into a coherent pattern which works for the objective and effective protection of human rights. A measure of flexibility and reasonableness is needed but the EU cannot leave standard-implementation to the realm of short-term political concessions. On the other hand, insisting on one-sided requirements may prompt a backlash from the targeted countries:<sup>107</sup> this links to the question of whether — and to what extent — the EU attitude towards the protection of minorities in Eastern Europe can and should be adopted *vis-à-vis* minority issues in all third countries and the EU member states as well.

<sup>104</sup> This kind of cooperation is already in place within the context of enlargement and the special strategy towards certain countries of south-east Europe. The supervisory role of the OSCE as regards the implementation of the two EU-sponsored Stability Pacts further suggests constructive patterns of cooperation among the relevant bodies.

<sup>105</sup> This approach is revealed by present-day patterns of human rights information-gathering such as in-country fact-finding, reporting practice and direct access to relevant meetings: Pentassuglia, 'Minority Protection', *supra* note 3, at 140–141.

<sup>106</sup> See e.g. Chayes and Chayes, *supra* note 41, at 180. This is also illustrated, albeit indirectly, by the fact that such relevant institutions as the OSCE High Commissioner on National Minorities may rely upon the strong EU leverage to make their own efforts effective. See e.g. Ratner, *supra* note 54, at 688.

<sup>107</sup> See e.g. Green, 'Backlash Grows in Eastern Europe Against EU', *International Herald Tribune*, 29 June 2000, [www.iht.com](http://www.iht.com).