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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

ROUND TABLE ON
"NON-CITIZENS AND MINORITY RIGHTS"

Geneva, 16 June 2006
09.00 a.m.-1.00 p.m.

University of Geneva
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IDENTIFICATION, RELEVANCE AND ADMISSIBILITY OF CRITERIA OTHER THAN CITIZENSHIP

I. Introduction

1. The issue of whether and to what extent non-citizens should benefit from specific minority protection is a long-debated one. The controversial approach to it depends largely on the absence of a legally-binding and even generally accepted definition of the term "minority". In the light of recent trends and developments in the international protection of human rights as well as the recurrent discussions on this subject, a Working Group composed of members of the Venice Commission(Messrs. van Dijk, Matscher and Malinverni) was established in early 2004 with a view to carrying out further reflection on the legal and practical significance of the citizenship requirement and possible alternative criteria.

2. Aware of the importance and complexity of this matter, the Working Group considered that it would be extremely useful to have an exchange of views on this matter, together with representatives of the other main international bodies dealing with minority protection. Consequently, the Working Group held a meeting in Strasbourg on 28 May 2004 which was attended by the members of the Working Group, members of the Advisory Committee on the Framework Convention for the Protection of National Minorities, the Working Group on Minorities within the UN Sub-Commission on Human Rights and the Committee of Experts of the European Charter for Regional or Minority Languages. Furthermore, the meeting was attended by representatives of the Secretariat of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe and the Office of the OSCE High Commissioner on National Minorities.

3. The reflection process was pursued further in the context of the 19th meeting of the Sub-Commission on the Protection of Minorities, which took place on 9 June 2005 in Venice. Following a discussion based on various written submissions prepared by participants and a background note prepared by the Secretariat (CDL-MIN(2005)001), the Sub-Commission asked the Working Group to pave the way for a general study through the preparation of working documents aimed at identifying specific minority rights and the criterion/a (such as long-standing lawful residence) which could, if appropriate, replace the citizenship one. It was agreed that this work would be carried out in consultation with the above-mentioned international bodies.

4. Before finalising a draft study and transmitting it to the plenary, the Working Group decided to organise a round table in Geneva on 16 June 2006 with the participation of representatives of the other main international bodies concerned, as well as external experts. The present document (CDL(2006)052) has been prepared by the Secretariat with a view to helping focus the discussions of the roundtable on other, possible alternative criteria to the citizenship one. Its content could be reflected in the proposed general study, which will also include other chapters drawing on the previous discussions and various written materials prepared for the round table.

II. Identification, relevance and admissibility of criteria other than citizenship

A. Existence of alternative criteria

5. The relevance of the citizenship criterion as a precondition for enjoying minority rights has been both a long-debated and a controversial issue. Moreover, international standards and practice have been under significant evolution in recent decades. While the question of citizenship has regularly featured prominently in the debate, it should be borne in mind that other elements, often considered constitutive of a minority, have also been proposed, analysed and even implemented in practice. Such elements can be found in various international standards

- legally binding or not – and/or in their corresponding explanatory reports. National legislation and practice offer further evidence of the relevance of such criteria.

6. It may be argued that the relationship between such elements and the citizenship criterion has often remained unclear: in other words, one would have difficulty to contend that these criteria have been specifically developed in order to replace the reference which is often still made to citizenship. While this may be true, it is equally pertinent to stress that they have not been developed in a way that would exclude this possibility. In any event and for the purpose of this study, it is important to underline that the relevance of other criteria has already been analysed and their "workability" has often been tested in various national contexts.

B. Complex nature of minority rights

7. The protection of persons belonging to minorities in international law is generally viewed as a combination of classical individual rights and freedoms on the one hand and "enhanced" or "core" minority rights on the other. The first category includes basic rights such as freedom of association, freedom of expression, freedom of peaceful assembly, freedom of thought, conscience and religion, respect for private life and of course the prohibition of discrimination. These rights, which are enshrined in a number of international treaties such as the ECHR, the ICCPR and the ICERD, are universal in nature and can be invoked by every human being, irrespective of his or her affiliation with a minority.[1] It has nevertheless been found indispensable to repeat them in most if not all international standards dealing specifically with the position of minorities since they represent essential and perhaps even foundational guarantees for persons belonging to minorities: without unimpeded exercise of these basic rights and freedoms coupled with a particular sensitivity for their key role in enabling the affirmation of a specific identity, state schemes, policies and strategies intended to support minorities could never be fully operational.[2]

8. The second category is made up of "enhanced" or "core" minority rights. Although this notion is not legally defined, it embraces a set of States' obligations and principles which in turn result in rights, facilities and concrete measures taken on behalf of persons belonging to minorities. These enhanced minority rights can in principle not be inferred from the catalogue contained in the ECHR as they are more demanding.[3] They are entrenched in instruments or

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[1] See Article 1 ECHR, which states that "*The High Contracting Parties shall secure to* everyone within their jurisdiction *the rights and freedoms defined in Section I of this Convention*".

[2] See § 51 of the explanatory report of the FCNM, which refers to Article 7 and reads as follows: "*The purpose of this article is to guarantee respect for the right of every person belonging to a national minority to the fundamental freedoms mentioned therein. These freedoms are of course of a universal nature, that is they apply to all persons, whether belonging to a national minority or not (see, for instance, the corresponding provisions in Articles 9, 10 and 11 of the ECHR), but they are particularly relevant for the protection of national minorities. For the reasons stated above in the commentary on the preamble, it was decided to include certain undertakings which already appear in the ECHR.*"

[3] This may of course change depending on future developments of the ECHR case-law; see in this context ECtHR judgment Chapman vs. UK of 18 January 2001 ad §§ 93-94, *"(...)The Court observes that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle (see ... in particular the Framework Convention for the Protection of National Minorities), not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the*

provisions dealing specifically with minorities, such as the FCNM[4], the ECRML[5], the CSCE/OSCE commitments and Article 27 ICCPR.

9. Although human rights and fundamental freedoms were originally meant to place an obligation on States not to interfere with their exercise (i.e. an essentially negative obligation), subsequent interpretation and especially ECHR case-law have inferred positive obligations on the part of the states: the latter now have a duty to protect human rights and fundamental freedoms against violations which do not emanate from them. The possibility of such positive obligations has also been recognised in different contexts by the ECtHR, including that of persons entitled to a protection under minority instruments.[6]

10. While each person belonging to a minority enjoys all individual human rights and freedoms, the exercise of such rights "in community with others", in particular through the freedom of association, is often indispensable for a minority to be able to preserve and develop its specific identity. This is however not sufficient: the exercise of basic freedoms and enhanced minority rights by members of a minority - even in community with others - but without any State involvement whatsoever would most probably mean nearly insurmountable difficulties for many minorities to maintain their identity.

11. It follows that organised State action aimed at helping minorities preserve and develop the essential elements of their identity is crucial and actually even dictated by both the letter and the spirit of relevant international standards, such as the FCNM[7] and the ECRML.[8] Although

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whole community. However, the Court is not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation (...)".

4 See for example F. de Varennes, in: The Rights of Minorities, A commentary on the FCNM, Oxford Commentaries on international Law, Oxford University press, 2005, Article 10, p. 304: *"[Art. 10 § 2FCNM] sets outs the conditions under which a state's administrative authorities have an obligation to use a national minority language in contact with members of the public. That individuals may claim such a right from public authorities is novel from the point of view of international standards of international and European law, since it is not explicitly recognized in either the ECHR or the ICCPR".*

5 It is true that the ECRML does not define rights held by particular categories of persons as this instrument is meant to protect languages rather than individuals or groups; the obligations it places on States may, however, result in rights for individuals (see J.-M. Woehrling, The ECRML - A critical commentary, Council of Europe Publishing, Strasbourg 2005, p. 27, 31).

6 See in particular ECtHR judgment Chapman vs. UK of 18 January 2001 ad § 96, which stresses that "*there is (...) a positive obligation (...) by virtue of Article 8 to facilitate the Gypsy way of life*"; see also ECtHR judgement Cyprus vs. Turkey of 10 May 2001 ad § 278, which recognised a failure of the "TRNC" authorities to make continuing provision for [Greek medium education] at the secondary-school level, which was considered to constitute a denial of the substance of Article 2 Protocol 1 (right to education).

7 See Article 5 § 1 FCNM, which prescribes for the State Parties an obligation to "… *promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture and to preserve the essential elements of their identity* ..." and largely mirrors § 7 of the preamble; § 61 of the explanatory report emphasises the existence of a positive obligation for the Parties in respect of Article 9 § 3 FCNM; see also § 38 of the second ACFC Opinion on Slovakia of 36 May 2005: "*The Advisory Committee recalls that Article 4 of the Framework Convention and the related paragraphs of the explanatory report, as well as other international human rights instruments, make it very clear that special measures are not only legitimate but may even be required under certain circumstances in order to promote full and effective equality*

initially somewhat controversial, a State duty to take positive action is now also widely accepted in relation to Article 27 ICCPR, as attested by the HRC itself[9] and corroborated by academic legal opinions.[10] The 1992 UN Declaration on Minorities makes it clear that the rights it spells out often require action, including protective measures and encouragement of conditions for the promotion of their identity and specified, active measures by the State.[11]

C. Need to target state action through adequate criteria

12. Given the particular nature of minority rights and the corresponding importance to take positive action, most if not all state policies aimed at protecting minorities provide for and regulate cultural support through specific legislation, assistance programmes, budgetary and other measures.[12] Furthermore, enhanced minority rights such as language rights and participatory rights almost inevitably necessitate the setting up of specific infrastructures and/or the adoption of special measures to ensure that those concerned can make an effective use of their rights in practice.

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in favour of persons belonging to national minorities (...)". Although the FCNM undoubtedly requires positive measures, the scale of such measures may differ according to the relevant provisions at issue – see F. de Varennes/P. Thornberry, in: The Rights of Minorities, A commentary on the FCNM, Oxford Commentaries on international Law, Oxford University press, 2005, Article 14, p. 426*: "one tension which will need to be addressed in a more straightforward fashion in the future is if and how states parties have positive obligations flowing from Article 14(1), perhaps even financial ones, when the travaux préparatoires and the Explanatory Report to the treaty would both initially suggest this is not necessarily the case. While this is logical, given the FCNM's objectives (...) this would need to be specified more clearly (...)".*

8 See Article 7 ECRML, which invites the Parties to base their policies, legislation and practice on key objectives and principles, such as "*the need for resolute action to promote regional or minority languages in order to safeguard them*" (§1 (c)) and "*the provision of appropriate forms and means for the teaching and study of regional or minority languages at all appropriate stages*" (§1 (f)); § 61 of the explanatory report of the ECRML adds that "*It is clear today that, by reason of the weakness of numerous regional or minority languages, the mere prohibition of discrimination is not sufficient to ensure their survival. They need positive support. This is the idea expressed in paragraph 1.c. (...)".* As emphasised by

9 See HRC General Comment N° 23(50) on Article 27 ICCPR, ad §§ 6.1, 6.2 and 9.

10 According to F. Capotorti, this provision requires active and sustained measures on the part of states, including the provision of resources, in order to effectively preserve minority identity (Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, UN Publication, 1979, §§ 217 and 588). This interpretation is shared by other commentators, such as P. Thornberry (Minority rights, in: *Collected Courses of the Academy of European Law*, VI-2, 1995, p. 337) and G. Malinverni (La Suisse et la protection des minorités (art. 27 Pacte II), in: *La Suisse et les Pactes des Nations Unies relatifs aux droits de l'homme*, p. 241-242); other scholars have suggested that an obligation to take positive steps under Article 27 ICCPR can arise only in an indirect way: see C. Tomuschat, Protection of Minorities under Article 27 ICCPR, in: *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte*, Festschrift für Hermann Mosler, Berlin 1983, p. 970.

11 See Commentary of the Working Group on Minorities to the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, ad §§ 14, 33 and 56 (E/CN.4/Sub.2/AC.5/2005/2 of 4 April 2005).

12 For an overview of such State policies, see the relevant introductory parts of the state reports submitted pursuant Article 25 § 1 FCNM (www.coe.int/minorities).

13. Against this background, States are confronted with the need to design schemes to support minority language and culture. In doing so, they may legitimately look for certain guarantees to make sure the impact of their (often long-term) efforts will be maximised and will meet the real needs of persons belonging to minorities. States therefore often identify - or in practice make use of - certain criteria which are meant to attest the viability of the services offered and the representativity of the (group of) persons submitting specific requests for linguistic services or other cultural support. In this context, a number of alternative criteria can be envisaged, such as the requirement of a lawful residence, the size of a minority, the length of time on a given territory, the existence of kin-state support or even other criteria able to attest the existence of strong and lasting ties coupled with real needs.

D. Lawful residence

14. International standards specifically designed for persons belonging to minorities do not explicitly mention the requirement of a (lawful) residence. The notion of residence had been included in the draft additional protocol on the rights of national minorities to the ECHR adopted by the PACE.[13] Moreover, several declarations/reservations entered upon ratification of the FCNM make mention of it.[14] In both contexts though residence is envisaged as a constitutive element of various attempts to define the term national minorities, rather than as a particular criterion to be relied upon for certain specific minority rights and facilities.

15. State practice, however, suggest that the notion of (lawful) residence is often used or referred to as a condition, even implicitly, for being entitled to certain rights and measures. For example, States often set up minority consultation structures with a view to identifying regular interlocutors who can express the needs of persons belonging to minorities and submit requests for financial or other support for their initiatives. Channelling positive measures, such as support for cultural initiatives, through such structures is indeed meant to ensure a well-targeted impact on those concerned. A wide range of consultation mechanisms coexist in European practice, such as *ad hoc* consultative commissions, advisory bodies to the parliament and/or the government, to systems of cultural autonomy involving the setting up of minority councils through free and secret ballot.

16. States usually try to ensure a certain representativity of the minority consultation structures they establish and may therefore adopt legislative provisions governing their legal status. In this context, the requirement of a minimum number (or percentage) of persons who belong to a given minority and reside in the country – or in a given administrative division of it - is commonly prescribed among the conditions laid down in such regulations.[15]

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[13] See PACE Recommendation 1201(1993), draft additional protocol ad article 1 (a).

[14] See the declarations/reservations entered by Germany, Latvia, Estonia, Poland and the Russian Federation.

[15] See for example Article 24 of the Constitutional Law on Rights of National Minorities in the Republic of Croatia; Article 2 of the Law on Cultural Autonomy for National Minorities of Estonia; Articles 31-32 of the Act on the Rights of National and Ethnic Minorities of the Republic of Hungary; see also Article 40 of the Draft Law on the Statute of National Minorities of the Republic of Romania.

17. In principle the requirement by a State wishing to establish consultation mechanisms and/or provide support for cultural and other initiatives, namely that a sufficient number of persons belonging to a minority are legal residents, is justifiable and does not seem to have met with objections from human treaty bodies.[16] Lawful residence actually testifies to the existence of a factual and legal link between a group of persons and the State. The latter may therefore legitimately ask for some evidence of such a link, including through the requirement of a lawful residence,[17] before creating new consultation structures, taking positive measures and thereby committing public money for minority groups.

18. It should be stressed, however, that an additional requirement such as the citizenship criterion has often been criticised in the same context by different international bodies in that it could not be reasonable or might in some cases lead to arbitrary exclusions.[18] The Venice Commission itself has already questioned the admissibility of restricting certain cultural and linguistic rights to citizens only and highlighted in this regard the exclusion of non-citizens from membership in a system of cultural autonomy as well as in associations established to promote and protect the identity of minorities.[19]

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[16] Concern has been expressed by the ACFC in relation to the numerical conditions placed on the setting up of minority committees at regional and local level in the Czech Republic (i.e. a minimum of 10% in the administrative territorial unit concerned) but this seemed mainly motivated by the fact that the setting up of such committees was actually considered a precondition by the Czech authorities for granting linguistic rights: see ACFC second Opinion on the Czech Republic of 24 February 2005, ad §§ 174-176.

[17] The requirement of a lawful residence must of course not be coupled with excessively rigid rules and/or be implemented in an arbitrary or discriminatory way: see in this context ACFC first Opinion on the Russian Federation of 13 September 2002, ad §§ 35-36, 91 and 110, which singles out the residency registration regime as problematic in that it hampers access to education and other rights for persons belonging to minorities. The ECtHR on its part held a 10-year residence requirement compatible with Article 3 Protocol 1 ECHR (right to free elections), but the case was very specific and probably unique in that it concerned a provincial election in New Caledonia (French Overseas Territories), whose status amounted to a transitional phase prior to the possible acquisition of full sovereignty and was part of a process of self-determination (ECtHR judgment of 11 January 2005, Py vs. France, ad §§ 61-65). In the *Polacco and Garofalo* case, only those who had been living continuously in the Trentino-Alto Adige Region for at least four years could be registered to vote in elections for the Regional Council. The former Commission took the view that that requirement was not disproportionate to the aim pursued, given the region's particular social, political and economic situation. It accordingly considered that it could not be regarded as unreasonable to require voters to reside there for a lengthy period of time before they could take part in local elections, in order to acquire a thorough understanding of the regional context so that their vote could reflect the concern for the protection of linguistic minorities (*Polacco and Garofalo v. Italy*, no. 23450/94, Commission decision of 15 September 1997, DR 90-A, p. 5).

[18] See ACFC second opinion on Slovakia of 26 May 2005, ad § 21-24; ACFC first Opinion on Estonia adopted on 14 September 2001, ad § 29 and second Opinion on Estonia adopted on 24 February 2005 ad §§ 66-69; ACFC second Opinion on Hungary of 9 December 2004, ad § 22; ACFC second Opinion on Croatia adopted on 1 October 2004, ad §§ 28-30; ACFC second Opinion on Romania adopted on 24 November 2005, ad § 30; UN Human Rights Committee, General Comment N° 15(27), ad § 7 *in fine*; Commentary of the Working Group on Minorities to the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, ad §§ 50-51 (E/CN.4/Sub.2/AC.5/2005/2 of 4 April 2005).

[19] See Opinion of 25 October 2005 on the Draft Law on the Statute of National Minorities living in Romania (CDL-AD(2005)026), ad §§ 30, 36 and 56-57; see also Opinion of 30 June 2004 on the revised Draft Law on Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro (CDL-AD(2004)026), ad § 34 which mentions cultural rights.

E. Numerical size of a minority

19. The qualification as a minority shall not depend on the numerical strength of a group. Indeed even tiny groups are to be considered covered by the instruments protecting minorities, provided they meet the necessary objective elements and express the wish to cohere as a minority with a view to preserving their specific identity. This is attested both by state practice, which contains numerous examples of protection granted to tiny minorities[20], and findings adopted by international bodies.[21]

20. While numbers may not *per se* justify the exclusion of a group from the general protection any minority is entitled to, they are not without relevance when it comes to determining the level of protection granted to a minority. General human rights can of course not be subject to restrictions based on numbers but enhanced minority rights can. This is especially the case for those language rights and facilities which go beyond the mere personal right to use one's language freely in private and in public, which is already guaranteed by articles 8 and 10 ECHR. Most frequently quoted examples include the right to make use of a minority language in official dealings, the right to minority language education and the display of bilingual topographical indications.

21. Different expressions can be found in the corresponding international standards, such as "substantial numbers", "sufficient demand", "numerical strength"[22] or "number considered sufficient/justifying measures".[23] At least some forms of limitation - based on numbers - in the enjoyment of language rights and facilities must therefore be regarded as compatible with these expressions. It is no coincidence that international standards do not specify further which proportions or percentages should trigger the rights and facilities at issue since the assumption is that flexibility is needed in this respect to adequately cope with the variety of national situations.[24]

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[20] For an overview of the minority groups – including smaller ones - considered protected by the FCNM by the State Parties, see state reports submitted pursuant Article 25 § 1 FCNM (www.coe.int/minorities) ad Article 3. For example, Slovenia committed itself to ensure the specific rights of the Italian and Hungarian minorities "*irrespective of their numbers*" (first state report of 29 November 2000, ad § 11).

[21] See the call for special attention to the needs of numerically smaller minorities in ACFC first Opinion on Poland of 27 November 2003, ad § 44; ACFC first opinion on the Russian Federation of 13 September 2002, ad § 75; ACFC first Opinion on Moldova of 1 March 2002, ad § 76; ACFC first Opinion of 1 March 2002 on Ukraine, ad §§ 34, 42 and 65.

[22] See Articles 10 § 2, 11 § 3 and 14 § 2 FCNM; OSCE Oslo Recommendations regarding the linguistic rights of national minorities ad "names", Recommendation 3; OSCE The Hague Recommendations regarding the education rights of national minorities ad "minority education in vocational schools", Recommendation 15 and explanatory Note ad "general introduction", last paragraph. See also Commentary of the Working Group on Minorities to the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, ad § 60 (E/CN.4/Sub.2/AC.5/2005/2 of 4 April 2005) which mentions *inter alia* "*the size of the group*" as one of the factors to be taken into account in the implementation of Art. 4.3 of the Declaration.

[23] See Articles 8 § 1 (a)iii, 8 § 1 (b)iv, 8 § 1 (c)iv, 8 § 1 (d)iv, 8 § 2, 9 § 1, 10 § 1, 10 § 2 and 12 § 2 of the ECRML.

[24] See § 66 of the explanatory report of the FCNM : " *Moreover, the Framework Convention deliberately refrains from defining "areas inhabited by persons belonging to national minorities traditionally or in substantial numbers". It was considered preferable to adopt a flexible form of wording which will allow each*

22. Practice suggests that several States have set more precise conditions pertaining to numbers in their legal order, including through the entrenching of numerical minimum thresholds in relevant statutory provisions. This is a useful step as the absence of a legal basis in domestic law for the use of minority languages or even a complete discretion left to the authorities to decide on the admissibility of such a use do not seem acceptable.[25] Numerical thresholds, albeit permissible and regularly used, should not be demanding to such an extent as to impair the very essence of language rights for persons belonging to minorities or deprive these rights of their effectiveness.[26] Furthermore, it seems preferable not to base decisions on the maintenance or closure of minority language classes exclusively on minimum numbers but rather balance such numbers with other criteria equally useful to determine needs and assess the level of demand.[27] More generally and without questioning the practice of adopting thresholds or percentages, States may also opt for less automatic criteria which would reserve a real margin of appreciation for the authorities, thus making it possible to take into account the numerical size of a minority as one element in a general balance of interests before reaching a decision.

Party's particular circumstances to be taken into account". See also § 35 of the explanatory report of the ECRML: "*A key expression in this provision is "number of people justifying the adoption of the various protective and promotional measures". The authors of the charter avoided establishing a fixed percentage of speakers of a regional or minority language at or above which the measures laid down in the charter should apply. They preferred to leave it up to the state to assess, within the spirit of the charter, according to the nature of each of the measures provided for, the appropriate number of speakers of the language required for the adoption of the measure in question*".

[25] See ACFC first Opinion on Azerbaijan of 22 May 2003, ad §§ 56-57; ACFC first Opinion on Poland of 27 November 2003, ad §. 67. See also examples quoted by F. de Varennes/P. Thornberry as concerns calls for clear demand thresholds aimed at triggering the introduction of minority language education, in: The Rights of Minorities, A commentary on the FCNM, Oxford Commentaries on international Law, Oxford University press, 2005, Article 14, p. 420.

[26] The ACFC has for example repeated that a numerical threshold requiring that the majority – be it absolute or relative – of the population concerned belong to the minority to activate the rights foreseen under Article 10 (2) FCNM was too high and therefore constitutes an excessive obstacle: see ACFC first Opinion on Bosnia and Herzegovina of 27 May 2004, ad § 81; ACFC first Opinion on Croatia of 6 April 2001, ad §§ 43-44; ACFC first opinion on Moldova of 1 March 2002, ad § 62. ACFC first opinion on Ukraine of 1 March 2002, ad § 51. See also F. de Varennes/P. Thornberry, in: The Rights of Minorities, A commentary on the FCNM, Oxford Commentaries on international Law, Oxford University press, 2005, Article 14, p. 427.

[27] See ACFC first opinion on Austria of 16 May 2002, ad § 63; see also ACFC first opinion on Germany of 1 March 2002 ad § 60: "*The Advisory Committee considers that the minimum requirement of 20 pupils to continue to run a class offering minority language teaching is very high from the point of Article 14 of the Framework Convention. Apart from the fact that the municipality of Crostwitz lies in an area "traditionally" inhabited by Sorbians in the meaning of this provision, it should be stressed that, as well as the parents of the children concerned, the Sorbian Council of the Saxon Parliament, certain municipal authorities and the umbrella association of Sorbians, among others, have expressed strong opposition to the closure, showing that there is sufficient demand for the class to be kept open*". For F. de Varennes/P. Thornberry, "*a reading of Committee practice on this issue suggests that, the "mechanical" application of numerical criteria would not do justice to the nuances of individual cases: that the "numbers game" is a game played in particular contexts where there are different demands, needs, and possibilities*", in: The Rights of Minorities, A commentary on the FCNM, Oxford Commentaries on international Law, Oxford University press, 2005, Article 14, p. 421; see also D. Wilson, A critical Evaluation of the first Results of the Monitoring of the FCNM on the issue of Minority Rights in, to and through Education, in: Filling the Frame – Five Years of Monitoring the FCNM, Council of Europe Publishing, Strasbourg 2004, p. 185-186.

23. In view of the foregoing, it seems justifiable for States to rely on the numerical size of a minority - often in combination with other criteria – when confronted with a choice to be made on the extension of language rights. As part of core or enhanced minority rights, language rights indeed involve significant (financial and other) effort by the State, mainly through positive measures, in order to be fully operational in practice. For example, to be able to process requests received in a minority language or even to respond in such a language certainly requires from the authority or public service concerned a minimum infrastructure, qualified staff members and/or translators, language training for civil servants, etc. The argument is all the more valid as concerns the creation of real opportunities to receive minority language teaching within the education system. In this context, it is legitimate for the State to take into serious account the capacity of a minority to contribute to the durability of such services and facilities over time, notably by looking at its numerical size.

F. Time factor and link with a territory

24. "Minority area" provisions are to be found in international standards. This is mostly - if not exclusively - the case in relation to core minority rights, i.e. essentially language rights. Illustrative examples include the expression "*in areas inhabited by persons belonging to national minorities (...) traditionally (...)*" used in Articles 10 §2, 11 §3 and 14 §2 FCNM, which respectively deal with the use of minority languages in relation with administrative authorities, bilingual topographical indications and minority language teaching. Such clauses clearly allow for some form of territorial limitations by the States. Indeed it would not seem reasonable to oblige them to make, for example, minority language education systematically available across the whole country, including in areas where there is no evidence of the presence of a minority, at least for a significant period of time. The ECRML proceeds from the same assumption in that most of its provisions contain a territorial clause ("*within the territories in which such languages are used*").[28]

25. The question of the length of time the presence of a minority in a given area is needed cannot receive a general, abstract answer. A "traditional" settlement may probably require a continuous presence over years, perhaps even generations although it is not possible to articulate any precise time limit.[29] This question needs to be distinguished from that of the requirement of longstanding and lasting ties with the state of residence, which is often considered a constitutive element in various attempts to define the term minority.[30] the purpose of the latter is to require a traditional (or even historic) presence of a minority group in the territory of the State, not in a specific area of it. It is thus not used as a criterion to decide on the activation of enhanced

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[28] For an analysis of the ECRML concept of a language's territory, see J.-M. Woehrling, The ECRML - A critical commentary, Council of Europe Publishing, Strasbourg 2005, p. 65-66.

[29] See explanatory report of the FCNM, ad § 66: *"(...) the Framework Convention deliberately refrains from defining "areas inhabited by persons belonging to national minorities traditionally or in substantial numbers". It was considered preferable to adopt a flexible form of wording which will allow each Party's particular circumstances to be taken into account. The term "inhabited ... traditionally" does not refer to historical minorities, but only to those still living in the same geographical area (see also Article 11, paragraph 3, and Article 14, paragraph 2).".*

[30] See *inter alia* declarations/reservations entered upon signature/ratification of the FCNM by Austria, Estonia, Latvia, Luxembourg, Switzerland. See also Art. 1 of the draft additional protocol contained in PACE recommendation 1201 (1993).

language rights in specific areas, but rather as a general test to decide on the granting of minority protection status.[31]

26. In view of the foregoing, territorial limitations - coupled with time requirement - in the availability of linguistic rights and facilities seem in principle admissible. They should, however, be based on reasonable and objective criteria. For example, States may check the traditional presence of a minority in a given region using *inter alia* census results, although in this case they must not base themselves exclusively on the latest census figure but rather consider such results over a longer period of time.[32] Moreover, the designation of certain zones for the purpose of applying these "minority area" provisions should not be made in too a rigid way so as to exclude any possibility for a more flexible application in justified, individual cases.[33] What essentially matters eventually in the use of territorial restrictions is that persons belonging to minorities do not lose their status – and thereby all protection – when they take residence outside their traditional area of settlement. It should therefore be accepted that the range of rights and facilities at their disposal can be reduced, provided the authorities ensure that the specific needs of these persons living outside their traditional areas of settlement are being catered for.[34]

G. Existing kin-state support

27. Support provided by kin-states for their kin-minorities abroad is a common feature in Europe, as illustrated *inter alia* by the dense network of bilateral agreements dealing with this issue. Such support focuses on education and culture, which are the most relevant areas in this context. For example, bilateral co-operation often encourage foreign support in order to secure adequate textbooks and qualified teachers for minorities. This has proven to be instrumental for the quality of minority language education.

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[31] The ECRML has a somewhat different perspective in this respect since the definition set out in Article 1 requires that regional and minority languages – be they territorial or non-territorial - are "*traditionally used*" to be covered by this instrument; the length of time a language with a territorial base has been present regionally remains important as many provisions can only be applied in such regions and not across the whole country (see J.-M. Woehrling, The ECRML - A critical commentary, Council of Europe Publishing, Strasbourg 2005, p. 58-59).

[32] See ACFC first opinion on Austria of 16 May 2002, ad § 53; see also ACFC second opinion on Slovakia of 36 May 2005, ad § 87.

[33] This is all the more important in those States which attach particular weight to the principle of territoriality. In this context, see ACFC first Opinion on Switzerland of 20 February 2003 ad §§ 11-12, 22 and 69, the latter paragraph of which concerns in particular the enrolment of pupils in schools with instruction in the minority language in municipalities located on the edge of a minority area; see also ACFC first Opinion on Slovenia of 12 September 2002, ad §§ 18-19 and 67; ACFC second opinion on Slovenia of 26 May 2005, ad §§ 132-136, which addresses the situation of those living in the immediate surroundings of so-called "ethnically mixed areas"; ACFC first Opinion on Austria of 16 May 2002, ad § 16.

[34] State practice and FCNM monitoring seem to corroborate this view: see for example ACFC first Opinion on Switzerland of 20 February 2003, ad § 22; ACFC first Opinion on Germany, ad § 16; ACFC first opinion on Austria ad § 16; see, however, also § 21 of ACFC first opinion on Denmark of 22 September 2000 and §§ 40-41 of ACFC second Opinion on Denmark of 9 December 2004 for a different national practice.

28. The question then arises as to whether States can legitimately rely on the existence of kin-state support to determine the actual level of their assistance for cultural and other initiatives put forward by various minorities and, more generally, their level of commitment to promote the conditions enabling minorities to preserve and develop the essential elements of their identity.

29. The reply seems to be necessarily a nuanced one. First, it has to be recalled that the main responsibility always lies with the home-State as concerns commitments and obligations towards minorities. Intervention by kin-states, which have subsidiary character, can therefore not entirely replace home-State support. Secondly, in order to comply with international principles of minority protection, support provided by kin-states must respect certain principles, identified by the Venice Commission and relating both to the form and to the substance of the measures.[35]

30. Bearing in mind these important caveats, there seems to be room for home States to invoke an existing kin-state support to moderate the level of their cultural support and target more specifically those minorities which do not benefit from such a support.[36] Roma in particular frequently benefit from an enhanced state support aimed at promoting equal opportunities for their access to education. This seems justified and compatible with the equality and non-discrimination principles, as in most countries Roma, who cannot rely on the support of a kin-state, find themselves in a disadvantaged position as compared to the rest of the population.

III. Concluding remarks

31. The term "minority" has not been given a legally binding definition in international law. Furthermore, different categories may be covered by this term: in the UN system, the beneficiaries of the rights under Article 27 ICCPR are persons belonging to "ethnic, religious or linguistic" minorities and the 1992 Declaration adds the category "national" minorities. In the European context, the category "national minority" is preferred and can be found in the FCNM and in the OSCE documents. Although terminology and concepts are unlikely to be defined and unified in international law, common features can be identified as regards state action needed to enable persons belonging to minorities to assert their specific identity.

32. Minority rights should not be regarded as a distinct category, nor interpreted and analysed in isolation from the human rights family. It is rather a combination of classical (universal) human rights – whose exercise is often collective - and enhanced minority rights/facilities. While the former may occasionally entail positive obligations from the States, the latter undoubtedly and

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[35] See Report on the Preferential Treatment of National Minorities by their Kin-States of 22 October 2001, CDL-INF(2001)19, ad E "conclusions", which emphasises that the adoption by States of unilateral measures granting benefits to the persons belonging to their kin-minorities, which in the Commission's opinion does not have sufficient *diuturnitas* to have become an international custom, is only legitimate if the principles of territorial sovereignty of States, *pacta sunt servanda*, friendly relations amongst States and the respect of human rights and fundamental freedoms, in particular the prohibition of discrimination, are respected; preferential treatment may in particular be granted to persons belonging to kin-minorities in the fields of education and culture, insofar as it pursues the legitimate aim of fostering cultural links and is proportionate to that aim.

[36] See for example ACFC first Opinion on Bosnia and Herzegovina of 27 May 2004, ad § 60; ACFC first Opinion on Serbia and Montenegro of 27 November 2003, ad § 48; ACFC first Opinion on Armenia of 16 May 2002, ad §§ 63, 64 and 76; ACFC first Opinion on Moldova of 1 March 2002, ad § 76.

inherently necessitate a concerted, coherent and sustained state action aimed at offering adequate opportunities and providing a range of linguistic rights and facilities. Such positive action is essential to enable persons belonging to minorities to assert their specific identity, which is the objective of every minority protection regime. Hence due regard must be given to this complex set of rights and obligations in any attempt to determine the exact scope of a state's action through the use of relevant criteria.

33. Even though human rights and fundamental freedoms are universal in nature, it is legitimate for States to try and circumscribe the circle of those who will directly benefit from its special measures designed to promote the specific identity of minorities. Bearing in mind the need to respect the principle of equality and the prohibition of discrimination, it seems useful and even necessary to rely on objective criteria in this regard. Criteria such as residence, size, kin-state support and time factor coupled with link with a territory are amongst those which can be found most frequently in relevant international standards and often matched by concurring state practice. They should not be considered exhaustive as other criteria may also prove useful and workable in practice. While citizenship undoubtedly indicates a strong link, these alternative criteria also bear witness – at least to an extent – to genuine ties between persons belonging to minorities and their home-state.

34. The relationship between these other criteria and the citizenship is not finally settled. On the one hand, the use of other criteria may appear preferable in certain contexts such as enhanced linguistic rights, especially in the field of education and use of minority languages in the public realm. On the other hand, the use of the citizenship criterion remains perfectly admissible - and perhaps more suitable - in certain limited contexts, in particular as concerns some political rights and access to certain public functions. What seems increasingly problematic from the point of international law is the general and systematic use of the citizenship criterion made by certain States, irrespective of the aforementioned complex nature of the set of individual's rights and state's obligations concerned. A more nuanced use of the citizenship criterion, together with other relevant criteria, would certainly avoid the risk of arbitrary exclusions while preserving the state's capacity to target its effort and channel its resources to those who most need it.[37]

[37] See Opinion of 25 October 2005 on the Draft Law on the Statute of National Minorities living in Romania (CDL-AD(2005)026), ad §§ 25 and 27. ACFC opinion of on PACE Recommendation 1492 (2001), ad § 17; Commentary of the Working Group on Minorities to the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, ad §§ 9-11 (E/CN.4/Sub.2/AC.5/2005/2) of 4 April 2005.