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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT REPORT
ON NON-CITIZENS AND MINORITY RIGHTS

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in consultation with

The Advisory Committee on the Framework Convention for the Protection of National Minorities
The Committee of Experts of the European Charter for Regional or Minority Languages
The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe
The OSCE Office of the High Commissioner on National Minorities
The Office of the UN High Commissioner for Human Rights

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" and the aim of minority protection regimes both in international and domestic law. In the light of recent trends and developments in the international protection of human rights as well as recurrent discussions on this subject, a Working Group composed of members of the Venice Commission was established in early 2004 and subsequently enlarged with other members (Mr Aurescu, Mr Bartole, Mr van Dijk, Ms Lazarova Trajkovska, Mr Matscher and Mr Malinverni) and an independent expert (Mr Alfredsson) 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, 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 the Promotion and Protection of Human Rights, as well as 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 of 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, depending on the circumstances, be more appropriate than 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 report 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. Participants in the round table addressed a number of arguments, including the implications of a lack of legally binding definition of the term "minority", as well as the existence and practical application of criteria other than citizenship.

5. The present report (CDL-MIN(2006)002) first aims at giving a comprehensive picture of the international standards and practice, in the light of national examples ***and bilateral agreements****, as regards the relevance of the citizenship and other criteria for circumscribing the circle of those entitled to minority rights. In the light of this picture, the report goes on by suggesting to depart from a generally restrictive stance based on rigid criteria - including citizenship - and move towards a more nuanced approach on the question, drawing inter alia on the above-mentioned exchanges held in Strasbourg, Venice and Geneva and the points of convergence identified by the participants.* ***The present report therefore seeks to consolidate the approach of the Venice Commission on the status of non-citizens belonging to minorities. This has been done mainly by reviewing earlier, topical Opinions of the Venice Commission and testing them against the evolving practice of the relevant UN and European bodies, in the light of country-specific examples. This***

***exercise has resulted in the formulation of general, practice-oriented findings (Chapter IV) and conclusions (Chapter V)**.*

6. This report tackles the situation of (national) minorities, whose members have a specific ethnic, cultural or linguistic identity. It is not limited to the (national) minorities in the classical sense since it also covers the so-called new minorities (immigrants, foreign workers, refugees). The situation of other groups like disabled persons or homosexuals, who can also be described as minorities - at least from a social viewpoint – is however excluded from the scope of this report.

7. This report has been adopted by the Commission at its … Plenary Session in Venice on ….

II. International standards and practice

A. The absence of a legally binding definition of the term "minority"

8. To date, there exists no legally binding definition of the term "minority" in international law. The term "minority" is not a unified concept either: UN texts usually address "ethnic, religious or linguistic minorities"[1] and regional European instruments on minority rights use the concept of "national minorities".[2]

9. In the inter-war period, the Permanent Court of International Justice (PCIJ) already concluded that the existence of a minority was a question of "fact" and not of "law", which made state "recognition" irrelevant under international law.[3]

10. In his study on various legal aspects of the minority question for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Special Rapporteur Francesco Capotorti provided in 1979 a definition with regard to Article 27 of the UN International Covenant on Civil and Political Rights (ICCPR).[4] His suggested definition, which included the citizenship requirement, was however not accepted by the Sub-Commission. The UN Human Rights Committee (HRC), which monitors the implementation of the ICCPR, has subsequently adopted the view that Article 27 ICCPR is not limited to citizens.[5]

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1 "*The beneficiaries of the rights under Article 27 ICCPR, which has inspired the Declaration, are persons belonging to "ethnic, religious or linguistic minorities". The Declaration on Minorities adds the term national minorities". This addition does not extend the overall scope of application beyond the groups already covered by Article 27. There is hardly any national minority, however defined, that is not also an ethnic or linguistic minority*", 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 § 6 (E/CN.4/Sub.2/AC.5/2005/2 of 4 April 2005).

2 See in particular the Council of Europe Framework Convention for the Protection of National Minorities of 10 November 1994 (FCNM); see also the Helsinki Final Act of 1975 and the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe, 1990, section I, ad §§ 30 to 40.

3 See Greco-Bulgarian Communities, PCIJ Series B, No. 17, 1930.

4 According to Capotorti, the term "minority" refers to "*a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their cultures, traditions, religion or language (Study on the rights of persons belonging to ethnic religious and linguistic minorities*", UN Doc. E/CN.4/Sub.2/384/Rev.I, 1979, ad § 568).

5 See HRC General Comment No. 23(50) on Article 27 ICCPR, ad § 5.1.

11. At the European level, efforts to come up with a generally agreed definition of the term "national minority" also met with difficulties. The Venice Commission and the Parliamentary Assembly of the Council of Europe (PACE) each proposed a definition,[6] but none of these texts has been entrenched in an international convention. The most relevant legally binding instrument adopted under the auspices of the Council of Europe, namely the FCNM, contains no definition of the concept of "national minority".[7]

12. While the general view has long been that a definition of the term "minority" was a *sine qua non* to make the international protection of minorities a workable regime in practice, opinions have evolved in the last decade or so. For example, it is striking to note that within the Council of Europe, the Committee of Ministers (CM) has discouraged further attempts to come up with a definition.[8] Even the PACE now no longer calls for a definition in its latest texts adopted on minority protection.[9] The OSCE High Commissioner on National Minorities also has not found it necessary or even desirable to formulate a definition for the purpose of his mandate.[10]

13. It is to be noted that despite the absence of a legally binding definition of the term "minority" in international law, there is wide agreement that a minority must combine objective features (such as language, traditions, cultural heritage or even religion, etc.) with a subjective element, namely the desire to preserve the specific elements of its identity. Admittedly, this remains a very broad scheme for addressing minority issues and States can therefore develop more detailed criteria – or even propose their own definition – to tackle minority issues, provided they do not rely on arbitrary or unjustified distinctions, which would be the source of discrimination.[11]

B. The approach followed at the European level

1. The Council of Europe

1.1. The European Convention on Human Rights

14. The European Convention on Human Rights of 1950 (ECHR) does not contain specific minority rights provisions[12] and, from that perspective, it can only deal with the concerns of minorities in an indirect way. Indeed "everyone" is entitled to the rights guaranteed by the ECHR as this instrument does not recognise categories of individuals or minority groups as bearer of rights.

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6 See hereinafter comments under §§ 60-68 (The Parliamentary Assembly, II.B.1.d. p. 18) and §§ 69-73 (The Venice Commission, II.B.1.e. p. 21).

7 Paragraph 12 of the explanatory report of the FCNM reads as follows: *"It should also be pointed out that the Framework Convention contains no definition of the notion of "national minority". It was decided to adopt a pragmatic approach, based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering the general support of all Council of Europe member States."*

8 See in particular CM reply of 13 June 2002 to PACE Recommendation 1492(2001), whereby the CM stated that *"(…) with regard to the proposal for an additional protocol to the European Convention on Human Rights concerning the rights of national minorities, which would include the definition of national minority contained in Assembly Recommendation 1201(1993), the Committee of Ministers considers that it is somewhat premature to reopen the debate on this project (…)"*

9 See hereinafter §§ 66-67.

10 See related comments under II. B 2.

11 See EU Network of Independent Experts on Fundamental Rights, Thematic Comment No 3 on "The Protection of Minorities in the EU", 25 April 2005, p. 10.

12 See *X. v. Austria*, No 8142/78, D.R. 18 (1980), pp. 88, 92-93.

15. The ECHR has nevertheless proven relevant for persons belonging to minorities who wish to assert the essential elements of their specific identity, as this is mainly possible through the exercise of the human rights and fundamental freedoms which are protected by this instrument, such as freedom of assembly and association, freedom of expression, respect for private and family life, freedom of thought, conscience and religion.

16. The main strength of the ECHR - including for persons belonging to minorities - lies with its supervisory mechanism, which is of a binding character by the effect of judgments delivered by the European Court of Human Rights. Furthermore, the overall "pluralist ambience" which extends to forms of association, ideas and ways of life, coupled with the commitment to pluralist democracy of which the ECHR is an expression, can make a difference for minorities: as evidenced by a growing case-law generated by individual applications from persons belonging to minorities,[13] the ECHR is in the process of sharpening its sensitivity to "ethnic" issues.[14]

17. Practice under the ECHR shows a clear reluctance from the former Commission and the Court to attempt a definition of the term "national minority", although the Court has recently shown its preparedness to review the legal process by which States Parties have denied national minority status to a given group.[15] Since the Court takes the view that a legally binding definition of the term "national minority" is not necessary to ensure the full respect for human rights and fundamental freedoms to individuals or associations claiming to be members of a minority, it has, consequently, not taken a general stance on the citizenship criterion as a possible constituent element of the concept of minority.

18. In fact, a review of the numerous decisions and judgements made by the Court in cases involving persons belonging to minorities reveals that - provided that admissibility conditions are met - the Court stands ready to examine any alleged violation of a substantive right on its merits, irrespective of the fact that the applicant may be non-citizen of the respondent State and, formally speaking, fall outside the scope of a possible domestic definition of the term "minority". For example, important rulings have been delivered by the Court on the situation of foreign Roma asylum-seekers in Belgium[16] and Italy.[17] Similarly, ethnic Russians from Latvia not holding the citizenship of this country have been able to see their complaint considered by the Court,[18] even though the authorities of Latvia are of the opinion that members of a national minority need to be Latvian citizens.[19]

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[13] **For an overview of the relevant ECHR case-law, which includes a few dozens of decisions and judgments, see for example R. Medda-Windischer, The Jurisprudence of the European Court of Human Rights, in European Yearbook of Minority Issues, Volume 4, 2004/5, Leiden/Boston 2006, p. 557-594; G. Gilbert, Jurisprudence of the European Court and Commission of Human Rights and Minority Groups prepared for the Working Group on Minorities of the UN Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/SUB2/AC.5/2002/WP.2; S. Spiliopoulou Akermark, The Limits of Pluralism – Recent Jurisprudence of the European Court of Human rights with Regard to Minorities: Does the Prohibition of Discrimination Add Anything ? in: Journal on Ethnopolitics and Minority Issues in Europe (JEMIE) edited by the ECMI, Issue 3/2002, Flensburg.**

[14] See P. Thornberry/M. Estébanez, Minority rights in Europe, Council of Europe Publishings, 2004, p. 68.

[15] See ECHR [GC] judgment of 17 February 2004, *Gorzelik and others v. Poland*, ad §§ 66-71.

[16] See ECHR judgment of 5 February 2002, *Čonka v. Belgium*, in which the Court found that the circumstances of the arrest and deportation of Slovakian nationals of Roma origin from Belgium to Slovakia amounted to an infringement of Articles 5 and 13 ECHR and of Article 4 of Protocol No. 4 to the ECHR.

[17] See decision of 14 March 2002, *Sulejmanovic and Sultanovic v. Italy*, whereby the Court declared partly admissible the complaints lodged by a group of citizens of former Yugoslavia of Roma origin about the circumstances of their arrest and deportation from Italy to Bosnia and Herzegovina. The Court subsequently endorsed (8 November 2002) a friendly settlement between the Government and the applicants.

[18] See ECHR [GC] judgment of 9 October 2003, *Slivenko v. Latvia*, in which the Court found a violation of Article 8 ECHR in the deportation of ethnic Russians living in Latvia; ECHR judgment of 16 June 2005 (pending before the Grand Chamber), *Sisojeva and others v. Latvia*, where the refusal of the Latvian authorities to

19. In sum, it can be stated that the ECHR offers a powerful and efficient mechanism of protection for persons - be they citizens or non-citizens - belonging to minorities, as long as the violation of classical human rights and fundamental freedoms is at stake, mainly through a state excessive interference. The ECHR has, however, produced very limited results under the prohibition of discrimination as concerns the State obligation to take special measures on behalf of minorities to compensate their vulnerable and disadvantaged position.[20] This state of affairs may be explained by the inherent limitation of Article 14 ECHR,[21] whose violation needs to be invoked in correlation with another, substantive right. ECHR practice therefore does not seem to offer examples of rulings promoting special measures for minority groups, be it in the context of applications lodged by citizens or non-citizens. The additional protocol 12 to the ECHR, which entered into force on 1 April 2005, might encourage future developments in this direction, although its explanatory report suggests some caution in this respect.[22]

1.2. The Framework Convention for the Protection of National Minorities (FCNM)

(a) Analysis of the declarations/reservations under the FCNM

- *Overview of existing declarations*

20. The absence of a definition of the concept of "national minority" in the 1994 FCNM itself, coupled with the particular sensitivity of the issue, prompted many States to enter declarations[23] upon signature or ratification, with a view to giving further precisions on the groups to be protected.[24]

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regularise the stay of the applicants in Latvia despite their long period of residence in the country was deemed to amount to a violation of their right to respect for their private and family life under Article 8 ECHR.

19 See hereinafter footnote 26.

20 **See S. Bartole, La Convenzione-quadro del Consiglio d'Europa per la protezione delle minoranze nazionali, in: Rivista di Diritto e Procedura Penale, vol. II, 1997, p.570; Vienna International Encounter on Some Current Issues Regarding the Situation of National Minorities (ed. Matscher), Vol. 7 of the Publication of the Austrian Human Rights Institute, 1997.**

21 Even though Article 14 ECHR explicitly mentions the "*association with a national minority*" as one non-admissible ground for discrimination, the alleged violation of this provision has been considered only in very rare cases by the former Commission and the Court.

22 See Additional Protocol 12 to the ECHR, explanatory report, ad § 16 *"(…) The fact that there are certain groups or categories of persons who are disadvantaged, or the existence of de facto inequalities, may constitute justifications for adopting measures providing for specific advantages in order to promote equality, provided that the proportionality principle is respected. Indeed, there are several international instruments obliging or encouraging states to adopt positive measures (see, for example, Article 2, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4, paragraph 2, of the Framework Convention for the Protection of National Minorities and Recommendation No. R (85) 2 of the Committee of Ministers to member states on legal protection against sex discrimination). However, the present Protocol does not impose any obligation to adopt such measures. Such a programmatic obligation would sit ill with the whole nature of the Convention and its control system which are based on the collective guarantee of individual rights which are formulated in terms sufficiently specific to be justiciable*".

23 The term "declaration" is used hereinafter to designate all statements submitted upon signature or ratification of the Framework Convention, irrespective of the terminology used by the States and without attempting to distinguish between "reservations" and "declarations" according to the Vienna Convention on the Law of Treaties.

24 The following 15 countries have made declarations on the personal scope of application of the Framework Convention: Austria, Belgium, Denmark, Estonia, Germany, Liechtenstein, Luxembourg, Malta, the Netherlands, Poland, Russian Federation, Slovenia, Sweden, Switzerland and "the former Yugoslav Republic of Macedonia".

21. Most of these declarations contain a definition of the term "national minority" for the purposes of the Framework Convention and/or a list of the groups protected. A few other declarations neither contain a definition nor list the groups protected, but express a view - at least indirectly - on the citizenship requirement.[25]

22. Out of the 14 declarations containing a definition and/or listing the groups protected, 8 explicitly mention the citizenship (or the nationality) of the state of residence as a condition for persons belonging to national minorities to enjoy the protection of the FCNM.[26] The other 6 declarations, however, do not make any reference to the citizenship requirement.[27]

23. Among the States that have entered a declaration making an explicit link to the citizenship requirement, some of them have thereby simply echoed an already existing condition entrenched in their constitutional legal order.[28] For some others, restricting minority rights to citizens is not dictated by the actual wording of their Constitution: this step is rather inspired by relevant provisions of their legal order and/ or is simply part of a general policy towards national minorities formulated in the context of the implementation of the FCNM.[29]

24. When considering the text of the declarations, it is also important to bear in mind that an explicit reference to the citizenship criterion does not necessarily fully reflect the practice followed by the State concerned in the different fields covered by the FCNM. In the context of its monitoring work, the Advisory Committee on the FCNM (ACFC) has on occasions noticed that, despite the official approach of their Government, some authorities were not too strictly relying on the citizenship requirement when dealing with persons belonging to national minorities in their concrete sphere of competences.[30]

25. Another element inviting to take the wording of declarations with caution is that even in States that have given their own definition of the term "national minority" and/or a list of the

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[25] This is the case of the declaration entered by the Russian Federation, which takes the view that State Parties are not entitled to include a definition of the term "national minority" in their declarations, especially when such declarations result in the exclusion from the scope of the Framework Convention of non-citizens who have been arbitrarily deprived of the citizenship of their state of residence; see also the declaration of Malta, which reserves its right not to be bound by the provision on effective participation (article 15 FCNM) of persons belonging to national minorities insofar as it entails the right to vote or to stand for election, a right which is reserved to Maltese citizens.

[26] These are: Austria, Estonia, Germany, Latvia, Luxembourg, Poland, Switzerland and "the former Yugoslav republic of Macedonia". The case of Latvia should, however, be further qualified as the declaration provides for an explicit extension of the scope of application to those non-citizens who *"(…) identify themselves with a national minority that meets the definition contained in this declaration (…)"* and adds that these persons *"(…) shall enjoy the rights prescribed in the Framework Convention, unless specific exceptions are prescribed by law.*"

[27] These are: Belgium, Liechtenstein, Malta, the Netherlands, Slovenia, Sweden.

[28] See, for example, Article 35, § 1, of the Constitution of Poland; Article 7 of the State Treaty of 1955 re-establishing an independent, democratic Austria.

[29] See, for example, the case of Germany and that of Switzerland.

[30] See, for example, ACFC first Opinion on Estonia of 14 September 2001, ad § 17, where the ACFC welcomed that as regards the citizenship criterion, the Government *de facto* appeared to take a considerably more inclusive approach to the protection of national minorities than that suggested in the declaration. See also ACFC second Opinion on Estonia of 24 February 2005, ad § 25, which states that "*the authorities explicitly endorse the inclusive approach by noting that, while the declaration specifies the direct beneficiaries of the provisions of the Convention, it is also apparent that all provisions of the Framework Convention are applicable in practice without any substantive limitations, and the norms of the Convention are equally available for all persons who consider themselves belonging to national minorities.*"

groups protected without mentioning the citizenship criterion, an analysis of the related practice may indeed reveal that most rights and facilities are *de facto* available to citizens only.[31]

26. The current report does not address the situation of States which have included a citizenship requirement in their legislation without any corresponding clause in a declaration or in their constitutional order.

- *Position of the States that have not entered declarations*

27. In order to have a meaningful overview of the State practice pertaining to the citizenship requirement under the FCNM, it is necessary to briefly examine whether those States which have not entered a declaration on the personal scope of application, have nevertheless expressed a view on this issue. This is all the more important since the majority of State Parties to the FCNM have not submitted any declaration.

28. A first groups of States is made up of those which have unequivocally indicated they consider the Framework Convention to be applicable to citizens only. Such statements have been made already in the first State Reports[32] or in the subsequent stages of the monitoring procedure.[33] Here again, some of the States concerned have thereby simply reiterated what is already enshrined in their constitutional legal order.[34] For some others, restricting minority rights to citizens only does not seems to result from the wording of their Constitution.[35]

29. A second group of States is composed of those which have not stated that they consider the FCNM to be applicable to citizens only. While it is rather certain that some of these States do not intend to make any difference between citizens and non-citizens when it comes to granting rights and facilities to persons belonging to a national minority,[36] the situation is less clear in some other States which have not formulated a position of principle on the issue. It may be argued that some of them tend to disregard the citizenship criterion in practice,[37] but others seem to rely on this criterion at least in sectoral fields, depending on the various rights and facilities at stake.[38]

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31 See, for example, the case of Slovenia, where the "autochthonous" character of the three minorities protected practically means that only persons holding Slovenian citizenship may benefit from the protection of the FCNM (see ACFC first Opinion on Slovenia of 12 September 2002, ad §§ 16-20; ACFC second Opinion on Slovenia of 26 May 2005, ad §§ 28-39); see also the case of Denmark, where the importance placed "on the deep historic ties" of the German minority with the Kingdom of Denmark actually means that only Danish citizens from this minority can rely on the protection offered by the FCNM (see ACFC first Opinion on Denmark of 22 September 2000, ad § 16, as well as the numerous references made to the Danish citizens of the German minority in the first and second State Reports as well as in the comments submitted by the Government of 14 December 2005 on the ACFC second Opinion of 9 December 2004).

32 See, for example, paragraph 19 of the first Report of Armenia; paragraph 1 under Article 3 of the first Report of Serbia and Montenegro.

33 See paragraphs 21-22 of the comments of the Russian Government on the first Opinion on the Russian Federation; see also Second Report of Croatia under "from the Report of the Ministry of Justice".

34 See, for example, Article 5 of the Constitutional Law on the Rights of National Minorities of Croatia which provides for a definition of the term "national minority" which mentions the citizenship criterion.

35 See, for example, the case of Armenia.

36 See, for example, ACFC first Opinion on Sweden of 20 February 2003, ad § 16; first Opinion on the United Kingdom of 30 November 2001, ad § 14; first Opinion on Norway of 12 September 2002, ad § 20.

37 See, for example, the cases of Azerbaijan, Albania and Italy.

38 See ACFC first Opinion on Lithuania of 21 February 2003, ad §§ 18-20; first Opinion on Ukraine of 1 March 2002, ad § 17.

- *Preliminary findings*

30. This overview of the position taken by the States signatories to the FCNM as regards the citizenship criterion clearly shows that there is a great variety of approaches by the different States. These approaches may in some cases be dictated by clear constitutional criteria, but appear more frequently guided by the existence of relevant legislative provisions and/or the formulation of a general policy towards national minorities.

31. A closer examination of national situations, as is done in the context of the monitoring under the FCNM, would probably reveal that even for States that have taken a clear position in favour of against the citizenship requirement, be it in a declaration or not, that position is not always consistently reflected in practice. Indeed, domestic authorities may appear more flexible *vis-à-vis* the citizenship requirement when dealing with practical cases in their concrete sphere of competences.

32. In sum, the present overview makes it difficult to identify a dominant trend under the FCNM as regards the position taken by the States on the citizenship criterion since a meaningful pattern of national examples exist in both directions. In addition, it must be kept in mind that this topic is under constant evolution. The monitoring of the FCNM indeed shows that certain States have (at least partly) reconsidered their approach on the issue on the basis of the results of the first cycle[39] and this shall become more apparent in the subsequent cycles of the monitoring.

(b) Monitoring of the FCNM by the ACFC

33. According to Article 26 §1 FCNM, the Committee of Ministers shall be "assisted" by an "Advisory Committee" in evaluating the adequacy of the measures taken by the Parties to give effect to the principles set out in the FCNM. According to Rules 23-24 of Resolution (97)10, the ACFC shall transmit its "opinions" to the CM, which is then to adopt its own conclusions and recommendations on the implementation of the FCNM. From its inception, back in 1998, the ACFC has debated how it would address the personal scope of the FCNM. This was prompted, amongst other things, by the absence of any definition of the concept of "national minority" in the FCNM itself, and by the many declarations made by States Parties giving precisions on the groups to be protected.

34. Mindful that it would be very difficult to come up with even a working definition of the term "national minority", the ACFC decided that the best way forward was to adopt a pragmatic approach and deal with personal scope-related issues on a case-by-case basis as they occurred rather than to try from the outset to draw up general principles or rules. The ACFC thus decided, in 1999, that its stance with regard to the declarations relating to the personal scope of the FCNM should be pragmatic. It decided to engage in a constructive dialogue with the States concerned in an effort to encourage them to reconsider their positions where this was deemed to be too restrictive.[40]

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[39] For example, Finland is one of the State parties where the ACFC has encouraged the authorities to reconsider their approach to the scope of application as explained in the state report, especially regarding the distinction drawn between the so-called "old Russians" (covered by the FCNM, according to the government) and other Russians (not covered). In the second cycle, the authorities, recognize the criticism that this approach has prompted, including that coming from minority representatives. In its second opinion on Finland, the ACFC also affirms its previous view that the Finnish-speaking population of the Åland Islands is to be taken into account in the context of the implementation of the FCNM, as a minority-in-a-minority situation. In the second cycle, the state report addressed their situation, and it is also important to note that ACFC has succeeded in opening a dialogue also with the authorities of Åland Islands around this question.

[40] See the report of the ACFC's 5th meeting, 13-16 September 1999, item 6, ad § 11: *"The Advisory Committee then proceeded to discuss the conclusions it could draw from the exchange of views. It agreed that, taking into account that Governments, when submitting their written statements on the personal scope of application of the Framework Convention in general, had not qualified these as reservations, but rather as*

35. In its first four Opinions, adopted in September 2000, the ACFC outlined its approach vis-à-vis the personal scope of the Framework Convention. The introductory paragraphs of the Opinions on Slovakia, Hungary, Denmark and Finland clearly acknowledged that States have a certain margin of appreciation in this context but at the same time stressed that this is to be exercised within certain limits, which were expressed in fairly general terms.[41] In addition, the ACFC's Opinions included a general call on the States to apply the FCNM in a more nuanced manner and to consider the Convention's application, on an article-by-article basis, to those groups that were not explicitly designated as "national minorities" for the purposes of the FCNM.[42] This clause was meant to help ensure that there was no obstacle to the future development of the FCNM, including as regards the so-called "new minorities".

36. The ACFC continued to follow this approach throughout the first monitoring cycle, reiterating the "standard" paragraphs relating to Article 3 in virtually all of the Opinions it adopted. The ACFC explained this approach further in its Opinion concerning PACE Recommendation 1492 (2001).[43]

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declarations, they should be treated as such. Indeed, legal analysis allows the Advisory Committee to follow a pragmatic approach: the declarations are to be considered as measures of implementation or as information concerning the measures taken to implement the Framework Convention. Under Article 26(1) of the Framework Convention, it is the duty of the Advisory Committee to examine the adequacy of any such measures. The examination will be initially carried out by the country-specific working groups which will, to this end, need to obtain information about the existence of linguistic, cultural, religious and ethnic groups in the country (as is expressly provided for in the outline for state reports). It was further agreed that information provided by States in state reports and other indications concerning the personal scope of application of the Framework Convention in the country will be treated in the same manner as the above-mentioned declarations. Where a working group considers that the envisaged personal scope of application may be too restricted, it will seek to enter into a dialogue with the State concerned."

41 The paragraphs in question are worded as follows: *"The Advisory Committee underlines that in the absence of a definition in the Framework Convention itself, the parties must examine the personal scope of application to be given to the Framework Convention within their country. The position of the […] Government is therefore deemed to be the outcome of this examination.*

Whereas the Advisory Committee notes on one hand that parties have a margin of appreciation in this respect in order to take the specific circumstances prevailing in their country into account, it notes on the other hand that this margin of appreciation must be exercised in accordance with general principles of international law and the fundamental principles set out in Article 3. In particular it stresses that the implementation of the Framework Convention should not be a source of arbitrary or unjustified distinctions.

For this reason the Advisory Committee considers that it is part of its duty to examine the personal scope given to the implementation of the Framework Convention in order to verify that no arbitrary or unjustified distinctions have been made. Furthermore, it considers that it must verify the proper application of the fundamental principles set out in Article 3."

42 The paragraph in question reads as follows: *"The Advisory Committee further notes that the Report provides some information on other groups that the Government does not consider, at this stage, to be covered by the Framework Convention. The Advisory Committee is of the opinion that it would be possible to consider the inclusion of persons belonging to these groups in the application of the Framework Convention on an article-by-article basis and is of the opinion that the […] authorities should consider this issue in consultation with those concerned."*

43 See the ACFC's Opinion of 14 September 2001 on PACE Recommendation 1492 (2001) on the rights of national minorities, ad §§ 6, 16 and especially 17, worded as follows: *"In the Advisory Committee's opinion, the Framework Convention is not an instrument that operates on an "all-or-nothing" basis. Even if a group is covered by the Framework Convention, it does not necessarily follow that all of the Convention's articles apply to the persons belonging to that minority. Similarly, if a minority is not covered by the majority of the provisions in the Framework Convention, that does not necessarily mean that none of the provisions is relevant to the members of that group. The Advisory Committee believes that a nuanced, article-by-article approach to the "definition" question is not only fully in line with the text of the Framework Convention but is actually dictated by it. This flexibility in the implementation of the Framework Convention could be made more difficult by including a definition in a legally binding European instrument*."

37. Although the ACFC's reasoning remained very concise in the "standard" paragraphs of its Opinions, on several occasions the ACFC was much more explicit in its criticism concerning the exclusion by some States of certain groups from the scope of the FCNM:

- For example, as regards Roma and certain other groups in Denmark,[44] the ACFC took the view that the Government should enter into a dialogue with representatives of these groups in order to identify any interest they may have in being given the protection afforded by the FCNM.

- The ACFC has also commented on the situation of certain groups whose specific identity and desire to preserve that identity were beyond doubt but who were not always considered to fall within the scope of the Framework Convention. Examples include the groups which at national level were in the majority, but which constituted a minority at regional level,[45] as well as indigenous peoples.[46]

- Lastly, on a number of occasions, the ACFC also commented in detail and with some criticism on the exclusion from the personal scope of application of the FCNM, not groups as such, but certain persons who could objectively be considered as belonging to minorities recognised by the State. Such is the case where the protection afforded by the FCNM - not in the context of the new minorities - but rather in that of the traditional minorities, is restricted solely to those who have acquired the citizenship of the country of residence.[47]

38. Apart from the more substantiated criticisms under Article 3 with regard to the exclusion of the above-mentioned groups or individuals, the ACFC has, in the course of its Opinions, commented at greater length on the situation of groups which governments do not consider to be protected by the FCNM; however, this has been almost exclusively in connection with Article 6, regarding the promotion of a spirit of tolerance and intercultural dialogue, and protection against acts of discrimination. In the view of the ACFC, the spirit and the letter of this provision allow for no limitation of the scope exclusively to those groups that are considered to be

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[44] See ACFC first Opinion on Denmark of 22 September 2000

[45] For example, the Finnish-speaking population of the Province of Åland (cf the report of the ACFC's 6th meeting, 22-24 November 1999, item 6, ad § 11; ACFC first Opinion on Finland of 22 September 2000, ad § 17), and the so-called "constituent" peoples of Bosnia and Herzegovina, i.e. Bosniacs, Serbs and Croats, (cf first Opinion on Bosnia and Herzegovina of 27 May 2004, ad §§ 26-28).

[46] See the case of indigenous peoples in the Russian Federation, first opinion on the Russian Federation of 13 September 2002, ad § 26.

[47] Cf. ACFC first Opinion on Estonia of 14 September 2001, ad §§ 17-18: "*The Advisory Committee considers that, bearing in mind the prevailing situation of minorities in Estonia, the above declaration is restrictive in nature. In particular, the citizenship requirement does not appear suited for the existing situation in Estonia, where a substantial proportion of persons belonging to minorities are persons who arrived in Estonia prior to the re-establishment of independence in 1991 and who do not at present have the citizenship of Estonia"; see also second Opinion on Estonia of 24 February 2005, ad § 26:*

With a view to the foregoing, the Advisory Committee is of the opinion that Estonia should re-examine its approach reflected in the declaration in consultation with those concerned and consider the inclusion of additional persons belonging to minorities, in particular non-citizens, in the application of the Framework Convention".

By contrast, see the Opinion on Sweden of 20 February 2003, paragraph 16: "*The Advisory Committee notes that, upon ratifying the Framework Convention, Sweden made a declaration according to which the national minorities in Sweden are Sami, Swedish Finns, Tornedalers, Roma and Jews. In their dialogue with the Advisory Committee, the Swedish authorities have confirmed that the provisions of the Framework Convention are to be implemented in the same way for all persons belonging to these particular minorities regardless of whether or not they are Swedish citizens. The Advisory Committee strongly welcomes this inclusive approach with respect to the minorities concerned. Bearing in mind that a large number of persons concerned are not Swedish citizens, this inclusive approach contributes to the impact of the Framework Convention and helps to avoid any arbitrary or unjustified distinctions within these minorities*."

national minorities. Starting with its opinion on Ukraine, the ACFC has repeatedly expressed this interpretation.[48] The ACFC's comments in relation to Article 6 in many opinions show that the situation of groups not considered by governments as protected by the Framework Convention – especially the new minorities – has been raised on several occasions in order to condemn an atmosphere of hostility or intolerance,[49] prejudice, shortcomings or discriminatory practices in fields such as education,[50] the media,[51] the attitude of the law-enforcement agencies[52] and access to the labour market.[53] There is a clear material link between Articles 4 and 6 of the FCNM, and the ACFC has often, at least implicitly, addressed the situation of groups other than the minorities recognised by the State concerned, in the wider context of the fight against all forms of discrimination.

39. When following the 'article by article' approach of the ACFC, the question is to identify which of the protective measures envisaged in the FCNM can be restricted to citizens, and which other criteria are relevant. It may be useful, in this connection, to make use of the distinction now generally used in human rights analysis between the threefold levels of State obligations which apply to all human rights: the obligation to *respect*, the obligation to *protect*, and the obligation to *fulfil* the rights.

40. The ACFC takes the view that the obligation to *respect* the freedoms contained in the FCNM is generally applicable to all persons belonging to minorities, irrespective of their citizenship. In general, these are universal human rights, not limited to minorities. States are obliged to respect the rights of minorities under Article 7 FCNM to freedom of assembly, association and expression, the right of minorities under Article 8 FCNM to practice their religion, and the freedom of minorities under Article 9 FCNM of expression and information including their own media. States are also obliged to respect the right of minorities under Article 10 §1 FCNM to use their own minority language, in private and public, their right under Article 13 FCNM to manage their own private educational institutions, and their right under Article 14 §1 FCNM to learn their own language. States have a duty to respect the use of these rights also for minorities, or individuals within the minorities, whether they are citizens or not.

41. It is also clear from the practice of the ACFC that the State has a duty to encourage a spirit of tolerance and intercultural dialogue between all groups living on its territory, irrespective of citizenship (Article 6 §1 FCNM) and that an important function of the State is to *protect* minorities and their members - including non-citizens - against threats or acts of discrimination (Article 6 §2 FCNM).

42. What remains more debatable is whether those rights which require more active or proactive measures (the duty to *fulfill*) also apply to non-citizens. It seems in particular that the ACFC has not yet formulated a comprehensive response to three important questions:

- While States generally must ensure equality before the law to minorities, whether citizens or not (Article 4 §1 FCNM), do States have a duty under Article 4 §2 FCNM to adopt proactive measures, in all areas of economic, social and cultural life, even for

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48 See first Opinion on Ukraine of 1 March 2002, ad § 37, in which the ACFC *"(…) recalls that Article 6 of the Framework Convention has a wide personal scope of application, covering also asylum-seekers and persons belonging to other groups that have not traditionally inhabited the country concerned."*

49 See first Opinion on Austria of 16 May 2002, ad § 85.

50 See first Opinion on Slovenia of 12 September 2002, ad § 45.

51 See first Opinion on Ireland of 22 May 2003, ad § 67.

52 See first Opinion on the Czech Republic of 6 April 2001, ad § 40.

53 See first Opinion on Germany of 1 March 2002, ad § 37.

non-citizen members of minorities? Selected elements of the ACFC's practice suggest that this duty does exist, at least with regard to permanent non-citizen residents.

- Is the State obliged, under Article 10 § 2 FCNM (and provided the other conditions in that article are fulfilled such as "inhabited traditionally or in substantial number and where there is a real need"), to ensure conditions under which the minority can use their own language in relations with the authorities? The ACFC seems to admit that non-citizen individuals who are affiliated with a group traditionally residing in the territory must be entitled, together with those who lived there before, to use their own language in such contexts, but that 'new minorities' as such cannot generally demand this.[54] On the other hand, could resident minorities affected by a sudden territorial/constitutional change (such as the restoration of the independence of the Baltic States or the dissolution of former Yugoslavia) demand that the language they have traditionally used in relation to authorities can still be used ? It seems that no general answer can be given but rather that each country-specific situation, including from a socio-historical perspective, plays a crucial role.[55]

- The third question concerns language education. Can non-citizens legitimately demand publicly funded education in their own language or instruction in their language? As in the previous example, it will probably depend on the national context. 'New minorities', in the sense of persons who have on their own will entered into and settled in a country they knew was not their own, are not necessarily entitled to demand instruction in their language. On the other hand, groups of non-citizen residents who lived there at the time of independence or restored independence should in principle have the possibility to learn their language and, at least to some extent, obtain education in their language, especially in primary school. Here again, the practice of the ACFC regarding the Baltic States and former Yugoslavia has to be carefully analysed, but overall seems to point to this direction.[56]

43. With regard to effective participation in public life (Article 15 FCNM) it is a general rule accepted by the ACFC that the right to vote and to be elected to certain kinds of public office can be reserved to citizens, in line with Article 25 of the ICCPR. The ACFC has pointed out, however, that this restriction must not go beyond what is the legitimate purpose of the restriction contained in Article 25 ICCPR. The term 'public service' in Article 25 (c) should in particular be limited only to positions which imply exercise of public authority, and should not include employment in service institutions such as railways, telecommunication enterprises and others, even if publicly run.

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[54] While no country-specific Opinion of the ACFC has ever called for an extension of the right to use a minority language in official dealings to "new minorities", a few Opinions have explicitly touched upon the position of non-citizens belonging to a recognised minority in relation to language rights: see in particular first Opinion on Sweden of 20 February 2003, ad §§ 16 and 48-50; see also second Opinion on Slovakia of 26 May 2005, ad §§ 22, 24, 86.

[55] For example, whereas the use of the Russian language by - or with - the authorities seems to be an important concern in the second Opinion on Estonia of 24 February 2005 (see §§ 16, 55, 95-98), the use of Croatian, Serbian or Macedonian in relation with the Slovenian authorities is not addressed at all in the second Opinion on Slovenia of 26 May 2005. The second Opinion on Croatia of 1 October 2004, however, addresses in critical terms (see §§ 112-114) the status of the Serbian language in relation to Article 10 §2 FCNM.

[56] Education in the Russian language is indeed a central concern in the second Opinion on Estonia of 24 February 2005 (see §§ 137-149); in this context, mention needs to be made of the general stance taken by the ACFC vis-à-vis the citizenship requirement in Estonia: *"(…) the citizenship requirement does not appear suited for the existing situation in Estonia, where a substantial proportion of persons belonging to minorities are persons who arrived in Estonia prior to the re-establishment of independence in 1991 and who do not at present have the citizenship of Estonia*", first Opinion on Estonia of 14 September 2001, ad § 17. The general deterioration of the situation of non-Slovenes from former Yugoslavia in terms of opportunities to learn their mother tongues or to be educated in them is also tackled in the second Opinion on Slovenia of 26 May 2005 (see §§ 110, 112), albeit in more general way.

44. Restrictions to citizens of the right to be elected and to vote should apply only to elections for regular governmental bodies. The ACFC has for instance criticized Estonia for their restriction to citizens of the right to be elected to the governing boards of cultural groups under the law on cultural autonomy.[57] According to the ACFC, the right also set out in Article 15 FCNM for persons belonging to minorities to effective participation in the economic, social and cultural life of the country concerned can generally not be restricted to citizens. The relevant criterion would therefore probably be **lawful and effective** residence of a certain duration, though the details of this may still have to be worked out.

(c) Monitoring of the FCNM by the Committee of Ministers (CM)

- *First monitoring cycle*

45. As mentioned above, the CM is assisted by the ACFC to adopt its own conclusions and recommendations but keep the final responsibility in the monitoring of the FCNM. A survey of the resolutions adopted by the CM during the first monitoring cycle shows that the question of the personal scope of application has been explicitly addressed on various occasions, although not with full consistency[58]. The most well-known cases concern Denmark and those countries which claim to have no minorities on their territory, i.e. Liechtenstein, San Marino and Malta. Other countries also need to be mentioned, such as Ireland, Spain, Estonia and Finland.

46. In the case of Denmark, the CM asked the Government to give further consideration to the personal scope, in consultation with those concerned. This is undoubtedly the furthest the CM has gone on this subject in the context of the first monitoring cycle, bearing in mind that the Government of Denmark had entered a restrictive declaration upon ratification of the FCNM. It has to be borne in mind, however, that the Government had never made the effort to give any serious reasons in the monitoring procedure to justify its exclusion of certain groups which clearly had a distinct identity.

47. With regard to Liechtenstein, San Marino and Malta, the CM merely pointed out that there remained potential for application of a number of provisions of the FCNM, albeit rather limited.[59] In view of the fact that neither the governments in question nor the ACFC had identified any traditional minorities in these countries, the CM's reference to the "potential for application of a number of provisions of the Framework Convention" can relate only to new minorities. Such potential should, logically, have also been recognised by the CM in relation to the other States Parties, and especially those which had experienced large-scale waves of immigration in recent decades; however, this was not the case.

48. With regard to Ireland, the Resolution made explicit reference not only to the Traveller community, but also to the new "immigrant communities" and "other communities", albeit the Government held the view that "immigrants, refugees and asylum seekers cannot be considered to constitute a national minority under the terms of the Convention".[60]

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[57] See first Opinion on Estonia of 14 September 2001, ad § 29.

[58] Reference is made here solely to cases where the Resolutions contain criticisms in this regard. There are some cases where the Resolutions welcome the efforts made by the authorities to extend the personal scope: see, for example, Section 1, first indent of the Resolution on the United Kingdom, ResCMN(2002)9.

[59] See Resolution ResCMN(2001)6 on Liechtenstein; Resolution ResCMN(2001)8 on San Marino; Resolution ResCMN(2001)7 on Malta.

[60] See the Government's comments on the Opinion of the Advisory Committee on Ireland, section I.

49. With regard to Spain, there is a clear discrepancy between the ACFC Opinion and the Resolution of the CM concerning the personal scope of application of the FCNM.[61] While the concluding remarks of the Opinion clearly stress the absence of an effective State policy for implementing the principles set out in the FCNM and point to the fact that such a policy is closely linked to the personal scope of application of this instrument, the Resolution does not embrace at all this reasoning.[62]

50. In some cases, the CM Resolutions contain references or at least potential references to groups other than those to which the State grants the protection of the FCNM, including new minorities. Such references are, however, invariably implicit and it is doubtful whether the countries concerned will be prepared to interpret them in such a progressive way. Examples are the reference to the need to promote the naturalisation process in the Resolution on Estonia,[63] the reference to the Russian-speaking population (and not to the "Old Russians") in the Resolution on Finland,[64] and several references to the need to strengthen safeguards in the fight against discrimination.[65]

- *Second monitoring cycle*

51. In the context of the second monitoring cycle, the CM has pursued its monitoring tasks largely according to the already-established practice, with preparation of its Resolutions, based on the concluding remarks of the ACFC. The second-cycle Resolutions adopted so far repeat, by and large, the concluding remarks of the ACFC, in some cases virtually *verbatim*. But there are also cases where the CM has opted for softer phrases, partly echoing the ACFC's message, but with toned-down terminology. At the same time, it is important to bear in mind that all second-cycle Resolutions "invite" the States to take measures to implement the detailed recommendations of the ACFC, including those that are not explicitly repeated in the resolutions, providing a firm basis to address them in the follow-up dialogue.

52. As regards the personal scope of application, the CM's second Resolution on Estonia shows that problems faced by non-citizens are increasingly relevant in the context of the implementation of the FCNM in spite of the restrictive declaration made by Estonia. Indeed, in the first recommendation contained in the said Resolution, the CM calls for "further positive measures to facilitate and encourage naturalisation, including through increased free-of-charge state language training".[66] While this recommendation is primarily aimed at promoting integration through naturalisation, in practice it targets mostly non-citizens belonging to the Russian minority, i.e. persons which fall outside the scope of the Estonian declaration. **In addition to the CM and the ACFC,[67] the concern that undue obstacles in the naturalisation process may have detrimental effects in terms of integration – particularly for persons belonging to minorities who lost their citizenship following the break-up of**

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61 See second indent, item 1 of the Resolution as opposed to § 99 of the concluding remarks of the Advisory Committee.

62 See ResCMN(2004)11.

63 See ResCMN(2002)8.

64 See ResCMN(2001)3.

65 See for example, the Resolution on the United Kingdom, Section 1, last indent, or Resolution ResCMN(2003)9 on Russia, Section 1, 5th indent.

66 See ResCMN (2006)1.

67 **See in particular § 37 above, third indent (footnote 47).**

the predecessor State - has also been voiced by other bodies, including at the UN level[68] **and, most recently, the PACE.**[69]

53. As regards Denmark, there have been noteworthy developments in the substance of the monitoring dialogue, the scope of which clearly goes further than the formal declaration. This is particularly so regarding the Roma, whose concerns have become a central issue in the FCNM process in Demark as well, even though Roma remain, formally speaking, outside the Danish declaration. Issues concerning Roma – with or without Danish citizenship - are therefore not only a key theme for the ACFC, but also in the CM's Resolution, in which the Danish authorities are urged to "find alternative solutions for the Roma children which remain in a separate Roma class in order to guarantee equal education".[70]

54. As regards Slovenia, it is significant that the CM included several paragraphs related to non-Slovenes from other parts of the former Yugoslavia residing in Slovenia in its second Resolution, reflecting a proposal by the ACFC that included calls to "look for ways to increase level of state assistance granted" to them, and thereby further increased the relevance of the FCNM's monitoring process to groups that fall outside the scope of the formal declaration.[71]

55. In the above cases, the States' definition is rooted in the ratification bill, which means that a formal change in position would not be a simple task. In those cases where the State Party has indicated its position only in the State report, it can be easier to adapt the approach on the issue. Finland is one of the States Parties where the ACFC has encouraged the authorities to reconsider their approach to the scope of application as explained in the State report, especially regarding the distinction drawn between the so-called "old Russians" (covered by the FCNM, according to the Government) and other Russians (not covered). In the second cycle, the authorities, while not explicitly stating any change in their formal position in this regard, recognize the criticism that this approach has prompted, including that coming from minority representatives. The distinction is given only little attention by the ACFC in those parts of the second opinion that relate to substantive paragraphs of the FCNM, and the inclusive term "Russian-speaking population" is regularly used.[72] It will be interesting to see whether the approach is maintained by the CM in its forthcoming Resolution on Finland.

(d) General assessment

56. The above developments are perhaps not enough to merit revisiting the general assessment that "Governments are generally reluctant to reconsider, let alone amend, their approach to the personal scope of application of the convention".[73] They do, however, indicate that a significantly more flexible and nuanced approach has gained ground in the implementation and monitoring practice under the FCNM, even in those cases where the Government's formal position on the issue has remained intact. It is interesting to note that a move towards a more nuanced approach to the definition issue can be detected not only in the

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68 **See in particular the relevant paragraphs of the CERD General Recommendation No. 30 "Discrimination Against Non-Citizens" which is quoted under § 88 below; see also HRC Concluding Observations on Latvia, 3 October 1995, document CCPR/C/79/Add.53; HRC Concluding Observations on Estonia, 15 April 2003, document CCPR/CO/77/EST.**

69 **See in particular § 98 below, footnote 94.**

70 See ResCMN (2005)9.

71 See ResCMN (2006)6.

72 See second Opinion on Finland of 2 March 2006, ad §§ 23, 28, 147-152.

73 See Rainer Hofmann, "The Framework Convention at the End of the First Cycle of Monitoring", in *Filling the Frame; Five years of Monitoring the Framework Convention for the Protection of National Minorities* (Council of Europe Publishing, Strasbourg, 2004), p. 22.

work of the ACFC, but also in the work of the CM and, although to a lesser extent, in governmental practice.

1.3. The European Charter for Regional or Minority Languages

57. The foundation of the European Charter for Regional or Minority Languages of 1992 (ECRML) is the need to promote and protect regional and minority languages. It combines concerns relating to conservation of Europe's linguistic heritage and the promotion of diversity with more conventional concepts such as human rights and non-discrimination.

57bis The ECRML is primarily not an instrument for the protection of minorities. It is focused on the promotion and protection of regional and minority languages and, in this way, it may be of some use for the protection of minorities, bearing in mind that language is one of the most important aspects of their protection.

58. The ECRML is a normative instrument which does not create justiciable rights, whether for minorities or for persons belonging to minorities. While of necessity it acknowledges the concept of a minority, it tends to focus more on the concept of "speakers" of the language in question. The ECRML places, however, obligations on States which accede to it. Those obligations require them to adopt the measures laid down in it, unless domestic law already affords the same guarantees as in the ECRML. In that sense, the obligations may therefore eventually result in rights for individuals.[74]

59. The ECRML avoids equating too closely membership of a group of speakers of a particular language with membership of a national or ethnic minority. While the two concepts are frequently indistinguishable, they are not necessarily connected, since any language is capable of being learnt by anyone from any background, who can then claim to be a speaker of that language.

60. According to the definition set out in Article 1 (a) ECRML, the expression "regional or minority languages" does not include the languages of migrants. The term "migrants" applies in principle to persons of foreign origin who are not nationals of an acceding states. The question as to whether non-citizens can also benefit from the measures aimed at protecting a regional or minority language remains, however, not an easy one to answer: it would seem difficult to distinguish in practice between citizens and non-citizens speaking the same language so as to deny the latter and not the former the right to make use of their language in certain contexts.[75]

1.4. The Parliamentary Assembly of the Council of Europe (PACE)

(a) Exclusion of non-citizens as a starting point

61. In its Recommendation 1134 (1990) on the rights of minorities, the PACE for the first time recommended to "draw up a Protocol to the European Convention on Human Rights or a special Council of Europe convention to protect the rights of minorities in the light of the principles" stated in this Recommendation. This proposal was reiterated in PACE Recommendation 1177 (1992).

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[74] See J.-M. Woehrling, *The ECRML - A critical commentary*, Council of Europe Publishing, Strasbourg 2005, pp. 27, 31.

[75] See in particular first Report of the Committee of Experts of the ECRML on Slovenia, ad §§ 35-40, which calls for the protection of the Serbian, Croatian and Bosnian languages, although they are largely spoken by foreigners and considered languages of migrants by the Slovenian authorities. See also J.-M. Woehrling, *The ECRML - A critical commentary*, Council of Europe Publishing, Strasbourg 2005, pp. 57-58, 89.

62. The PACE has since exerted pressure on Council of Europe Governments to prepare a treaty, preferably in the form of an additional protocol to the ECHR. The PACE has been at the origin of standard setting for the rights of minorities by adopting Recommendation 1201 (1993) on *an additional protocol on the rights of national minorities to the European Convention on Human Rights*, which included the proposal of a concrete text for an additional protocol to the ECHR.

63. The draft additional protocol contained in Appendix to Recommendation 1201 was not endorsed by the CM. However, the PACE has succeeded in persuading the implementation of its provisions in a number of Council of Europe member States, through its role in the consideration and acceptance of new candidates for membership. The fact that the treaties on good-neighbourly relations and friendly co-operation concluded by Hungary with Slovakia in March 1995, Hungary with Romania in September 1996, and Romania with Ukraine in 1997 make express reference to the Recommendation confers on the draft protocol the same legal standing as the other provisions of those treaties. **It needs to be stressed, however, that the meaning of certain provisions of Recommendation 1201 was modified by the interpretative declarations included in the text of these treaties**. **These bilateral treaties, however, seem to have had little if no impact outside their signatory States.**

64. The PACE has long considered that the text of the draft additional protocol, as proposed in Recommendation 1201 (1993), remained an important reference document for a new additional protocol to the ECHR. According to this recommendation, which sets out a definition of the term "national minority", members of a national minority means a group of persons who are citizens of that State. This is to be understood as a clear citizenship requirement.

65. Subsequent texts adopted by the PACE on the rights of national minorities repeatedly made reference to Recommendation 1201 and its definition therein.

66. This definition was clearly confirmed by the PACE in its Recommendation 1255 (1995) on the protection of the rights of minorities adopted on 31 January 1995.[76] In Recommendation 1492 (2001) on rights of national minorities adopted on 23 January 2001, the PACE reaffirmed its position that an additional protocol to the ECHR on the rights of national minorities was necessary "drawing on the principles contained in Recommendation 1201 (1993), and endeavouring to include therein the definition of national minority adopted in the same recommendation;" in order to ensure justiciability of minority rights before independent judicial courts, notably the European Court of Human Rights.

(b) Latest developments

67. In its Recommendation 1492 (2001) , the PACE used for the first time more specific and considerably stronger language to make the FCNM a universal and effective European instrument on minority protection. In this context, the PACE condemned "the denial of the existence of minorities and of minority rights in several Council of Europe member states and the fact that many minorities in Europe are not afforded adequate protection".[77]

68. The ~~latest~~ **following** comprehensive recommendation on the rights of national minorities show**ed** a clear evolution in that the concerns of the PACE have changed to focus on the risk of

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[76] See PACE Recommendation 1255(1995), ad § 2: "*The Assembly now confirms the principles listed in its Recommendation 1201 (1993) and the additional protocol it then proposed, in particular the definition of a "national minority*" (…)".

[77] See Recommendation 1492(2001), ad § 11: With regard to the citizenship criteria, the recommendation nevertheless stressed "*that immigrant populations whose members are citizens of the state in which they reside constitute special categories of minorities, and recommends that a specific Council of Europe instrument should be applied to them*".

discriminatory exclusion of minority groups by those States which have entered declarations or reservations upon ratification of the FCNM.[78] Having somewhat shifted its priorities, in Recommendation 1623(2003) the PACE no longer referred to Recommendation 1201(1993) and the necessity to adopt a definition of the term "national minorities". The Rapporteur stressed in particular that it would be rather unfortunate if the European standards of minority protection appear to be more restrictive in nature than the universal standards, the more so as Article27 ICCPR is binding for all State Parties to the FCNM.[79] Bearing in mind that the scope of Article 27 ICCPR is not limited to citizens, this suggests that the PACE wanted to warn against undue restrictions of the scope of application of the FCNM, based on the citizenship criterion.

69. The approach of the PACE is still likely to evolve in the future as this body regularly reviews issues linked to the protection of national minorities, although not always in a consistent way. For example, the recent recommendation of the PACE on the concept of "nation" seems to imply that national minorities must be made up of citizens only.[80] **On the other hand, Resolution 1527(2006), which addresses the rights of national minorities in Latvia, pays particular attention to the situation of non-citizens and contains a number of recommendations to tackle their situation, including as regards naturalisation and abolition of unjustified differences in rights between citizens and non-citizens.[81]** The **latest** ~~next~~ **general recommendation on national minorities, i.e.** Recommendation 1766(2006) ~~in preparation~~, ~~seems~~ **is** very much in line with Recommendation 1623(2003) in that it calls for more ratifications of the FCNM and the withdrawal of restrictive declarations or reservations,[82] **without making any reference to Recommendation 1201(1993) and the necessity to adopt a definition of the term "national minorities".**

1.5. The Venice Commission

70. The approach of the Venice Commission towards the question of citizenship as a constitutive element of the concept of national minorities has significantly evolved from its early years of existence. In that evolution, the Venice Commission has been influenced by similar contemporary developments of minority protection both within the UN system and the European context (OSCE and Council of Europe).

71. The starting point is certainly the proposal for a European Convention for the Protection of Minorities prepared by the Venice Commission in 1993. Indeed, Article 2 of this text set out a definition of the term "minority", which covered only "nationals" of the State.[83] The legal instrument eventually adopted by the member States of the Council of Europe in 1994, namely

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78 See Recommendation 1623(2003), ad § 6: "States Parties do not have an unconditional right to decide which groups within their territories qualify as national minorities in the sense of the framework convention. Any decision of this kind must respect the principle of non-discrimination and comply with the letter and spirit of the framework convention."; the PACE consequently called on "those States Parties which have ratified the framework convention but have made declarations or reservations, to drop them in order to exclude arbitrary and unjustified distinctions, as well as the non-recognition of certain minorities" (ad § 11 iii).

79 See Doc. 9862 of 19 July 2003, ad § 94.

80 See Recommendation 1735(2006), ad § 8; document 10762 of 13 December 2005, ad § 2.

81 **See Resolution 1527(2006), ad §§ 17.7-17.10 and 17.11.2.**

82 See **Recommendation 1766(2006) on Ratification of the FCNM by the member states of the Council of Europe**, ~~document 10961 of 12 June 2006, Report on "ratification of the FCNM by the member States of the Council of Europe",~~ ad §§ 7.1, 7.2 and 7.3.

83 The proposed definition states: "*For the purposes of this Convention, the term "minority" shall mean a group which is smaller in number than the rest of the population of a State, whose members, who are nationals of that State, have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion or language*", in: CDL-MIN(1993)006, ad Article 2.

the FCNM, did however not contain any definition of the term "national minority" and made no reference whatsoever to the citizenship criterion.

72. The first comments discussed by the Venice Commission on domestic draft legislation governing the rights of national minorities confirmed this approach in that they held that a definition not including the element of nationality was "incomplete".[84] In its Opinion on the interpretation of Article 11 of the Draft Protocol to the ECHR appended to PACE Recommendation 1201, the Venice Commission endorsed – at least implicitly – the reference to the citizenship criterion entrenched in the definition proposed by the PACE.[85]

73. The Opinions adopted in respect of Croatia and Bosnia and Herzegovina in 2001 represent a turning point in the approach followed by the Venice Commission. Indeed, the Commission noted for the time that the restriction of the notion of minority to citizens only "*departs, however, from recent tendencies of minority protection in international law (Article 27 of the ICCPR and practice of the HCNM). Furthermore, except in the case of political representation at levels other than the local level, citizenship is generally irrelevant to the content of internationally prescribed minority rights*".[86]

74. The subsequent Opinions of the Venice Commission in relation to several draft laws on minorities have confirmed this new approach. Having occasionally recalled that no binding international rule was formally prohibiting a citizenship requirement, the Venice Commission has often explicitly encouraged the States concerned to withdraw such a requirement from their legislation since this would be more in keeping with the purpose of the protection of national minorities and the most recent developments in international law,[87] **as evidenced by the findings from relevant Human Rights Treaty bodies.** This recommendation to abandon the citizenship requirement was voiced even more forcefully by the Venice Commission in the particular political and social context of state succession following the break-up of former larger federations.[88]

2. The Office of the OSCE High Commissioner on National Minorities

2.1. Background

75. Citizenship is a notion that has presented problems for many persons belonging to minorities across the OSCE. This gives rise to practical questions and difficulties in several situations in which the OSCE High Commissioner on National Minorities (HCNM) has become involved.

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84 See CDL(1995)014, Comments on the draft law of the Republic of Moldova on "the Rights of Persons belonging to National Minorities" (C. Economides), ad B § 1.

85 See CDL-INF(96)4, Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly, ad § 3 a).

86 See CDL(2001)74, Opinion on the Constitutional Law on the Rights of National Minorities in Croatia, ad § 4; CDL(2001)71rev., Opinion on the draft law on rights of national minorities of Bosnia and Herzegovina, ad § 4.

87 **See in particular CDL-INF (2001)014, Opinion on the Constitutional Law on the Rights of National Minorities in Croatia, ad item 4, and CDL-INF (2001)012, Opinion on the Draft Law on Rights of National Minorities of Bosnia and Herzegovina, ad item 4;** see also CDL-AD(2003)013, Opinion on the Draft Law on Amendments to the Law on National Minorities in Lithuania, ad §§ 5-6; CDL-AD(2004)013, Opinion on Two Draft Laws amending the Law on National Minorities in Ukraine, ad §§ 16-22; CDL-AD(2005)026, Opinion on the Draft Law on the Statute of National Minorities Living in Romania, ad §§ 24-30.

88 See CDL-AD(2004)026, Opinion on the revised draft law on exercise of the rights and freedoms of national and ethnic minorities in Montenegro, ad §§ 31-37.

76. The documents of the OSCE contain no definition of minorities. Minority rights were developed within the overall context of the human rights law. The 1990 CSCE Copenhagen Document provides that "to belong to a national minority is a matter of a person's individual choice and no disadvantage may arise from the exercise of such choice".[89]

77. The former HCNM, Mr Max van der Stoel, has asserted "I know a minority when I see one". Furthermore, in his keynote address at the opening of the OSCE Minorities Seminar in Warsaw in 1994, the former HCNM went on to clarify a minority as follows: "First of all, a minority is a group with linguistic, ethnic or cultural characteristics, which distinguish it from the majority. Secondly, a minority is a group which usually not only seeks to maintain its identity but also tries to give stronger expression of that identity".

78. Over the years, the HCNM has been involved in a variety of situations and with regard to a variety of groups, including non-citizens (e.g. Russian ethnics in Estonia and Latvia)[90] and some without a kin-state (e.g. Crimean Tatars). In his work, citizenship is very closely related to the idea of integrating diversity. For the HCNM, a policy of integration means the integration of all persons residing on the territory of a State, whether they are citizens or not. The risks of alienation or isolation leading to tensions, which a policy of integration seeks to combat, are not confined to citizens. Indeed such tensions may well be exacerbated by the absence of citizenship.

2.2. Basic principles

79. The focus of the HCNM is mainly political, geared towards conflict prevention. While his tools are political, his blueprints are based on international legal standards, including the ICCPR, the ECHR and the FCNM. These standards map out the framework in which political compromise can be made. They constitute the minimum level of acceptable behaviour concerning specific individuals.

80. In all these situations, the HCNM has emphasised that internationally protected human rights are universal, also in the sense that they must be guaranteed to everyone within the jurisdiction of the State without discrimination. He has stressed that minority rights are an integral part of human rights and the principal of equal treatment extends to the enjoyment of minority rights. Indeed, in order to achieve full equality, minority rights have to be secured in addition to non-discrimination measures.

2.3. Outcome

81. In the light of recurrent problems relating to citizenship and the enjoyment by persons belonging to national minorities of rights and privileges on the basis of equality with other persons within various States, the Office of the HCNM has reflected upon the underlying issues and specific problems. To this end, it has been engaged in an internal process of analysis on the subject of citizenship, based upon practical experiences in real country situations in which the HCNM has been involved.

82. The essence of the findings of this process can be summarized as follows:

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89 See 1990 CSCE Copenhagen Document, ad § 32.

90 **For example, the HCNM has paid continued attention to the need to simplify and accelerate the naturalisation process in Latvia, as well as to study the possibility to extend the rights of non-citizens: see K. Drzewicki/V. de Graaf, The Activities of the OSCE High Commissioner on National Minorities: July 2004-June 2005, in: European Yearbook of Minority Issues, Volume 4, 2004/5, Leiden/Boston 2006, p. 606.**

- Citizenship is not a basis upon which *a priori* to exclude the enjoyment of minority rights. Indeed, both the philosophy and international law of human rights confer minority rights on the bases of specific differentiated needs and desires which relate to all human beings within the jurisdiction of the State, precisely in contradiction to the citizen/alien distinction. There are very few rights, including the rights of minorities specifically, which are in any way connected to the content of citizenship – the clear permissible exception being certain political participatory rights at the central State level and the right to return to one's country, which may be reserved for citizens under international human rights law. Consequently, the formal position of some States that non-citizens are not entitled to minority rights *per se* does not accord with the essential impetus or logic of human rights.

- Given the limited relevance of citizenship for the realization of rights generally and the enjoyment of minority rights in particular, criteria other than citizenship appear to be more relevant as an indicator of an individual's "genuine and effective link", i.e. a factual and legal connection with the State. The will of the individual to establish and maintain such a bond is significant in this respect. **Lawful and effective** residency, for example, is more important for realizing the content of the various rights; it denotes a factual and legal connection, but also a degree of commitment to the State on the part of the individual. The longer the period of residency, the more likely it is that social ties will develop and the greater the degree of "insiderness". It can logically be argued on this basis that those non-citizens able to demonstrate an "effective link" with the State e.g. through permanent residency, could be entitled to exercise the political right to vote or stand for office, at least at a local government level.

- If citizenship is largely irrelevant for purposes of entitlements to human rights, including minority rights, the question arises as to whether it is relevant at all. The legal content of citizenship is considered to be very "thin" in terms of the rights (and the duties) which can be attributed exclusively to citizenship beyond those human rights which are to be enjoyed by all within the State's jurisdiction. In terms of duties, citizenship is relevant in relatively few areas, e.g. for military service (which may be of declining importance). However, while the content may be thin, the important exclusionary role of citizenship as a legal status was recognized (as a way of limiting immigration, expelling non-citizens, etc.). Citizenship does, therefore, make a difference from the perspective of the outsider. From the individual citizen's point of view, paradoxically, citizenship may matter more when s/he leaves the territory of their own State, at which point diplomatic protection abroad and other support including the right to return becomes important.

83. In sum, it may be concluded that for the HCNM, citizenship is not a meaningful criterion for entitlement to minority rights (with the exception of political participation at the central/State level) and, following this logic, should not be invoked by States for such a purpose.

3. Bilateral agreements protecting minorities

83bis In addition to existing international instruments, a range of bilateral and multilateral instruments for the protection of national minorities have been concluded by neighbouring states in fields such as culture, education and information. States are encouraged to enter into such agreements, including by Article 18 FCNM, as they foster transfrontier co-operation.

83ter While there exist no comprehensive study on the scope and practical implementation of such bilateral and multilateral agreements, it seems that many of these instruments stick to the citizenship requirement, as evidenced by Article 7 of the Austrian State Treaty of 15 May 1955, the Degasperi – Gruber Agreement of 5 September 1946 concerning South-Tyrol, the Agreement concluded by Italy in 1954 concerning the

situation of the Italians in Istria and Dalmatia and the more recent bilateral agreements concluted by Hungary with Romania and Slovakia.

C. The approach followed at the UN level

84. Citizenship has traditionally been viewed as a matter so close to the core of statehood and sovereignty that international organizations in their human rights standard-setting and monitoring activities have only made occasional inroads into the questions concerned. It would seem that these inroads have not always been well-coordinated, including in the UN.

4. Equal Rights for Everyone

85. The main rule is that all human beings are born free and equal in dignity and rights.[91] Logically, subsequent articles of the UDHR and those of many other instruments, like the two International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR), stipulate that everyone, with one major exception pertaining to the running for office and voting in elections,[92] is entitled to the rights contained therein. For the purpose of realizing equal enjoyment of everyone to all human rights, the prohibition of discrimination and established special rights and special measures, like those adopted to the benefit of minority persons and/or minority groups, apply across the board of civil, cultural, economic, political and social rights.

5. The Rights of Citizens and Non-citizens

86. In paragraph 3 of General Comment No. 25 on article 25 of the ICCPR entitled "The right to participate in public affairs, voting rights and the right of equal access to public service",[93] the Human Rights Committee stated:

> "In contrast with other rights and freedoms recognized by the Covenant … article 25 protects the rights of 'every citizen'. State reports should outline the legal provisions which define citizenship in the context of the rights protected by article 25. No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Distinctions between those who are entitled to citizenship by birth and those who acquire it by naturalization may raise questions of compatibility with article 25. State reports should indicate whether any groups, such as permanent residents, enjoy these rights on a limited basis, for example, by having the right to vote in local elections or to hold particular public service positions."

87. The International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (ICEAFRD) stipulates in Article 1 paragraph 2 that it "shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens". Despite this inherent limitation in the text of the ICEAFRD, its implementation by the Committee on the Elimination of Racial Discrimination (CERD) has given rise to innovative comments in relation to non-citizens.

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91 See Article 1, paragraph 1, of the Universal Declaration of Human Rights of 1948 (UDHR).

92 See Article 21 of the UDHR and Article 25 of the ICCPR.

93 In UN document CCPR/C/21/Rev.1/Add.7.

88. In this context, the CERD stated, in paragraph 4 of General Recommendation No. 30 entitled "Discrimination Against Non-Citizens",[94]: "Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim." In paragraph 13, the CERD recommended: "Ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents." In paragraph 17, it is recommended that States "Regularize the status of former citizens of predecessor States who now reside within the jurisdiction of the State party". While the CERD does not address directly minority rights in this General Recommendation, it called in paragraph 37 for "the necessary measures to prevent practices that deny non-citizens their cultural identity, such as legal or *de facto* requirements that non-citizens change their name in order to obtain citizenship, and to take measures to enable non-citizens to preserve and develop their culture". **These recommendations echo the concerns voiced by the PACE[95], as well as the CM and the ACFC [96], according to which undue obstacles in the naturalisation process may have detrimental effects on the integration of persons belonging to minorities who lost their citizenship following the break-up of a larger, multiethnic State.**

89. Article 2, paragraph 3 of the ICESC states: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals." This exception is not available to developed countries.

90. The Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in which They Live (adopted by UN General Assembly resolution 40/144 of 1985) contains, in its Articles 5-9, a list of the rights that aliens shall enjoy. The Declaration is not subject to a separate monitoring procedure, but it can be and is quoted by other monitoring instances when issues concerning non-citizens, non-nationals and aliens come up. .

6. Non-Citizens and Minority Rights

91. In General Comment No. 23 on article 27 of the ICCPR, that is on minority rights, the Human Rights Committee spelled out in paragraph 5.1: "The terms used in article 27 indicate

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94 Adopted in 2004 and available at:

http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e3980a673769e229c1256f8d0057cd3d?Opendocument.

95 **See in particular Resolution 1527 (2006) on the rights of National Minorities in Latvia, ad § 5: "*In the case of the succession of states, the citizenship issue is among the sensitive points which would constitute the framework for all problems related to the status of minorities. According to the Council of Europe's legal instruments, statelessness should be avoided and everyone who, at the time of state succession, had the nationality of the predecessor state, has the right to nationality. The Assembly is of the opinion that, regardless of the reasons for which one state was succeeded by another, the principle to be respected is that of free choice in respect of their new citizenship for the nationals of the predecessor state. The reasonable doubts about the loyalty of some citizens of the predecessor state towards the successor state could not be a ground for denying their right to the free choice of the citizenship (nationality) but eventually an argument for applying the lustration procedures, however always in compliance with the human rights of those concerned as stated in Resolution 1096 (1996) of the Parliamentary Assembly. Furthermore, when the state succession takes place in the context of a liberation process, only those who, as representatives of the predecessor state, violated the human rights of those who supported the self-determination which led to the formation of the successor state, may be exempted from the free choice of the citizenship (nationality)* "; see also §§ 7 and 11 of the same text.**

96 **See § 37 above, third indent (footnote 47); see also § 52 above.**

that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party. In this regard, the obligations deriving from article 2.1 are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone." [97]

92. Following the presentation and debate about the State report by Japan under the ICCPR, the Human Rights Committee observed in paragraph 13 of its concluding observations, under the heading of principal subjects of concern and recommendations:

> "The Committee is concerned about instances of discrimination against members of the Japanese-Korean minority who are not Japanese citizens, including the non-recognition of Korean schools. The Committee draws the attention of the State party to General Comment No. 23 (1994) which stresses that protection under article 27 may not be restricted to citizens."[98]

7. General assessment

93. Based on the arguments above, it would seem that in the UN system minority persons need not have citizenship in order to enjoy human rights and minority rights.[99] In other words, a group can constitute a minority even if its members have not (yet) obtained citizenship. Indeed, the existence of a minority is and should be a question of fact and not of law or of government recognition, as governments should not be allowed to exclude minorities or define them away by non-acknowledgement or by arbitrary denial of citizenship.[100] Admittedly, non-citizens will not have the right to run for office or vote in elections - at least at the national level -, but minority persons without citizenship should have access to practically all other human rights, including minority rights. States have significant leeway for deciding on the criteria for the granting of citizenship, as long as they do not discriminate in their legislation and practices.

D. Concurring application of different international regimes for non-citizens ?

94. Non-citizens residing on the territory of a given State can be classified into three different categories in international law. Firstly non-citizens may enjoy the status of "aliens", i.e. foreign citizens. Secondly, non-citizens may under certain circumstances be granted the status of "refugees". Thirdly, non-citizens may be "stateless" persons.

95. In the case of aliens, there is no **legally binding** general international instrument regarding their protection.[101] The receiving State has, in principle, the sovereign right to admit aliens on its

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97 In UN document CCPR/C/21/Rev.1/Add.5.

98 In UN document CCPR/C/79/Add.102 of 19 November 1998.

99 Another indication is the fact that the mandate of the newly established UN Independent Expert for Minority Issues does not limit her action to those citizens who belong to a minority and experience suggests that she has already tackled the situation of non-citizens in her activities.

100 See EU Network of Independent Experts on Fundamental Rights, Thematic Comment No 3 on "The Protection of Minorities in the EU", 25 April 2005, p. 10.

101 See, however, UN General Assembly Resolution 40/144 of 13 December 1985 - Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.

territory and to govern the regime of aliens residing on its territory.[102] However, each State has the obligation to provide aliens residing on its territory with a set of minimal guarantees of norms agreed through international treaties., irrespective of the treatment granted to its own citizens. The content of this principle may be identified on a case-by-case basis, but there is a broad acceptance that it implies respect of the core of fundamental human rights.

96. At the same time, aliens living on the territory of a given State enjoy the diplomatic and consular protection of the State of citizenship. Hence the State of citizenship may exercise diplomatic protection when its citizens have suffered a prejudice which results from certain action/measures taken by the authorities of the State of residence, provided that such measures are deemed incompatible with international law and after exhaustion of domestic legal remedies. Moreover, according to the 1963 Vienna Convention on Consular Relations, the sending State may intervene for defending its own citizens' rights which should have been observed by the receiving State (Article 5).

97. As regards refugees, the reference document is the 1951 Convention related to the Status of Refugees.[103] This instrument enshrines the principle of *non-refoulement*, which means that no Contracting State shall expel or return ("*refouler*") a refugee against his or her will, in any manner whatsoever, to a State where he or she fears persecution. As a rule, the State Parties to this Convention shall grant refugees the same treatment as the aliens accepted on their territory (Article 7 of the Convention). Moreover, this instrument sets out a number of rights and principles. For example, State Parties cannot discriminate against refugees by reference to their race, religion or State of origin (Article 3 of the Convention); Article 4 of the Convention regarding the right to religion provides for a treatment not less favourable to the one granted to the citizens; Article 22 of the Convention regarding the right to education provides for the same treatment for refugees as for citizens of the State as far elementary education is concerned.

98. In the case of stateless persons, the 1954 Convention relating to the Status of Stateless persons, which has however a limited role in international relations, sets up a similar framework for stateless persons as for refugees: principle of non-discriminatory treatment on the basis of race, religion or State of origin (Article 3), treatment similar to the one granted to aliens, unless the Convention provides for a more favourable treatment.

99. In view of the foregoing, it has been suggested that extending the scope of certain minority rights and facilities to non-citizens would create a parallel - or even overlapping - application of different sets of international norms: protection of national minorities and, at the same time, protective measures for aliens, refugees or stateless persons. It has been further argued that the simultaneous application of these different regimes would result in practical and conceptual difficulties and contradictions raising issues of discrimination, in particular when the diplomatic protection would be exercised on behalf of an individual already enjoying protection in his home State as a member of a minority group.**[104]**

100. Bearing in mind the overall coherence of the protection of human rights in international law, it seems, however, that the aforementioned potential difficulties ~~could be easily avoided~~

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[102] Nevertheless, States usually agree - on a bilateral or multilateral level - on the treatment applicable to nationals of the other Contracting Parties, by granting certain specific rights or specific regimes, as the most favoured nation treatment.

[103] The Convention was amended by the 1967 Protocol, with the main scope of enlarging the notion of refugee. The Protocol is however considered an independent international instrument from the Framework Convention of 1951.

[104] **The present report does not address potential difficulties arising from the implementation of supportive measures by a State in favour of persons belonging to a kin-minority abroad when these persons simultaneously enjoy minority protection in their home state (on this question, see CDL-INF (2001)019, Report on The Preferential Treatment of National Minorities by Their Kin-State).**

should not necessarily entail contradictions raising issues of discrimination. These specific regimes protecting non-citizens under international law indeed pursue a specific goal by responding to a particular need for protection. Such a goal cannot contradict the very principles of minority protection, which form part and parcel of human rights.[105] **As concerns diplomatic protection, there seems to be a growing trend in international law, which is confirmed by research in comparative constitutional law,[106] to consider that this form of protection is no longer an exclusive and discretionary act of a State: it is progressively seen as an effective means to respond to human rights violations affecting by citizens abroad. Diplomatic protection is, however, unlikely to enter into more frequent conflicts with the international regime protecting minorities, even if certain minority rights and facilities are extended to non-citizens: although it may be argued that States are under a growing obligation to intervene on behalf of their citizens abroad through diplomatic protection, this obligation can only arise in relation to "serious" or "significant" violations of human rights.[107]** ~~Diplomatic protection in particular should therefore not be construed as a means of "compensating" a possibly deficient implementation of enhanced minority rights by the authorities of the home-State of the individuals concerned~~.

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

A. Existence of alternative criteria

101. 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.[108]

102. 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 still often 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 purposes of this report, 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.

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105 The same holds true for the possible combination of other specific regimes, such as minority protection and the protection of indigenous peoples; in this regard, see ACFC first Opinion on the Russian Federation of 13 September 2002, ad § 26: *"(…)The Advisory Committee shares the view, held by the Government and a number of representatives of the indigenous peoples, that the recognition of a group of persons as constituting an indigenous people does not exclude persons belonging to that group from benefiting from the protection afforded by the Framework Convention (…)".*

106 **At the European level, a number of Constitutions lay down a State obligation to grant diplomatic protection when the human rights of a citizen abroad are violated. In many States, this obligation even implies a corresponding right of the citizen abroad to be granted diplomatic protection.**

107 **See Draft Articles on Diplomatic Protection of the UN International Law Commission (ILC) adopted in 2006 at its 58th session, in particular comment (3) to Article 2 and comment (3) to Article 19**.

108 For example, a minimum number of pupils for opening/maintaining a minority class is to be found in several countries, like Hungary, Romania or Poland. The traditional presence of a minority in a given territory is a central requirement to activate language rights in the public realm in countries such as Switzerland, Slovenia or Austria.

B. Complex nature of minority rights

103. 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~~ **former** include~~s~~ 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.[109] 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 an unimpeded exercise of these basic rights and freedoms, together 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 and successful.[110]

104. ~~The second category is made up of~~ "e**E**nhanced" or "core" minority rights **should not be confused with general human 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 general human rights treaties as they are more demanding.[111] They are entrenched in instruments or provisions dealing specifically with minorities, such as the FCNM,[112] the ECRML, the CSCE/OSCE commitments and Article 27 ICCPR. Furthermore, enhanced minority rights are also entrenched in certain peace treaties and in a number of bilateral agreements between neighbouring countries.

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[109] 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*".

[110] 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*."; **on the relationship between human rights and minority rights, see S. Bartole, La Convenzione-quadro del Consiglio d'Europa per la protezione delle minoranze nazionali, in: Rivista di Diritto e Procedura Penale, vol. II, 1997, p. 569-570**.

[111] This may of course change depending on future developments in standard-setting or in jurisprudence and 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 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 (…)".*

[112] 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"*.

105. 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 European Court of Human Rights, including that of persons entitled to a protection under minority instruments.[113]

106. While each person belonging to a minority enjoys almost 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.[114] 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.

107. 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[115] and the ECRML.[116] Although 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[117] and corroborated by academic legal opinions.[118] The 1992 UN Declaration on Minorities makes it clear that the rights it spells

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113 See in particular ECHR 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 ECHR 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).

114 **See S. Bartole, La Convenzione-quadro del Consiglio d'Europa per la protezione delle minoranze nazionali, in: Rivista di Diritto e Procedura Penale, vol. II, 1997, p.574**.

115 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 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 (…)"*.

116 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. (...)".*

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

118 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*

out often require action, including protective measures and encouragement of conditions for the promotion of their identity and specified, active measures by the State.[119]

C. Need to target State action through adequate criteria

108. 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.[120] 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.

109. 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 **and effective** residence, the size of a minority, the length of time on a given territory or even other criteria likely to attest the existence of strong and lasting ties coupled with real needs.

110. These alternative criteria must remain flexible in nature and should therefore not be applied in an automatic way, without due consideration being given to the right, measure or facility at issue. For example, it is now widely admitted that the numerical size of a minority can be taken into account to determine to what extent certain rights and measures can be implemented in favour of persons belonging to minorities.[121] This does not mean, however, that the same numerical threshold should be required for all the rights concerned. For example, while a sizeable percentage may legitimately be asked to introduce bilingual topographical indications, the right to make use of a minority language in judicial (criminal) proceedings or the right to use one's surname and first names in a minority language and their official recognition cannot be subject to the same threshold. In other words a nuanced approach, based on the right or measure at issue,[122] seems also required in the use of these other criteria. **Furthermore alternative criteria, such as residence and time factor, cannot be relevant as far as general human rights are concerned, but may important in relation to enhanced rights, particularly in the field of education**.

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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.

[119] 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).

[120] 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).

[121] See comments related under II, B, 1.2 (b), Monitoring of the FCNM by the ACFC.

[122] For a somewhat similar, article by article approach, see comments above under 1.2 (b), ad §§ 33-44.

D. Lawful and effective residence

111. International standards specifically designed for persons belonging to minorities do not explicitly mention the requirement of a lawful **and effective** 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.[123] Moreover, several declarations/reservations entered upon ratification of the FCNM make mention of it.[124] 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.

112. State practice, however, suggest that the notion of lawful **and effective** 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. Several types of consultation mechanisms coexist in European practice, ranging from *ad hoc* consultative commissions, advisory bodies to Parliament and/or the Government, to systems of cultural autonomy involving the setting up of minority councils through free and secret ballot.

113. States usually try to ensure a certain representativeness 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.[125]

114. 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 rights treaty bodies.[126] Lawful **and effective** 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 **and effective** residence,[127] before creating new consultation structures, taking positive measures and thereby committing public money for minority groups.

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

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

125 See for example Article 3 of the Law on Ethnic Groups in Austria; 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.

126 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.

127 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 ECHR 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 (ECHR judgment of 11 January 2005, Py vs. France, ad §§ 61-65). In the *Polacco and Garofalo* case, only those who had been living

115. 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.[128] 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.[129]

E. Numerical size of a minority

116. 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,[130] and findings adopted by international bodies.[131]

117. 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.

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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).

128 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); See EU Network of Independent Experts on Fundamental Rights, Thematic Comment No 3 on "The Protection of Minorities in the EU", 25 April 2005, p. 10.

129 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.

130 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).

131 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.

118. Different expressions can be found in the corresponding international standards, such as "substantial numbers", "sufficient demand", "numerical strength"[132] or "number considered sufficient/justifying measures".[133] 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.[134]

119. 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.[135] 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.[136] 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

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[132] 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.

[133] 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.

[134] See § 66 of the explanatory report of the FCNM. 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*".

[135] 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.

[136] 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.

the level of demand.[137] 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.

120. 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 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. The level of protection may therefore depend on the numbers of minority members in a given area of the State, not least of all for reasons of practicability.

F. Time factor and link with a territory

121. "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*").[138]

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[137] 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, pp. 185-186.

[138] 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, pp. 65-66.

122. The question of the length of time needed of the presence of a minority in a given area 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.[139] This requirement needs to be distinguished from that 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".[140] 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 language rights in specific areas, but rather as a general test to decide on the granting of minority protection status.[141]

123. 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.[142] Moreover, the designation of certain zones for the purpose of applying these "minority area" provisions should not be made in too rigid a way so as to exclude any possibility for a more flexible application in justified, individual cases.[143] 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.[144]

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139 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).".*

140 See *inter alia* declarations 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).

141 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 however 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).

142 See ACFC first opinion on Austria of 16 May 2002, ad § 53; see also ACFC second opinion on Slovakia of 26 May 2005, ad § 87.

143 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 the so-called "ethnically mixed areas"; ACFC first Opinion on Austria of 16 May 2002, ad § 16.

144 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.

IV. Findings

A. Definition of the term "minority"

124. 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 term "national minority" is preferred and can be found in the FCNM and in the OSCE documents.

125. The general attitude towards attempts to propose a common definition has gradually changed. Whereas until the early nineties, it was felt that a legally binding concept of "minority" was needed in international law, it has become increasingly clear in the last decade that efforts to bring about such a definition would not be successful and could even lead to a weakening of the minority rights regime. A definition would indeed be likely to reflect only the smallest common denominator. It follows that in the future, terminology and concepts are unlikely to be defined and unified in international law. Recent experience, however, has shown that through a pragmatic approach the corpus of international norms protecting minorities is workable in practice, even without a legally binding definition.

126. Bearing in mind the absence of a legally binding definition in international law, a number of States have chosen to formulate their own definition of the term "minority". Most of them have done so through a declaration submitted during the accession to the FCNM and/or in general laws on minorities. While a general definition at the domestic level is neither required by international standards nor indispensable to render the said laws operational, it is widely seen as acceptable in international law, provided that the definition does not result in arbitrary or unjustified distinctions or, indeed, in a standard of protection that is inferior as compared to the international standards concerned.

127. The inclusion of a citizenship requirement in a general (domestic) definition is, **formally speaking, not in violation of any legally binding international instrument**. **In the light of the latest developments witnessed in the implementation of the relevant international norms both within the UN and the European contexts, such an inclusion is, however, to be considered as** ~~should be avoided as not being in conformity with the object and purpose of minority protection~~. ~~Such~~ a restrictive element. **This restrictive element** ~~which~~ should **preferably** be avoided, ~~also~~ **including** in a **formal** declaration, ***[as it is at odds with the object and purpose of minority protection]*. In certain particular situations, a citizenship requirement** is **indeed** likely to have discriminatory effects by excluding certain members of minority groups who might also wish to preserve their specific identity. For example, ***[unless relevant sectoral legislative provisions and corresponding administrative practice clearly protect non-citizens belonging to minority groups*],** a citizenship requirement is likely to give the wrong signal that non-citizens cannot be entitled to rights and facilities which exist for minorities: in reality, human rights are universal and most of the enhanced minority rights - especially linguistic ones - already available to a minority group should not be refused to certain individuals on the basis of their citizenship as such a differentiation would hardly be in compliance with the principles of equality and non-discrimination.

B. Minority rights and related State obligations

128. 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 - which are often exercised in community with others - and enhanced minority rights/facilities. While the former may occasionally entail positive obligations from the States, the latter undoubtedly and inherently necessitate a concerted, coherent and sustained state

action aimed at offering adequate opportunities and providing a range of linguistic and other rights and facilities. 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.

129. Positive action is essential to enable persons belonging to minorities to assert their specific identity, which is the objective of every minority protection regime. International standards require such positive action mostly through programme-type provisions which set out objectives. These provisions, which are in principle not directly applicable, leave the States concerned an important margin of appreciation in the implementation of the objectives which they have undertaken to achieve, thus enabling them to take particular circumstances into account.

130. Each State shall secure to everyone within its jurisdiction - including non-citizens – the human rights guaranteed by the general human rights treaties binding upon them, mainly by refraining from undue interference in their exercise. A restrictive declaration entered upon ratification of the FCNM and/or a general law on minorities containing a citizenship-based definition can in no way mitigate this international obligation.

131. The State's (positive) obligation to take special measures on behalf of minorities and their members needs to be further qualified, especially for those (enhanced) rights and facilities which have resource-implications: it is legitimate for a State to try and circumscribe the circle of those who will directly benefit from its special measures designed to promote the specific identity of minorities. Such special measures are indeed costly and often require the setting up of a heavy infrastructure which is meant to meet lasting needs of the population concerned. States are therefore entitled to ascertain the existence of genuine and effective links with the minority group concerned before deciding to develop special measures.

C. Relationship between citizenship and other criteria

132. Bearing in mind the need to respect the principle of equality and the prohibition of discrimination, it is necessary to rely on objective criteria when deciding on the development of special measures on behalf of minority groups. Criteria such as residence, numerical size and time factor, coupled with a certain link with a territory, are amongst those which can be found most frequently in relevant international standards and are often matched by concurring State practice. They should, however, not be considered exhaustive as other criteria may also prove useful and workable in practice.

133. 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. In this context, the aforementioned distinction between positive and negative obligations needs to be borne in mind and may justify in certain contexts the requirement by the State of more stringent criteria, for example when it comes to deciding on the opening of a new infrastructure or the establishment of (linguistic or other) facilities.

134. States are therefore entitled to require that different objective criteria be met according to the rights and measures at stake. For example, a series of criteria attesting a strong and lasting link with a territory may be warranted when it comes to authorising the display of bilingual topographical indications, but certainly not before taking measures to protect persons subject to acts of discrimination, hostility or violence as a result of their affiliation with a minority. Furthermore, the use of a given criterion should not be applied in an automatic way since due consideration must be given to the particular right or measure at issue: a sizeable numerical threshold may indeed be admissible for bilingual topographical indications, but not for the right to use one's name in a minority language. In other words, an article-by-article approach leaving room for flexibility **is** ~~seems~~ preferable to determine the exact personal scope of application of

minority rights and more in keeping with both the wording and spirit of the relevant international standards, especially the FCNM.

135. The call for flexibility in the application of programme-type minority provisions also implies that common principles and objectives may not necessarily result in the same conclusions in different national contexts. For example, it has been repeatedly stressed that in the case of a break-up of a multi-ethnic State, those who suddenly lost the citizenship of their state of residence were at particular risk of exclusion. In such cases, a citizenship criterion intended to determine the scope of minority rights and facilities is therefore even more problematic than in other domestic situations and should be replaced by a residence requirement.[145] In sum, an article-by-article approach of the relevant international standards necessarily needs to be combined with an interpretation drawing on the national context at issue.

D. Restriction of certain rights to citizens: the exception

136. There **are** ~~seem to be~~ very few individual rights explicitly reserved for citizens in the various international instruments which are relevant to persons belonging to minorities. This does not mean that in practice all minority rights, especially enhanced linguistic rights, are equally relevant to all minorities (or persons belonging to a minority) since States may legitimately use other criteria to target their measures aimed at helping minorities to preserve and develop their identity.

137. The most frequently quoted example, in terms of admissible restrictions to citizens only, concerns the field of political rights. In this context, it is worth recalling that Article 25 ICCPR, which deals with the right to participate in public affairs, voting rights and the right of equal access to public service, addresses "every citizen" and not "everyone" or "every person" as in other provisions of the same treaty. Restricting certain political rights - including those guaranteeing minority representation in the legislature - to citizens who belong to a national minority is also viewed as a legitimate requirement under the FCNM.

138. Even though the restriction of the right to vote and to stand for office to citizens only can be regarded as admissible under international law, mentions needs to be made of a more recent tendency in Europe to extend these rights to non-citizens at the local level, provided non-citizens have been lawful residents of the area concerned for a certain period of time.[146] ~~Another cautious word must be added~~ **It needs** to **be** stress**ed, however**, that all rights, facilities and measures which are reserved for citizens and aim at ensuring an effective participation of persons belonging to minorities in public affairs cannot automatically be considered admissible. Although this is beyond doubt for the right to vote and to be elected in the legislature, the restriction of other participatory rights to citizens only has already raised concerns in different contexts, including in relation to cultural rights, and **does** ~~may~~ not always appear legitimate.

139. In addition to certain political rights, ~~**it seems that**~~ the right to equal access to the military service and civil service - at least for higher functions -, which may be seen as contributing to the effective participation of minorities, can legitimately be restricted to citizens. The right for a person to return to his/her own country, guaranteed *inter alia* by Article 12 ICCPR, **is** ~~may be~~ another example of a right which can be restricted to citizens.

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[145] **See in particular § 42, third indent, § 60, § 74 and § 88 above; see also § 140 below and PACE Resolution 1527 (2006) on the Rights of National Minorities in Latvia, ad §§ 2-4, 9, 11.**

[146] **As a recent example, see PACE Resolution 1527 (2006) on the rights of National Minorities in Latvia, ad §§12 and 17.5.**

140. The relationship between citizenship and other criteria is not finally settled. On the one hand, the use of other criteria may appear preferable in certain fields such as enhanced linguistic rights, especially as concerns education and use of minority languages in the public realm. The use of other criteria is also more appropriate in certain national contexts like State succession resulting from the dissolution of larger units: ~~**allocation of citizenship following the formation or consolidation of new entities is often slow and contested, which makes it essential that such problems do not spill over into the treatment of minorities**~~. On the other hand, the use of the citizenship criterion remains admissible - and perhaps even more suitable - in certain limited contexts, in particular as concerns some political rights and access to certain public functions.

141. What ~~seems~~ **is** 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 complex nature of the set of individual's rights and State's obligations concerned. A more nuanced and restrictive 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.

141bis. [Synthesis of Mr Bartole's proposal in CDL-MIN(2006)004: ***The universal character of human rights, and consequently minority rights since they form part and parcel of human rights, does not exclude the legitimate existence of conditions placed on the access to minority rights. Citizenship should therefore be regarded as a condition for accessing certain minority rights, but not as an element of a definition of the term "minority***"]

alternatively

141bis. [Synthesis of Mr Matscher's proposal in CDL-MIN(2006)003: ***A definition of the term "minority" remains preferable to determine the beneficiaries of the protection offered. Most of national and bilateral agreements concerned set out their own concept of "minority" and the minority rights they provide. Multilateral instruments, like Article 27 ICCPR and the FCNM, may allow for a wider understanding of the term "minority", but they do not entrench a universal notion of the term "minority" in legally binding terms.***

V. Conclusions

142. In view of the foregoing and mindful of the findings under chapter IV, the Commission wishes to formulate the following five principles on which it intends to rely in the future when confronted with issues pertaining to the personal scope of minority rights:

- **The Commission will bear in mind the need to ease the access to citizenship and the naturalisation process in those States where the relevant conditions are excessively restrictive, with a view to promoting fuller integration of those non-citizens who are long-term residents, especially those who form part of a minority group sharing a specific identity;**

- **In the particular context of State succession resulting from the dissolution of larger, multiethnic units, the Commission will devote particular attention to the need for successor States to regularize, without undue delay, the situation of those who lost their citizenship since experience has shown that allocation of citizenship following the formation or consolidation of new entities has often been slow and contested, with an adverse impact on persons belonging to minorities;**

- **The Commission will encourage those States which have neither adopted constitutional provisions nor entered a formal declaration under the FCNM which would restrict the scope of minority protection to their citizens only, to abstain from introducing a citizenship requirement in a domestic definition and/or in a declaration; furthermore, the Commission will encourage these States to consider, where necessary, the possibility to extend on an article-by-article basis the scope of protection of the rights and facilities concerned;**

- **The Commission will encourage those States which have adopted constitutional provisions and/or entered a formal declaration under the FCNM restricting the scope of protection for minorities to their citizens only to consider, where necessary, the possibility to extend on an article-by-article basis the scope of protection of the rights and facilities concerned to non-citizens;**

- **The Commission will invite States, in their efforts to better circumscribe on an article-by-article basis the personal scope of enhanced minority rights, to make a judicious and possibly combined use of the objective criteria which appear most suited to the context; these criteria include *inter alia* lawful and effective residence, numerical size, time factor coupled with a certain link with a territory and, in certain limited contexts** *[alternatively: only if needed from the constitutional viewpoint]***, citizenship.**